**European Parliament – 6 June 2018 – The Future of Capital Markets in the European Union: Towards Deeper Integration?**

Closing Keynote speech Marco Lamandini

Ladies and gentlemen,

let me first thank you for the privilege of giving this short final speech under the control of the true father of the ESAs, Jacques De Larosière. It is an honour to be back into this House.

There are very many different ways to look at the intersection between CMU and ESAs reform in the current situation. I'll take a simple one, today, and I will briefly elaborate on some legal challenges which seem to oppose the adoption of the proposed reform.

By now, we all know much, if not all, about Banking Union and Capital Market Union. We all know this is a moving target (the architecture is by its very nature evolutionary) and that the momentum for reform is also reflexive of the economic cycle and of the prevailing political mood (Brexit and ESMA proposed CCP Executive Session being one clear example of this). Yet, we also know that, out of anti-European rethoric, a strong Europe requires strong institutions and authorities subject to strong rules. This applies to many things, and ESAs are no exception .This is precisely why this reform matters. This is indeed a truly green-field to test resilience and adjustment capabilities of the European Union and of the Euro area in our current and difficult times. Legal determinants also play a role.

Let me capture only few aspects in a snapshot.

First, Banking Union was easier to design and implement! I know that, taken on its face, this may sound as a false statement, if only one considers the daunting institutional complexities we had to address to deliver. However, 'formal' banking (the one targeted, at least so far, by the Banking Union) has clear boundaries and a specific legal basis: indeed, Article 127(6) TFEU was key to take a giant institution like the ECB into the supervisory role. I am not suggesting that implementing the SSM and the Banking Union has been a simple exercise. It was not.

There is a wide sample of legal problems that witness this (without considering those, overarching but in the first place of political nature, revolving around the Third Pillar/EDIS and the European Monetary Fund as the final backstop for the SRF); problems lie with: (a) an unprecedented enforcement, by a EU institution, of national laws implementing CRD IV (judgment 24.4.2018, *Credit Agricole,* T-133 to T-.136/16, being a first example; fit and proper a second one); (b) excessive administrative complexity, in particular in compound proceedings with a NCA and ECB procedural "leg" (pending case CJEU C-219/17, *Fininvest;* pending case T-913/16, *Fininvest),* or in the SSM peculiar governance which requires the Governing Council to adopt by no-objection more than 1.500 decisions a year!*;* (c) blurred redlines of competences between ECB and NCAs out of the list of the main prudential tasks listed in the SSMR (I am not referring here to the NPL addendum – an issue I do not need to comment - but rather to the ECB letters of end March 2017 and the ECB position on AML and corporate governance of May 2018). But, , the most fundamental challenge within the SSM still lies on how to reconcile, at the supervisory level, micro-prudential and investment protection policies with macro-prudential and monetary policies (the point was recently addressed also by a EBA/ESMA joint statement of 30 May 2018).

In turn, also SRM is evolving and it had its baptism of fire with *Banco Popular*. More than 100 pending cases before the GCEU show that "shared" competences (in the adoption and implementation of the resolution decision) both horizontally between ECB (FOLTF assessment), SRB (adoption of the resolution scheme under Article 18(6) SRMR) and European Commission and Council (decision over the resolution scheme with endorsement by no objection under Article 18(7) SRMR) and vertically between SRB and NRAs are a

multiplier of legal claims at both national and European level. And questions on the suitability of Article 114 TFEU as legal basis (and the "Meroni" constraints), for the SRM and for the ESA alike, are indeed one of "the phantom(s) of the opera".

Yet, as I said, CMU is by far more complex. The key word for CMU is heterogeneity; diversity of (i) market players (issuers, intermediaries, infrastructures, service providers) and (ii) products, and (iii) a "variable geometry" of their European regulation and their national or European supervision. It is impossible to adopt a unitary approach. The point was already made 10 years ago by the De Larosière Group (Report, paragraph 218). No surprise, thus, that the Five Presidents report rightly suggested that a Single CMU Supervisor is only a long term objective. The current reform proposal is, thus, just a middle of the road proposal, a second step in a long journey and must be assessed in this context.

However, even this not revolutionary reform met strong opposition on legal grounds. I would like to briefly focus on some the points raised in the current debate.

a) A first fundamental objection relates to the 'institutional design'. At the date of their establishment the 3 ESAs were structured along a single template (and the founding regulations were almost identical). The ESFS operates on a sectoral basis, supervision is carried out by NCAs or colleges of NCAs and the ESFS is thus 'largely decentralised' (Moloney, 2014, p. 943). Could this single template be reconfirmed? Only to some extent. And yet, the template was already partly derogated a few years later by the conferral of limited, enumerated direct supervisory powers to ESMA, first on CRAs and then on trade repositories. This modified already, and for the good, the "functional and structural parallelism" (D'Ambrosio, 2018) among the 3 ESAs.

The reform is two-fold on this. On one hand, it is aimed at furthering the parallelism, removing some existing discrepancies in the founding regulations on tasks and powers in Article 8 (extending to ESMA and EIOPA the power to adopt supervisory handbooks and rules on stress testing, already granted in 2010 to EBA). On the other hand, the reform deepens the divide between ESMA on one side, and EBA and EIOPA on the other side, because it envisages the conferral of additional direct supervisory remits to ESMA (alone). This is also in line with the EMIR 2 proposal, which envisages the establishment of a dedicated body within the ESMA governance (the CCP Executive Session) and the conferral to ESMA of significant extraterritorial supervisory powers in respect of Tier 2 third country CCPs .

In due time this will re-open the question, rightly posed by the De Larosière Group 10 years ago, on the twin peaks approach (paragraph 216). Politically, it is still too early and the legal basis in the Treaty still in need of further testing. But the direction of travel is, to some extent, clear, and a time will come, in the EU-27, when we shall go up to the end of the road and merge the SSM, EBA and EIOPA. Two factors, to my mind, are preparing the ground. First, SSM is gaining traction as leading EU micro-prudential supervisor, as recently witnessed by the relocation of Nordea in Finland and by the strict approach adopted in the context of Brexit banks' relocation plans. Second, the EMIR 2 reform is in fact struggling with the 'silos' model: ESMA, as the only one among the ESAs with experience in direct supervision, is granted extraterritorial direct supervisory powers over Tier 2 third countries CCPs also in the prudential domain; but it lacks expertise on this, and this calls into the picture the ECB and the other central banks of issue. But this tells us a first lesson. Beware of obsessions with symmetry! Banking Union and CMU are different and one institutional template cannot fit all (A practical example? the new task of setting supervisory priorities would raise no problem if conferred only to ESMA but raises big concerns if granted to EBA, for undesirable overlaps which could threaten ECB independence).

b) A second question revolves around the envisaged new ESAs governance. I welcome a more independent and efficient Executive Board, with full time senior members, to some extent mimicking (and taking a step further) the SRM Board (I would recommend however to bridge between the EMIR 2 and the ESAs reforms on ESMA governance, to the effect that the CCP Executive Session be designed in the context

of the Executive Board, so as to prevent the emergence of a "two-headed" organizational structure within ESMA). Does such an Executive Board threat the existing balance of powers with NCAs? I do not think so. The rationale is clearly the opposite; the change is motivated by the need to redress existing imbalances, which make the ESAs less sharp than desirable in contrasting potential NCAs strategic behaviours. As I said, Europe can deliver only if European bodies are truly granted a strong European voice. Moreover, to the extent the Executive Board is granted, in addition to the administrative and preparatory role, powers of non-regulatory nature (those under Articles 17, 19, 22 and 32) I hardly see how the system would be converted into a supervisor of supervisors. It is rather a democratic example of decentralised integration, where the coordinating role of the hub is balanced by the governing attributes reserved to the spokes. With a lot of potential to unlock energy in the system and specialize each spoke in different directions, to leverage the overall efficiency. To dispel concerns, for other additional powers a tiered approach could be adopted and 'intrusive' decision-making powers, including those on strategic supervisory planning and independent reviews could be granted to the Executive Board subject to a no-objection decision (with qualified majority) of the Board of Supervisors. This could apply also to guidelines and recommendations under Article 16 (and on this, note that if there is a real need for a preventative check that the ESAs are not exceeding their competences, the right organ to be vested with this competence would be the joint Board of Appeal and not the Stakeholders' Group).

c) Direct supervisory powers do not pose a question of balance of powers between the Executive Board and the Board of Supervisors, but rather a question of legitimacy under Article 114 TFEU. Let me spend one word on this. I must say that I read the CJEU *ESMA shortselling* judgment (C-270/12), which reinterpreted "*Meroni*" and "*Romano*" as a comfortable "green light". I am aware that also a more restrictive reading of the judgment is well present in the debate. Waiting for further guidance by the Court (which is likely to come in one or more of the several pending cases on *Banco Popular*), it will be interesting, meanwhile, to read the opinion of the Council Legal Service which should be delivered, in its final version, shortly. But let me say that, to my mind, time has come to accept that Meroni is dead, in this context, and delegated discretion, when applied in a highly regulated context like the financial sector , is by definition circumscribed by sufficient criteria which per se prevent it from transcending into policy and is subject to a comprehensive system of quasi-judicial and judicial review which has proven stringent. Being clear on this would also help the co-legislators in focussing on what really matters, and namely core policy choices (and simplification of Level 1 rules: they grew with a factor of at least 12 over the last 10 years!)

I come to the conclusion. Two words on ESMA new tasks and on funding. To me, extending ESMA's direct supervision on newly regulated market players (such as benchmark administrators, cross border data reporting service providers) and enumerated cross border activities is fully consistent. This is also very important because it will leverage ESMA role as central data repository and financial data supervisor, in preparation for all challenges posed by FinTech supervision and will also push the system of supervisors towards more day-to-day coordination as it occurs, successfully, within the SSM. This impinges also on funding. My concern is that the reform, on this, is timid; investing more on the ESAs, and on ESMA in the first place, is a necessity! the system must rapidly evolve into a data-intensive Tech-authority of new generation. And this requires appropriate funding at every level of the hub and spokes.

Let me conclude with an image. In a secluded Buddhist temple lost in the Himalayan ridge of Ladhak there is a beautiful fresco featuring a monk and an elephant walking over the rainbow from earth to heaven. While they move up, they turn from gray to white. To take the ESAs, in due time, to their final destination and meanwhile to keep the right direction of travel, we all must trust that our European rainbow is solid ground for an elephant!

Thank you for your attention.