

The European Institutional Set Up for Financial Regulation and Meroni

European Banking Authority

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Introduction

- A functional perspective on ESA institutional design and Meroni
- Rule-making and Supervision
- Case C-270/12

Rule-making

- The specificities of financial market governance and rule-making
- A lack of resilience in EU governance, driven by Meroni
- The nature of the Meroni/Romano constraint
- Engaged by sub-delegations relating to non-legislative delegated rules (A 290 TFEU)
- A 291 and Case 270/12 – Meroni-free?
 - But in practice most ESA quasi-rule-making is under A 290

Rule-making

- How is Meroni expressed institutionally?
 - Regulatory Technical Standards; ESA-proposed and Commission-endorsed
 - Is this efficient?
 - Political, institutional, and Treaty realities
 - Experience with ESMA – only 3 BTSs subject to veto/revision
 - Commission concern tends to be with legislative fit, not regulatory design choices; compare technical advice
 - EBA ‘single rulebook’ and Commission incentives to support
 - Transparent process.....to the point of prejudice?
 - ESFS Review
 - Soft law concerns – not endorsement

Rule-making

- But there are difficulties which cannot be evaded by the political, institutional, and constitutional complexities
 - De-stabilizing institutional conflict
 - Inefficiencies (nature of current rule-design process)
 - Spill-over effects and the ‘Supervisory Handbook’
 - Nimbleness?
 - Rule hierarchy imposed by Meroni is troublesome
 - Procedural anomalies
 - ESA resilience and independence
 - Evidenced capacity of ESAs in rule design; procedural robustness
 - Fragile and complex rule-making environment

Rule-making

- The conundrum
 - Automatic endorsement – constitutional uncertainty; active endorsement – efficiency and other risks
- A modest proposal
 - ESA observer status at level 1
 - Board of Supervisor reform
 - Commission reporting obligation on endorsement process

Rule-making

- Meroni and Guidance (ESA Regulation A 16)
 - Meroni-resilient?
 - The normative colour of Guidance?
 - Board of Appeals
 - Commission and Short Selling Regulation Review (December 2013)

Supervision

- Centrality of supervision to next phase of ESAs
 - ESFS Review
 - Single Supervisory Handbook; euro area/SSM
- Meroni complexities significant
 - Supervision is executive/implementing in nature
 - Executive powers typically MS level (A 291 TFEU)
 - Conferred or delegated?
 - Assuming Meroni applies (the governing assumption in ESA design), functionally problematic
 - The discretion difficulty

Supervision

- The ESAs and supervision
 - ‘clear hierarchical authority’ (Case C270/12)
 - Where is Meroni engaged?
 - Horizontal ESA Regulation As 17-19 over NCAs and in relation to third parties
 - ‘Supervisor of supervisors’ function
 - Specific powers of intervention
 - ESMA: exs rating agencies; short selling
 - Different in nature
 - Exclusive; displace/substitute NCAs; conditions; breach of EU law required

Supervision

- Unresolved tension between political decision to empower ESAs as ‘supervisor of supervisors’ and reality that practical execution of this requires significant discretion
 - Discretion/judgment not in itself a difficulty
 - But where on the spectrum can discretion sit?
 - Policy choices; operating environment unstable; conditions (necessarily) subjective to allow judgment-based supervision?
 - Norm-setting effects?

Supervision

- Conditionality problems
 - The ESMA example: Meroni template for agency design rather than dictates of operational effectiveness
 - Spectrum from intense prescription to litigation-risk-prone subjectivity
 - ESA Regulation A 17 (decisions on third parties)
 - ESA Regulation A 19 (limiting conditions? functionally correct but Meroni difficulties; reality of engaging with differing supervisory judgments)
 - Complex legal texts and ambiguities where absolute operational clarity required

Supervision

- Does the AG Opinion in Case 270/12 help?
 - Conferred not delegated powers
 - Subject to conditions (sufficiently specific to respect institutional balance; cannot engage policy decisions)
 - ESMA powers clearly defined executive powers
 - Expert technical capacity
 - Move away from nature/extent of discretion to wider institutional balance/policy-making implications?
 - Functionally welcome; incentives to constrain ESAs
 - But not an easy course to steer.....