When More Is Needed: The European Financial Supervisory Reform and Its Legal Basis

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1. INTRODUCTION

How to reform the international supervisory architecture which proved so ineffective in averting the crisis and how to properly allocate financial supervision in an economic setting dominated by multi-jurisdictional financial conglomerates is a popular topic these days, both in the US and in Europe. This article briefly comments on the European proposals presented by the Commission on 27 May, discussing also their legal basis in the Treaty. Despite this the author acknowledges that the Commission's proposals mark an advance in the field, he advocates for a more straightforward pan-European approach in the redesign of the supervisory architecture.

In Brussels the Commission, following the De Larosière Report of end February and its action plan which was announced on 4 March 2009, put forward a proposal of reform on 27 May, which was then endorsed in mid June by the European Council. To be true, the issue has been vividly debated in Europe for a long time.[1] Despite this debate, policy action lagged behind and only the recent crisis prompted new action. The crisis clearly showed indeed that the asymmetry between international financial conglomerates and national supervision played a major role in averting the risks. Big players turned out to be, also in many European Member States, inefficiently supervised. Today, this simple truth is, finally, well recognized also by policy makers: suffice to mention, in Europe, the results of the De Larosière Report[2] and of the Turner Review.[3] Inefficiencies are both micro- and macro-prudential.[4]

Despite the recognized institutional failures of the existing European supervisory architecture and although many agree that in an integrated European financial market 'market players as well as consumers would probably benefit from having one integrated pan-European supervisory authority both from a practical and an economic perspective',[5] the establishment of such a single pan-European authority presiding over cross-border financial conglomerates is still far from becoming a reality. Realistically, in light of recent political compromises reached both in the CRD revision process (which led to the compromise text of 6 May 2009, watering down the consolidating supervisor decision-making power originally envisaged by the Commission's proposal) and at the European Council of 18–19 June (strongly advocated by the UK, as it is clearly witnessed also by the House of Lords Report published on 17 June 2009),[6] it seems that, also for transnational financial groups, in the near future we will likely continue to build on the existing, albeit upgraded, institutional framework based upon home country control, national supervisors, mutual recognition and institutional cooperation (albeit improved through the new European central authorities). Despite the crisis and its lessons, Europe seems to be willing to take, once again, the more traditional path of a progressive institutional evolution at multiple stages, very much along the lines of the historical development of the ESCB where the Committee of the central governors was first set at stage 1, then turned into the European Monetary Institute at stage 2 and finally transformed and upgraded into the ECB and ESCB at stage 3. It could be said, thus, that as regards pan-European banking and financial supervision, the current European proposals are more aimed at improving the supervisory architecture from stage 1 to stage 2 'plus' than to bring about an overall revolution of the supervisory architecture. In other terms, Europe is likely to be moving ahead from mere cooperation to enhanced coordination and just a little more, through the establishment, for macro-prudential supervision, of a European Systemic Risk Board (ESRB) and, for micro-prudential supervision, of three central agencies called to replace the existing

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1 Compare Lamandini, *Towards a New Architecture for European Banking Supervision*, in *ECL*, 2009, 6–13 (with additional references).

2 The High Level Group on Financial Supervision in the EU, *Report*, 25 Feb. 2009, passim, especially at Ch. III.

3 FSA, The Turner Review, A Regulatory Response, March 2009, 86 ff. (see also 36 where the lessons drawn from the Landsbanki collapse).

4 Compare Lamandini *Towards a New Architecture for European Banking Supervision*, 6.

5 Moss, 'The International Network of Financial Authorities', in *Handbook of Central Banking and Financial Authorities in Europe*, ed. Masciandaro, at 396; see also Eijffinger, 'The European Central Bank and Financial Supervision', in *Handbook of Central Banking and Financial Authorities in Europe*, ed. Masciandaro, at 476 and 481.

6 House of Lords, European Union Committee, The future of EU financial regulation and supervision, London, 17 Jun. 2009, especially at 29 ff.

Lamandini, Marco. 'When More Is Needed: The European Financial Supervisory Reform and Its Legal Basis'. *European Company Law* 6, no. 5 (2009): 197–202.
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3L3 Committees (CESR, CEBS and CEIOPS). This means that the Commission is bringing forward, on the one hand, the idea of an institutionalized supervisory network centred on the new EU authorities; at the same time, however, these new authorities will not pre-empt the regulatory and supervisory competence of national authorities nor will they take responsibility, at the centre, for the overall regulation and supervision of (at least) cross-border financial conglomerates.

Before considering in detail the Commission's proposal, it is worth putting it in context, briefly reviewing how the current cross-border supervisory setting is organized under European law, also in the wake of the recently approved CRD amendment and of other developments following the unfolding of the crisis.

The principle of home country control still represents and is likely to be confirmed as the cornerstone of European financial regulation and supervision. Contradictorily, it implies however that, in the case of cross-border players, branches are in principle regulated and supervised by the home country supervisor (except for liquidity and other minor concerns, which remain in the host country competence) whereas subsidiaries, being legally separate, are regulated and supervised by the host country. To be true, after the emergence of the crisis, drawing lessons from the uneven burden sharing implied in many cross-border bail outs, some[7] argued that also systemically relevant branches should be exempted from the home country control and left to the supervision of the Member State which, in case of distress, would be called to intervene. Others contend that the opposite should become true and subsidiaries should be subject to home country control within the frame of a newly established pan-European regulation of banking groups allowing asset transferability and defining ex ante a proper burden sharing between home and host Member States. The European regulatory response in the banking sector was, so far, quite cautious and almost timid. The CRD revision is going to confirm the home country control also on systemically relevant branches, providing however a sound legal basis under EU law for the colleges of supervisors for each and all cross-border banks. The CRD amendment sets out that 'colleges of supervisors shall provide a framework for the consolidating supervisor and the other competent authorities concerned to carry out the following tasks: (a) exchange information; (b) agree on voluntary entrustment of tasks and delegation of responsibilities; (c) determine supervisory examination programmes based on a risk assessment of the group; (d) increase the efficiency of supervision by removing unnecessary duplication of supervisory requirements; and (e) consistently apply the prudential requirements under the Directive across all entities within a banking group; apply Article 129(1)(c) taking into account the work of other forum that may be established in the area'. There will be a college for each multi-jurisdictional group (this means, today, 123 colleges) and therefore the composition of the colleges is 'at variable geometry'. This increases however the coordination problem of all these colleges[8] and would not deliver a truly level playing field for cross-border supervision, unless a uniform implementation of the supervisory functions by the colleges is achieved. A difficult, if not impossible, task essentially delegated now to the CEBS and tomorrow, according to the recent Commission communication of 27 May, to the new European agency, which 'shall elaborate guidelines for the operational functioning of colleges' (extending also on highly sensitive topics such as the size foreign branches and subsidiaries should be in order to have a right to participate at the college to the host supervisor and the possible differentiation between core and extended colleges). Each college shall be chaired by the consolidating supervisor, it being the supervisor of the Member State where the parent company has its headquarters. In principle, colleges shall work unanimously: under Article 129(3) the consolidating supervisor and the other competent supervisory authorities 'shall do everything within their power to reach a joint decision on the adequacy of the consolidated level for own funds as well as on uniform formats, frequencies and dates of reporting'. The European Authority (now the CEBS) can be consulted in case of disagreement by the consolidating supervisor either on its own initiative or upon request of any other competent authorities concerned and shall provide its non-binding advice (the college shall consider such advice and the consolidating supervisor departing from such advice shall be obliged to explain why). If, despite the advice of the CEBS, a unanimous agreement cannot be reached within the college, the new CRD proposal entrusts the consolidating supervisor with the power 'to make its own decision on the application of Articles 123, 124 and 136(2)' (and namely on reporting for the calculation of minimum capital requirements and on own funds requirements in excess of the minimum) only 'après un examen approprié de l'évaluation du risqué des filiales réalisée par les autorités competentes concernées'. Note that this provision, which is watering down the original Commission's proposal, draws a balance between home and host country supervision but is very far from making the lead supervisor a single entry point for any aspects of cross-border consolidated supervision.

To address emergency situations and in particular cross-border crises which may potentially jeopardize the stability of the financial system in any of the home or host Member States, most of the EU coordination action is based, still, on the non legally binding provisions of the Memorandum/a of Understanding (MoU), and now in particular on the 'soft law' provisions of the MoU on cooperation between the financial supervisory authorities, central banks and finance ministries of

7 See Turner Review, 36 and 96–102; compare also M. Brunnermeier et al., *The Fundamental Principles of Financial Regulation*, The Geneva Report, ICMB-CEPR studies, London, 2009, passim.

8 A problem already discussed by the industry, complaining that 'practices concerning formation and activities of banking supervisory colleges are extremely divergent': see EFR, *Monitoring Progress in EU Prudential Supervision*, at 42.

the EU on cross-border financial stability. The MoU fosters the establishment of Domestic Standing Groups and Cross-Border Stability Groups for national and international banking groups respectively whose activity should be guided by Voluntary Specific Cooperation Agreements. It sets out important common principles for cross-border financial crisis management, including the principle whereby 'if public resources are involved, direct budgetary net costs are shared among affected Member States on the basis of equitable and balanced criteria, which take into account the economic impact of the crisis in the countries affected and the framework of home and host countries' supervisory powers'. As regards the appointment of the lead supervisor, the MoU sets out that, 'as a rule the National Coordinator of the home country assumes the task of Cross-Border Coordinator in the management of a cross-border financial crisis' but at the same time that 'it may delegate tasks to authorities in a host country'. The Party assuming the role of coordinator may vary according to the nature and the stage of the crisis, and namely in a liquidity crisis with a potential for systemic implications the Central Bank of the home country will coordinate actions whereas in a solvency crisis with a potential for systemic implications which may imply the use of public funds, the Finance Ministry in the home country will coordinate the process of deciding on whether, to what extent and how public funds will be used. In this connection, Member States should agree in advance 'on burden sharing based on equitable and balanced criteria'. However, 'as the provisions of this Memorandum are not legally binding on the Parties, they may not give rise to any legal claim on behalf of any Party or third parties in the course of their practical implementation': in legal terms this means that these provisions are not legal norms but social norms. A code of good manners for supervisors, so to say, at least so long as detailed and specific burden-sharing agreements between Member States are not agreed upon and made internationally binding by the Member States concerned. It is hard to believe that in difficult times good manners may suffice to counterbalance possible incentives to cheat. Even more so when cheating may help in shifting the fiscal costs of banking bail out to other communities.

It is against this backdrop that we must consider the proposals put forward by the Commission communication of 27 May 2009. It must also be kept in mind that, a few months before, to enhance the role and the functioning of Lamfalussy Level 3 (3L3) Committees, the Commission brought about a proposal aimed at replacing the 3L3 decision-making process by consensus (which had hampered to date the contribution of the Committees to effective and speedy supervisory convergence) to a qualified majority vote system. However, even following such reform, the Committees' decisions are not binding for all members, since adoption of the common position is still based on a 'comply or explain' procedure, whereby a national supervisor can still deviate from the common position, if it substantiates the reasons for such a deviation.

Differently from the past, the new institutional framework proposed by the Commission would imply the following two pillars:

(1) The establishment of an ESRB to monitor and assess risks from a macro-prudential perspective, in order to address 'one of the fundamental weaknesses highlighted by the crisis, which is the vulnerability of the financial system to interconnected, complex, sectoral and cross-sectoral systemic risks'; the ESRB shall be composed of the governors of the central banks of the twenty-seven Member States and the President of the ECB (originally meant to chair the group; this provision is however likely to fail following the Ecofin of June due to the UK opposition); it would not have any legally binding powers but would issue warnings and recommendations to be channelled through the Ecofin Council and/or the new European Supervisory Authorities.

(2) The establishment, in lieu of the 3L3, of a European System of Financial Supervisors (ESFR), whereby the 3L3 would be replaced by three new European Supervisory Authorities (i.e., a European Banking Authority – EBA; a European Insurance and Occupational Pensions Authority – EIOPA; and a European Securities Authority – ESA), which would each have legal personality. The new Authorities would take on all the missions of the existing 3L3. They would have increased responsibility, and namely: (i) ensure a single set of harmonized rules, by developing binding technical standards (would they amount to a common rulebook?) and by drawing up interpretative guidelines; (ii) ensure consistent application of EU rules; (iii) facilitate the dialogue between national authorities, also settling any disputed matter as a last resort option; (iv) address any manifest breach of EC law from national authorities; (v) ensure a common supervisory culture and consistent supervisory practices; (vi) take on the full supervisory powers for entities up to now unregulated (CRAs, EU central counter party clearing houses);[9] (vii) ensure a coordinated response in crisis management; (viii) collect micro-prudential information; and (ix) undertake an international role. Despite this increased role, it must be stressed that 'the focal point for day to day supervision would remain at the national level, with national supervisors remaining responsible for the supervision of individual entities'. This reflects – as the Commission noted – that for the time being the financial means for rescuing financial institutions remains at the Member State level and with national taxpayers. In addition, for cross-border institutions, the colleges of supervisors will be the lynchpin of the supervisory system (ensuring a balanced flow of information between home and host authorities). The ESAs

9 The Commission adopted here a policy recommendation which can be found in Lamandini, *Credit Rating Agencies (CRAs) and European Regulation*, in *ECL*, 2009, 131–134.

should participate in meetings of the colleges of supervisors, as observers though, so as to contribute to the emergence of a common supervisory culture and consistent supervisory practices.

It is quite apparent that the new proposal does not envisage the proper establishment of a fully-fledged new central supervisory authority pre-empting financial regulation and oversight at the national level. Nonetheless the reform would upgrade substantially the European regulatory and supervisory coordination, opening the way to a new form (albeit weak) of pan-European oversight system. For our purposes today, two issues deserve, to my mind, special attention: what should be the legal basis for such a redesign of supervisory architecture and what should be burden-sharing and supervisory liability in case of shared supervisory responsibility.

Both issues were often voiced, in the regulatory debate, to advocate for a less stringent pan-European solution. The arguments that, on the one hand, to establish a new European supervisory authority a Treaty amendment is needed and, on the other hand, that there cannot be any centralization of supervisory functions because the ultimate cost of bail outs in the financial sector is paid by national tax payers are, to my mind, both flawed.

The legal basis currently found by the Commission for the establishment of the new European authorities rests on Article 95 of the Treaty. This provision confers the power to harmonize national laws 'where there are obstacles to trade, or is likely that such obstacles will emerge in the future because the Member States have taken or are about to take divergent measures which bring about different levels of protection'.[10] I believe this is a sound legal basis. Indeed, the delivery of a truly integrated financial market (a policy goal already made clear by the 1999 FSAP) implies, by its very nature, both a strongly harmonized investor and consumer protection throughout Europe (functional to the build up of the level of confidence needed to support the proper functioning of a pan-European market capable of diminishing the costs of financing for European undertakings) and a level playing field for financial players across Europe, irrespective of their country of origin. Both policy goals cannot be attained only through Level I or Level II regulatory measures. Most of the market designs affecting both investor and consumer protection and the competitiveness of financial firms rests, in the financial sector, in the supervisory approach. Without a uniform or at least strongly harmonized set of technical rules, the resulting uneven playing field prompts differentiated levels of investor and consumer protection and unfair competition within the industry (suffice to mention, how diverging supervisory approaches to branching followed by different home country supervisors can affect the internal growth of transnational banks in the same host country, favouring the player whose home country supervisor adopted the most lax approach; the same holds true for capital requirements in excess to the minimum). The United Kingdom, as often in the past, has been questioning these days in Brussels this legal basis, arguing that the legislative power conferred by Article 95 is a power to harmonize national laws not a power to establish Community bodies and to confer tasks to such bodies. This argument cannot be upheld and has already been denied by the Europen Court of Justice (ECJ) in previous cases. In the 'smoke flavouring case', for instance, the Court made clear that 'by the expression measures for the approximation in Article 95 the authors of the Treaty intended to confer on the Community legislature a discretion depending on the general context and the specific circumstances of the matter to be harmonised, as regards the harmonisation technique most appropriate for achieving the desired result, in particular in fields characterised by complex technical features' (p. 45). In turn, in the 'European Network and Information Security Agency case',[11] the ECJ stated clearly that Article 95 provides a sound legal basis also for the establishment of a new EU body 'responsible for contributing to the implementation of a process of harmonisation'; it also pointed out, in a case where the claimant contested the legal basis because the new EU body was conferred with non-binding consultative powers (note that in that case, the UK conceded that granting binding powers would amount to a harmonization exercise), that not only binding measures but even non-binding advice can amount to an approximation of the provisions laid down by law, regulation or administrative action in the Member States, provided that 'the tasks conferred on such a body are closely linked to the subject-matter of the acts approximating the laws, regulations and administrative provisions of Member States'. I do believe, thus, that the reference to Article 95 as legal basis for the reform is sound, without the need to act under Article 308 of the Treaty or to call for a Treaty amendment.[12]

On the other hand, the establishment of European agencies without a Treaty amendment and with a majority vote is not new. To be sure, 'supervisory functions are indeed directly linked to the exercise of national sovereignty'.[13] Moreover, as a general rule, public authorities should exercise their powers themselves, with the correlated risks and responsibilities. Delegating authority would in principle affect constitutional or other public law principles 'as it would allow public bodies to discharge themselves of

10 ECJ, 6 Dec. 2005, Case C-66/04, *United Kingdom v. European Parliament* ('smoke flavouring'), at para. 41 (with additional references).

11 ECJ, 2 May 2006, Case C-217//04, *United Kingdom v. European Parliament*.

12 We could also rely, if needed, as already mentioned by the De Larosière Report (at para. 190) on the enhanced cooperation provisions embedded in Arts 11 TEC and 43 TEU. Enhanced cooperation should be approved by the European Council by qualified majority and would allow the creation of the new Authorities at least with effect in those Member States willing to move forward the European integration of financial supervision. This would imply a 'variable geometry' approach, which however would leave uncovered London and, to my mind, would easily result quite insufficiently to address effectively the regulatory and supervisory competition in laxity experienced in the past and would open a leeway to the same negative spill over effects, the uniform targeting of which is one of the essential reasons for the new European action plan.

13 Wymeersch, *Delegation as an instrument of financial supervision*, Working Paper, 12 Dec. 2006, 3.

their legal duties by designating somebody else to do so'.[14] This means that there cannot be any delegation of decision-making from one supervisor to another, unless there is a clear legal basis to do so. However, as anticipated, to my mind the clear need for an efficient and well-functioning supervisory architecture for the integrated European financial market provides such a sound justification and sufficient EC legal basis, under the principles of subsidiarity and proportionality. In so doing, the reform would allow the European architecture to overcome an unjustified persistent supervisory fragmentation hampering the well-functioning of the internal market. It is worth recalling, in this respect, that, for the purpose of ensuring 'a high and uniform level of protection of the European citizens' the EU already established, in 2002, an independent authority, and namely the European Aviation Safety Agency with Regulation No. 1592/2002 of 15 July 2002. Recitals (11) and (12) motivate why the establishment of 'an independent authority having legal, administrative and financial autonomy' was needed 'for better arrangements in all the fields covered by the regulation, so that certain tasks currently performed at the Community or national level should be carried out by a single specialised expert body' and that the authority 'should be allowed to develop its expertise in all aspects (...) covered by the regulation, assist the Commission in the preparation of the necessary legislation and assist the Member States and the industry in its implementation, *and issue specifications and guidance material and to make technical findings*'. Note however that this regulation was based upon Article 80(2) of the Treaty which is specific for the transport sector. A similar path was also taken with the European Food Safety Authority (entrusted, though, solely with consultative powers) with Regulation No. 178/2002 of 28 January 2002 (based upon, this time, Article 95 of the Treaty).

Whilst I concur with the Commission on the proper legal basis for the new European financial supervisory architecture, I find however that, on the one hand, this legal basis limits the magnitude of regulatory powers which can be conferred on the new Authorities (essentially legally binding technical standards and little more) and, on the other hand, the political decision enshrined in the Commission proposal not to confer to the ESRB binding powers on macro-prudential matters is feeble and short sighted. In my view, the very same reasons which recommend the conferral of binding powers to the three new European authorities entrusted with micro-prudential supervisory powers would have supported, also as a matter of consistency, the conferral of binding powers in the macro-prudential framework. The two domains are strictly intertwined, as recent experience shows and also the foundation of a macro-prudential supervisory body rests, at the end of the day, on the need to protect investors, consumers and the internal market as a whole.

As regards micro-prudential supervision, in turn, it is questionable, to my mind, the current approach which, on the one hand, intends to confer regulatory functions to the new European Authorities, but, on the other hand, is not willing to confer to them also the supervisory functions (on a solo or consolidated basis), confirming in them the colleges, on the implied assumption that decision-making on individual supervision cannot be taken away from the home country supporting the potential burden of the financial firm's bail out. The issue shall be dealt with in some detail here below.

Indeed, on the burden sharing and liability issues the Commission communication is mostly silent. And not surprisingly so: the topic is difficult to manage in such an evolutionary setting. Indeed, the true point with the European System of Financial Supervisors – to the extent that such system is expressly entrusted by EC law with specific decision-making functions – is in my opinion on the balance between power and responsibilities. How to correlate power and risk?

On the one hand, as is well known, there is no European budget or European fiscal authority, so far, which could be used to address pan-European financial distress. Rescue packages and recovery plans draw on national resources. It is apparent though, that to date, under the nationally fragmented framework, the burden of failure or bail out costs are not necessarily aligned with the allocation of supervisory functions, although in principle lender of last resort and applicable deposit guarantee schemes should be those of the home Member State.[15] The Icelandic case clearly showed that systemically relevant branches, albeit supervised by the home country, could call for host country financial support.

Currently EC institutions address this issue by fostering the adoption of the MoU which – as mentioned above – should *inter alia* provide an equitable burden sharing among home and host countries, correlated to the joint exercise of crisis management. Nonetheless, this crucial exercise of international fair cooperation is explicitly made non-binding. It builds, therefore, and quite surprisingly so, on social norms and not on proper legal undertakings. It is moreover hard to believe that, failing a clear regulatory framework for such burden sharing, the parties of the MoU would really be able to agree in detail on the burden of costs which each of them should accept in proportion to the activities carried on by the supervised banking group in each Member State. Game theory suggests that joint welfare depends negatively on the supervisors' divergence of interest and that, when supervisors' preferences are not aligned, a first best decision can never be reached. This is a fundamental bias negatively affecting international banking and financial supervision made through bilateral or multi-lateral MoUs. Thus, there is here, to my mind, a clear case for regulatory intervention. Following the De Larosière advice, I do believe that burden sharing should be made legally binding adopting a fixed formula incorporating (at least) the following items: (a) role of the country in the individual supervision; (b) economic impact of the crisis on the Member State; (c) origin of the deposits taken by

14 Wymeersch, *Delegation as an instrument of financial supervision*, 17.

15 Compare also EFR, *On the Lead Supervisor Model*, at 8.

the institution (if any); (d) location of the assets of the institution; (e) revenue flows of the institution;[16] and (f) share of payment system flows of the institution.[17]

To my mind, this exercise of ex ante burden sharing could and should be made within the framework of the regulation of the new European Authorities, bringing about in this way a stronger correlation between supervisory powers and risk. This should also lead, in principle, to the conferral of the individual supervisory powers on transnational financial groups to the new European authorities (instead of the colleges), with a decision-making power referred to individual or consolidated supervision (as opposed to the powers of technical regulation) to be exercised in the single cases adapting the majority rule to a variable majority principle. In other words, the governing body of the competent Authority, when taking a supervisory decision on a specific transnational group, should pass the resolution by majority vote and the majority should be calculated by conferring to each Member State representative sitting on the board a different number of votes reflecting the burden ex ante assigned to such Member State.

This would make the new European authorities' accountability more transparent and effective. By simplifying the assignment of decision-making power, this would also bring about a clearer assignment of liability for the negligent performance of the supervisory function. In the current setting of the colleges of supervisors, on the contrary, it is often difficult to anticipate the final allocation of (civil) liability, due to the complex decision-making process followed within the college. On the contrary, should the European central Authority take the decision, it is clear that it must be held liable for such a solo decision. This is a principle embedded, for instance, in Article 22 of Regulation No. 1592/2002 for the Aviation Safety Agency. Moreover, such responsibility would be based on EU provisions, thereby averting the risk, currently present, that the standard of care required be different from one Member State to the other depending on the place where the liability action is brought.

2. CONCLUSION

In conclusion, to my mind, more is needed. The action plan envisaged by the Commission to upgrade the European supervisory architecture through the establishment of new European central authorities marks for sure an advance in respect of the current untenable fragmented system and may well prove a masterpiece of pragmatism and political realism. However, by postponing once more the establishment of a truly fully-fledged European supervisory Authority and of a truly integrated and uniform supervisory framework for the financial sector, European policy is 'buying risk'. Being blind or short-sighted now might prove dramatically costly in the years to come.

16 It is clear, to me at least, that the formula should incorporate also the benefits which each Member State accrued to very different extents from the banking group activity, when still profitable, in order to proportionate effectively costs and benefits. If the parent company skimmed the cream of the group profits, why should host Member States or the Union as a whole take up part of the burden?

17 See paras 141–143.