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OPINION OF THE LEGAL SERVICE[1]

From:	Legal Service
To:	Working Party on Financial Services and Banking Union
Subject:	**Market Integration and Supervision Package (MISP) Proposals** – **Compatibility of certain provisions with the *Meroni* doctrine**

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I. INTRODUCTION

1. On 5 December 2025, the Commission presented a proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 1095/2010, No 648/2012, No 600/2014, No 909/2014, 2015/2365, 2019/1156, 2021/23, 2022/858, 2023/1114, No 1060/2009, 2016/1011, 2017/2402, 2023/2631 and 2024/3005 as regards the further development of capital market integration and supervision within the Union[2], a proposal for a Directive of the European Parliament and of the Council amending Directives 2009/65/EC, 2011/61/EU and 2014/65/EU as regards the further development of capital market integration and supervision within the Union[3] and on proposal for a Regulation of the European Parliament and of the Council on settlement finality and repealing Directive 98/26/EC and amending Directive 2002/47/EC on financial collateral arrangements[4].

[2] Document 16345/25.
[3] Document 16347/25.
[4] Document 16348/25.

2. The Working Party on Financial Services has requested the Council Legal Service (CLS) to set out in writing its views on question whether a group of proposed provisions, aimed at amending four EU legislative acts (namely, inserting an Article 110c in the UCITS Directive[5], inserting an Article 47b in the AIFM Directive[6], and inserting an Article 14c in the CBD Regulation[7], as well as inserting Articles 17aa and 17aaa in the ESMA Regulation[8]) are compatible with the Treaties and the general principles of Union law, as interpreted by the Court of Justice in its so-called *Meroni* case-law[9]. This opinion confirms and complements the legal advice presented by the representative of the CLS at the meeting of this Working Party on 27 April 2026.

II. LEGAL BACKGROUND: THE MERONI CASE LAW

3. As already explained by the CLS in opinion 10449/18, paragraphs 3-9, the case-law of the Court of Justice has recognised the possibility for Union institutions to delegate powers to independent executive or regulatory bodies, in so far as the delegation relates to clearly defined executive competences, meaning that no power for making policy choices may be granted to the delegated body. According to the *Meroni* case-law, a delegation involving "*discretionary power implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy*"[10] would imply an illegal transfer of responsibility by substituting the choices of the delegator by those of the delegatee. Any use of delegated powers must be subject to strict review in the light of objective criteria determined by the delegating authority.

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5 Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities ("USCITSD").

6 Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers ("AIFMD").

7 Regulation (EU) 2019/1156 of the European Parliament and of the Council of 20 June 2019 on facilitating cross-border distribution of collective investment undertakings ("CBDR").

8 Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) ("ESMA Regulation").

9 Doctrine originating from the judgment of the Court of 13 June 1958, *Meroni v High Authority*, 9/56, EU:C:1958:7 (hereinafter *Meroni*).

10 Judgment in *Meroni*, ECR 1958, p. 133, at p. 142.

4. This was confirmed by the Court in the so-called *Short Selling* case, in which the Court accepted the conferral of powers on the European Securities and Markets Authority (ESMA) under Article 28 of Regulation 236/2012[11] in view of the fact that the concerned powers are "*precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority*".[12] The Court came to this conclusion on the basis of the following considerations (paragraphs 44 to 50 of the judgment):

– the provision in question does not confer any autonomous power on ESMA that goes beyond the bounds of the regulatory framework established by the ESMA Regulation;

– the exercise of the powers is circumscribed by various conditions and criteria which limit ESMA's discretion, which means that, before taking any decision, ESMA must examine a significant number of factors set out in the legislation and that the conditions are cumulative;

– the two kinds of measures which ESMA may take are strictly confined by the ESMA Regulation;

– ESMA's margin of discretion is circumscribed by the requirement to consult the European Systemic Risk Board and, if necessary, other relevant bodies, and by the temporary nature of the measures authorised.

5. The Court also noted that the detailed delineation of the powers of intervention available to ESMA is further provided by the Commission's power to adopt delegated acts to specify criteria and factors that ESMA itself must follow when exercising the power conferred on it (paragraphs 51 to 53 of the judgment).

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11 OJ L 331, 15.12.2010, p. 84.

12 Judgment of the Court of 22 March 2014, *United Kingdom v European Parliament and Council ("Short Selling")*, C-270/12, EU:C:2014:18.

6. In line with this case law, the CLS has also already confirmed in writing that it is possible for a legislative measure to grant to a body, office or agency an independent power to adopt decisions addressed at natural or legal persons, on whom they are binding, provided that such a power is contained within a precise legal framework and that it is limited in its purpose and in its scope. In any case, the power entrusted to the Union body, office or agency must be limited to executive tasks.[13] The empowerment of the agency to adopt implementing act of an individual scope must be subject to rules, criteria and standards, to ensure that the agency's power does not amount to the establishment of the policy of the Union.

7. In the same set of opinions, the CLS has also recalled that to grant a Union body, office or agency a certain power of assessment to apply rules to specific factual situations does not necessarily amount to a wide power of discretion to make policy choices, in the sense of the *Meroni* case-law mentioned above. What is essential is that policy choices and rule-fixing are made by the Union institutions, typically in the act by which powers are given to Union bodies. Within the policy-framework established by the Union institutions, the Union body, office or agency has a certain capacity to analyse facts and circumstances and to assess how they fall into the relevant rules. Indeed, in their daily practice, Union bodies, offices or agencies are systematically called upon to exercise a power of assessment when adopting individual binding decisions; were it not the case, they would not be able to contribute meaningfully to the implementation of Union policies.

[13] See the following CLS opinions: document 7174/05, document 9984/05 and, in the particular field of micro-prudential supervision, document 14349/09, document 14010/10, document 18136/10, document 6941/11 document 16182/13, document 10449/18 and document 6275/25.

III. LEGAL ANALYSIS

8. The proposed provisions concern two types of ESMA empowerments: (1) suspension of passporting rights (proposed Articles 14c(4) of the CBDR, 47b(4) of the AIFMD, 110c(4) of the UCITSD) and (2) taking a decision requiring the competent authority to revoke or amend a decision, or taking a decision instead of that authority to suspend the provision of services or activities on a cross-border basis by a particular entity (proposed Articles 17aa and 17aaa of the ESMA Regulation).

Suspension of passporting rights

9. As regards the first type, the Commission proposal empowers ESMA to suspend passporting when one of two conditions is fulfilled: (i) either where the competent authorities or stakeholders concerned fail to implement a decision, opinion, recommendation or action adopted or required by ESMA in order to address an identified cross-border issue or an opinion issued by the Commission, in accordance with Article 17(4) of the ESMA Regulation, or (ii) where ESMA has concluded that an entity that carries out its functions or offers services on a cross-border basis no longer fulfil the requirements of the applicable EU legislative act.

10. This empowerment results in the possibility for ESMA to adopt a binding decision, which, as explained in paragraph 6 above, is permissible under the *Meroni* doctrine. The empowerment is explicit, contained in a legal framework and does not go beyond the bounds of the regulatory framework established by the ESMA Regulation.

11. There are also elements that point to the fulfilment of the condition that ESMA's power is circumscribed by conditions and criteria which limit its discretion.

12. In particular, before the suspension, ESMA must send its findings to the entity and the competent authorities concerned and the latter may submit to ESMA a reasoned statement within 30 days. This mechanism is very similar to the consultation of the ESRB, which has been considered a relevant condition constraining the discretion of ESMA in the *Short Selling* judgment, as explained in paragraph 4 above.

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13. However, the proposed provisions contain one element that goes beyond what the *Meroni* case-law would allow, namely the second, non-cumulative condition, which allows the suspension of passporting rights if ESMA concludes that the entity no longer fulfils the requirements of the applicable EU legislative act.

14. As formulated, such a conclusion by ESMA would necessarily imply an assessment which, due to its holistic and complex nature, could be seen as falling short of the requirement to be constrained by sufficiently precise conditions and criteria.

15. In order to ensure that the empowerment is sufficiently constrained, several options are available: (1) the conditions could be made cumulative, rather than alternative; (2) the second condition could be formulated in a more precise and circumscribed way; and/or (3) echoing the reasoning of the Court in the *Short Selling* judgment, presented above at point 4, the suspension could be specifically designated as temporary. The CLS is ready to assist in drafting such provisions.

Suspension of the provision of services or activities on a cross-border basis

16. Concerning the second type of provision, the proposed Article 17aa of the ESMA Regulation establishes a procedure aimed at addressing a possible failure in effective supervision by requiring a competent authority to seek ESMA's opinion before granting approval to financial products, services, activities or entities in that sector. This procedure could lead to the adoption of a binding decision by ESMA requiring the competent authority to revoke or amend a decision that it has adopted or to make use of the powers which it has under the relevant Union law (proposed Article 17aa(4) of the ESMA Regulation).

17. Equally, the proposed Article 17aaa of the ESMA Regulation provides that where the relevant competent authority does not comply with a decision by ESMA requiring it to suspend the right to provide services on a cross-border basis, ESMA shall adopt such a decision. All competent authorities concerned must take all appropriate measures to ensure that the ESMA decision is applied within their respective territories.

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18. As with the provisions relating to the suspension of passporting rights, those empowerments include significant constraints framing the action and discretion of ESMA and are in principle in compliance with the *Meroni* case-law.

19. In particular, the whole mechanism under the proposed Article 17aa is conditioned upon the findings by a peer review or by an inquiry under Article 22(4) of the ESMA Regulation that a competent authority may be failing to effectively supervise market participants in the sector concerned, and that such supervisory failure could jeopardise the integrity of financial markets, financial stability or investor protection.

20. This is followed by an detailed dialogue procedure with the competent authority concerned laid down in the proposed provision. Only as a last resort may ESMA take a decision requiring the competent authority to revoke or amend a decision that it has adopted or to make use of the powers which it has under the relevant Union law.

21. While the cooperation between Union bodies and agencies, on the one hand, and national competent authorities, on the other hand, through opinions and dialogue is aligned with the legal framework for such bodies and agencies, the last element of this mechanism stands out, since, as the CLS has already clarified, an agency may not directly enforce the law of the Union against the national competent authorities[14]. Thus, in order to be fully *Meroni*-compliant, the discretion of ESMA in this process needs to be further framed.

22. One option would be to link this mechanism with the existing general mechanism in Article 17 of the ESMA Regulation, by conditioning it on the issuance of a formal Commission opinion (see Article 17(6) of the ESMA Regulation). Another possibility would be to limit the validity of such decision in time. These two options can also be combined (a preliminary Commission opinion and a subsequent temporary decision).

[14] CLS opinion of 13 November 2013, document 16182/13, paragraph 15.

23. Regarding the mechanism in proposed Article 17aaa, it should be noted that the grounds for triggering it are broader than those applicable to the proposed Article 17aa. Thus, *"reasonable grounds for considering that an entity [...] committed a serious infringement of the obligations set out in [the applicable legislation] that could jeopardise the integrity of financial markets, financial stability or investor protection"* suffice to trigger a procedure that may end up with a decision by ESMA requiring the competent authority to take a decision requiring the relevant entity to suspend its provision of services or activities on a cross-border basis.

24. While it is true that, as in the previously examined provisions, such a decision is subject to a substantive and detailed dialogue with the competent authorities concerned, the relatively ample discretion for launching the procedure would require further framing to ensure compliance with the *Meroni* case-law.

25. Thus, as suggested above as regards proposed Article 17aa, a link to a Commission decision and/or a possible temporal limitation of the validity of the corrective measures introduced by such a decision would render this provision compliant with the *Meroni* case-law.

IV. CONCLUSION

26. The Council Legal Service is of the opinion that the proposed Article 110c of the UCITS Directive, Article 47b of the AIFM Directive, Article 14c of the CBD Regulation, as well as the proposed Articles 17aa and 17aaa of the ESMA Regulation are compliant with the *Meroni* doctrine provided that certain of the powers delegated to ESMA are further framed in the manner suggested in paragraphs 15, 22 and 25 above.

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