

The European Securities and Markets Authority: Accountability towards EU Institutions and Stakeholders

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1. Introduction

This paper addresses the structure, the functions, and the powers of the European Securities and Markets Authority (ESMA), one of the three supervisory agencies created in 2010 in reaction to the financial crisis. ESMA is certainly a more powerful institution than CESR was in its capacity as a Lamfalussy Level 3 committee, although institutional obstacles and the cautiousness of many member States, national competent authorities and market players stopped a stronger centralization of regulatory and supervisory powers. Moreover, the governance of the new body still relies on representation of national competent authorities, so that ESMA can also be regarded as a reinforced network among regulators, besides being an instrument for further Europeanization of supervisory functions. Central features of ESMA are its stronger accountability and, more in general, its enhanced relationships with other key players in financial regulation, such as the European Commission, the European Parliament, EU and national authorities, and stakeholders in general. As is the case for any other supervisor, the regulatory framework that sets the stage for these relationships is paramount in striking the balance between agency independence, on the one hand, and accountability, on the other.

After an overview of the process which brought to the creation of the ESAs, the paper provides a general introduction to the theoretical rationale for independence and accountability of financial supervisors, showing the importance of the two principles and explaining to what extent they may result in a trade-off (par. ...).

In the light of this theoretical analysis, par. ... describes the main features of ESMA's organisation. After sketching out the characteristics of the internal

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governance structure, the paper specifically focuses on the devices the founding Regulation deploys in order to ensure that the Authority is also accountable vis-à-vis the EU institutions and the public in general, including the interested stakeholders.

As for the latter, a distinctive feature of the ESMA's internal organisation is the presence, mandated by the founding Regulation, of a stakeholder group which performs remarkable advisory tasks and closely interacts with the other bodies of the Authority. In par. ..., we focus on the features of the ESMA Securities and Markets Stakeholder Group and analyse its governance as well as its activity in the first period of its life.

Par. ... addresses ESMA governance from a procedural standpoint, and shows how the organizational structure dynamically operates when quasi-regulatory functions are carried out under the post-Lisbon institutional balance. Par. ... performs a similar analysis for supervisory powers.

Finally, par. ... evaluates the efficiency of the current legislative framework in the light of the EU institutional balance as interpreted in the case-law of the Court of Justice of the European Union, and provides some suggestions for further improvement of the existing equilibrium.

2. The creation of ESMA

In November 2008, the European Commission created a High Level Group chaired by Mr Jacques de Larosière in order to devise possible solutions with a view to strengthening the European supervisory arrangements, to better protecting the citizens, and to rebuilding trust in the financial system. The final report presented in February 2009 suggested the creation of an integrated European system of financial supervision.¹ Building on the Report, in September 2009 the Commission proposed² the creation of a European Systemic Risk Board to deal with macro-stability issues, and the replacement of the EU's existing supervisory architecture, based on the Level 3 Committees, with a European system of financial supervisors (ESFS), consisting of the ESRB itself and of three European Supervisory Authorities (ESAs): a European Banking Authority (EBA), a European Securities and Markets Authority (ESMA), and a European Insurance and Occupational Pensions Authority (EIOPA). On 22 September 2010, the European Parliament – following agreement by all Member States – voted through the new supervisory framework proposed by the Commission. This was

¹ Report by The High-Level Group on Financial Supervision in the EU, Brussels, 25 February 2009, at 48-58.

² The proposal was anticipated by the Commission Communication on European Financial Supervision (COM(2009) 252 final), 27 May 2009, which set out the structure of the new financial supervisory architecture.

confirmed by the ECOFIN Council on 17 November 2010. The new bodies have been established as from January 2011.³

In the new EU framework, the micro- and macro-prudential elements of financial supervision are entrusted on the one hand to the ESFS, which operates as a network among the ESRB, that is responsible for identifying and analysing systemic developments,⁴ and on the other hand to the three ESAs⁵ – including their Joint Committee – plus the national financial supervisors, in charge of micro-stability⁶. The legal basis of the ESAs is Art. 114 TFEU, which allows the adoption of “measures” aimed at the approximation of national law and administrative action whenever this is required for the establishment and the functioning of the internal market (Art. 26 TFEU).⁷ According to the European Court of Justice (ECJ), besides underpinning measures directly addressed to Member States, this flexible provision may also extend to the creation of administrative European bodies,⁸ and does not only. ESAs’ founding Regulations mention the ECJ case-law and specify that, in line with ECJ reasoning, the establishment of the Authority facilitates the uniform application and the

³ ESRB is located in Frankfurt, as its secretariat is provided by the European Central Bank. ESMA is in Paris, EIOPA in Frankfurt and EBA in London: the ESAs headquarters replicate those of their predecessors. Besides an obvious explanation in terms of path-dependence, the location of the ESAs outside Brussels reflects, from a geographical standpoint, the decentralised organization of the Authorities, which contributed to the political viability of the new architecture (see e.g. Paul Craig, *EU Administrative Law* (2012), OUP, at 143).

⁴ Regulation (EU) No 1092/2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board. See also Regulation (EU) No 1096/2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board.

⁵ See, respectively, Regulation (EU) No 1093/2010 for the European Banking Authority; Regulation (EU) No 1094/2010 for the European Insurance and Occupational Pensions Authority; Regulation (EU) No 1095/2010 for the European Securities and Markets Authority.

⁶ The follow-up of the ESRB’s analysis are recommendations and warnings to the supervisors (Art. 3(2)(c) and (d) Regulation (EU) No 1092/2010). Notwithstanding their non-binding nature, such acts have a significant political weight (Eddy Wymeersch, *Europe’s New Financial Regulatory Bodies*, 11 *Journal of Corporate Law Studies* 443 (2011), at 450). ESMA has committed to address such recommendations on a “comply or explain” basis (ESMA, *Frequently Asked Questions. A Guide to Understanding ESMA* (ESMA/2011/009), 3 January 2011, at 8).

⁷ Anders Neergaard, *European Supervisory Authorities. A New Model for the Exercise of Power in the European Union?*, 11 *Euredia* 603 (2009), at 617-8.

⁸ See ECJ, Case C-217/04, *United Kingdom v. Parliament and Council* (ENISA ruling), par. 44. The ruling is regarded – together with the “smoke flavouring” decision: see ECJ, Case C-66/04, *United Kingdom v. Parliament and Council*, par. 45 – as a symptom of a general loose approach by the ECJ when it comes to policing the compliance of EU agencies with general principles such as conferral and subsidiarity (Art. 5 TEU; Shammo (2011), at 1906 and 1909-10), which might challenge, if widely interpreted, the delegation of certain tasks to the ESAs.

consistent interpretation of EU law, and therefore contributes to financial stability (see e.g. Recital 17 Regulation No 1095/2010).⁹

Within this institutional design, ESMA is responsible for the integrity, transparency, efficiency and orderly functioning of financial markets, and contributes to ensuring that the taking of investment and other risks are appropriately regulated and supervised and that customer are sufficiently protected (Art. 1(5) and 8).

3. Independence and accountability of financial regulators: an overview

The importance of an autonomous management of financial regulation and supervision is recognised by the mainstream legal and economic literature. Although no uniform opinion exists on the reasons for outsourcing to external bodies some of the functions which would originally belong to the central government, one of the most common explanations refers to the problem of time inconsistency in policy choices regarding the financial sector.¹⁰ While politicians may be inclined to favour short term policies with the aim of being re-elected at the end of their term, regulators should be less prone to such incentives and might therefore be in a better position to adopt welfare increasing decisions in the long run, to the extent that the nomination procedure and other strategies such as cooling-off periods sufficiently insulate them from pressures by voters at large or by specific vested interests.¹¹

Another traditional explanation refers to delegation as a tool for reducing decision costs in matters where specific skills are needed, as the creation of agencies may help gather expertise in bodies characterized by detailed institutional objectives. Furthermore, agencies may facilitate the adoption of decisions on controversial and intractable problems where the majority

⁹ While the Recital offers a formal justification for the establishment of the ESAs, substantial critiques have been raised on the ability of a centralized regulatory and supervisory system to adequately address financial risks, which might even be worsened by the increased possibility of systemic errors (Moloney (2011a), at 70-1).

¹⁰ The explanation is typically developed for monetary policy by central banks, with regard to the temptation to inflate systemically they would have in the absence of independence from politics (see e.g. Kenneth Rogoff, The optimal degree of commitment to an intermediate monetary target, 100 Quarterly Journal of Economics 1169 (1985), at 1173 and 1180).

¹¹ Alberto Alesina and Guido Tabellini, Bureaucrats or politicians? Part II: Multiple policy tasks, 92 Journal of Public Economics 426 (2008), at 440 and 444-5. While this model is widely applied for – monetary policy (fn. ...) and – prudential regulation, information regulation is sometimes regarded as a field which could also be left to the lawmakers (Marc Quintyn and Michael W. Taylor, Regulatory and Supervisory Independence and Financial Stability, 49 CESifo Economic Studies 259 (2003), at 269). However, time inconsistency affecting law-making and supervision in financial markets can also discourage investments.

mechanism could not be able to produce efficient results,¹² and may more easily resort to procedures open to public participation.¹³ Finally, the creation of agencies in the EU context, besides facilitating the pooling of knowledge, also fosters the centralisation of powers, since Member States are more willing to accept delegation to agencies¹⁴ where they can have some representation.

To be sure, one might disagree that certain decisions, which are inherently political, should be left to bureaucrats lacking democratic legitimacy.¹⁵ However, once the case is made for outsourcing certain functions to bodies outside the scope of democratic representation, it is widely acknowledged that good performance of the institutional tasks by the authorities requires some degree of independence from both politicians and the regulated entities.¹⁶ It is indeed undeniable that, when a function has been carved out of the State's body, a lack of independence from either politicians or regulated entities would create perverse incentives in the exercise of the regulatory and supervisory functions. For example, the members of a supervisory body that is independent only in a formal sense might be forced to follow political or lobbying pressure while easily becoming scapegoats should a scandal or a systemic turmoil emerge: beside adding insult to injury, this would decrease the overall quality of financial regulation and supervision, as those having the substantial control on the agency – i.e., in this case, politicians – would not bear the responsibility of their choices¹⁷.

¹² See Kenneth J. Arrow, A Difficulty in the Concept of Social Welfare, 58 *The Journal of Political Economy* 328 (1950); David B. Spence, Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control, 14 *Yale Journal on Regulation* 407 (1997), 443.

¹³ On the informative benefits of participation see David B. Spence and Frank Cross, A Public Choice Case for the Administrative State, 89 *Georgetown Law Journal* 97 (2000), at 124-8.

¹⁴ Commission Communication COM(2008) 135 final, at 2 and 5.

¹⁵ This is especially so for central banking (on the optimal allocation of monetary policy decisions between politicians and central banks see Sylvester C.W. Eijffinger and Marco M. Hoeberichts, Central Bank Accountability and Transparency: Theory and Some Evidence, 5 *International Finance* 73, 2002), while the same critique is less appealing for other non-majoritarian institutions (especially in the EU: Giandomenico Majone, Delegation of Regulatory Powers in a Mixed Polity, 8 *European Law Journal* 319 (2002), at 327) although technical decisions in the area of financial markets law may have redistributive effects as well (see Martin Shapiro, The Problems of Independent Agencies in the United States and the European Union, 4 *Journal of European Public Policy* 276 (1997), at 280 and 284-6). See also OECD, Principles for the Governance of Regulators – Public Consultation Draft (2013), at 34-5.

¹⁶ See Giandomenico Majone, Strategy and Structure: the Political Economy of Agency Independence and Accountability, in OECD Working Party on Regulatory Management and Reform (ed.), *Designing Independent and Accountable Regulatory Authorities for High Quality Regulation* (2005), 130-1 and 143. See also OECD (2013), at 32-4.

¹⁷ Shifting responsibility in order to avoid the risk of being blamed is another explanation for the delegation of regulatory and supervisory functions (Edward Kane, Principal-Agent Problems in

At the same time, the rise of independent regulators creates an agency problem because, as in any other delegation of functions, bureaucrats may satisfy their own interests instead of pursuing the institutional objectives of their mandate.¹⁸ Supervisors' employees may be driven by careers concerns, which can for instance provide incentives to passing window-dressing measures instead of more effective remedies which are less perceivable by the public opinion.¹⁹ In financial regulation, this is all the more true because the objectives of supervisors are harder to define,²⁰ and therefore to measure,²¹ if compared to those of other independent entities such as central banks.²² The incomplete definition of the

S&L Salvage, 45 *Journal of Finance* 755 (1990), at 756), at least in case the actual net benefits of regulatory measures are not immediately perceived, so that no counterbalancing incentive exists to retain regulatory powers in order to enjoy full credit (Morris P. Fiorina "Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?", 39 *Public Choice* 33 (1982), at 46-9). In this respect, it should come as no surprise that politicians' preferences tilt towards the attribution of responsibility for some sensitive and potentially unpopular choices to an external agency (Alberto Alesina and Guido Tabellini, *Why Do Politicians Delegate?*, NEVER Working Paper 11531 (2005), at 17-8), while covertly trying to influence the latter at the same time (for an insightful description see e.g. John A. Allison, *The Financial Crisis and the free Market Cure*, New York, Mc Graw Hill, 2013, at 21-2). Of course, a symmetric reasoning can apply: once delegation is made and independence is ensured, the accountability of the delegating body shall not go beyond its effective influence over the agency (see the EU Commission's concerns in the Commission Communication COM(2008) 135 final, at 8).

¹⁸ For an example in the field of deposit insurance and bank resolution see Kane (1990), at 760.

¹⁹ See Luca Enriques, *Regulators' Response to the Current Crisis and the Upcoming Reregulation of Financial Markets: One Reluctant Regulator's View*, 30 *University of Pennsylvania Journal of International Law* 1147 (2009), at 1153-5, for further thoughts on the way regulators can also tackle concerns for public opinion with the adoption of purportedly ineffective measures with a view to showing that some effort is made in a context where taking no action would be more rational.

²⁰ See Craig (2012), 161 (precise definition of agency objectives greatly enhances accountability).

²¹ For instance, as pointed out by Charles Goodhart, *Regulating the regulator – An Economist's Perspective on Accountability and Control*, in Eilís Ferran and Charles Goodhart (eds.), *Regulating Financial Services and Markets in the 21st Century*, Oxford: Hart Publishing, 2001, at 151, the statutory objective referring to the reduction of financial crime is very difficult to verify. Think about prevention of financial frauds: once a company is discovered having cooked the books, supervisors are often blamed for not having done their job. However, it is impossible to say how many other scams have been prevented from the outset because of regulation or early detection, since events not occurring are no news. Moreover, even when a fraud emerges thanks to the supervisor, the latter is usually blamed for not having detected it at an earlier stage, before any damage could be made. Both cognitive biases skew the perception and the measurement of supervisors' effectiveness and, still worse, may foster overregulation (see text accompanying fn. [monopoly and overregulation]).

²² One can refer to the potentially conflicting objectives of transparency and orderly functioning of financial markets (as made evident by the enlarged possibility to delay the publication of inside information in case this would threaten financial stability: Art. 12(4) Proposal for a Regulation of

statutory duties is further exacerbated by the long-term relationship between supervisors and stakeholders, which prevents the drafting of funding statutes contemplating every possible future state of the world and hence makes full constraint of regulators' behaviour impossible.²³ Moreover, the presence of multiple direct and indirect stakeholders increases the risk that the agents deviate from their duties towards the principals,²⁴ as any measure which would not satisfy a group of interests might well be justified on the basis that it is aimed at protecting other principals. Accountability tools are devised in order to tackle these shortcomings.

According to the traditional view, accountability grounds the existence in democratic systems of unelected bodies with remarkable discretion by providing legitimacy to the delegation of powers. In a similar vein, accountability compensates for independence, adding a strengthened control by the principal to the benefits of agency specialization. However, in a context where stakeholders are not represented by a single homogeneous constituency, accountability to a group of interests also increases independence from other stakeholders:²⁵ it has therefore been stressed that accountability and independence do not necessarily represent a trade-off, since the former cannot properly operate without the latter.²⁶ This analytical framework contributes to explaining why the three ESAs, as well as other supervisors across the globe, deploy administrative law tools, such as consultations and consultative panels, which enable multiple stakeholders to have voice in the regulatory process. Not only do these devices convey fresh knowledge to the administrative processes,²⁷ but the early involvement of those

the European Parliament and of the Council on insider dealing and market manipulation (market abuse) (MAR) (Interinstitutional file: 2011/0295 (COD), 8 July 2013). Of course, similar trade-offs also affect prudential regulation and monetary policy, as may be the case for short and long-term stability of the financial system (see respectively Quintyn and Taylor (2003), 284; Allison (fn. ...), at 18-9), but financial supervision is especially prone to the consequences of multiple statutory functions (Eva Hüpkes, Marc Quintyn, and Michael W. Taylor, *The Accountability of Financial Sector Supervisors: Principles and Practices*, 16 *European Business Law Review* 1575 (2005), at 1582).

²³ See Donato Masciandaro, Rosaria Vega-Pansini, and Marc Quintyn, *The Economic Crisis: A Story of Supervisory Failure and Ideas for the Way Forward*, in Morten Balling *et al.* (eds.), *New Paradigms in Banking, Financial Markets and Regulation?*, Larcier, Brussels, 2012, at 21 and 33.

²⁴ Donato Masciandaro, Marc Quintyn, and Michael W. Taylor, *Inside and Outside the Central Bank: Independence and Accountability in Financial Supervision. Trends and Determinants*, 24 *European Journal of Political Economy* 833 (2008), at 834.

²⁵ Giandomenico Majone, *Independence vs Accountability? Non-Majoritarian Institutions and Democratic Government in Europe*, *European University Institute Working Papers No 94/3* (1994), at 26 (independence and accountability should be regarded as mutually reinforcing rather than mutually exclusive).

²⁶ Hüpkes *et al.* (2005), at 1577.

²⁷ See fn. ... *infra* and accompanying text.

affected by the impending rules makes spontaneous compliance more likely:²⁸ in both cases, the (actual or perceived) legitimacy of the regulatory action is increased as a consequence of accountability.²⁹

4. ESMA's accountability. Governance and procedures

In every jurisdiction, legislators adopt various strategies in order to constrain regulators' discretion into the limits set by the law and to ensure that bureaucrats employed by the agencies strive for the fulfilment of the statutory objectives.³⁰ For the sake of exposition, we roughly divide these strategies in two sets, with the caveat that such taxonomy inevitably shows some overlapping areas.³¹

The first set refers to the governance of agencies,³² and encompasses the rules that in a static perspective set the organization of the regulator, the composition of its internal bodies, and the power to appoint its members. These structural features may increase or decrease the voice of coalitions having a stake in the regulatory action, including the legislator.³³ Nonetheless, no matter how effective *ex ante* arrangements can be, they will never ensure that regulators and supervisors always comply with their duties – or, in a more cynic fashion, that they do not completely break the leash the legislator may be willing to maintain.³⁴ Procedures are therefore needed that dynamically involve the principals (or their representatives) during the regulatory process and allow for *ex post* reactions in case the regulators do not fulfil their obligations.

The second set of legislative devices also comprises the mechanisms aimed at ensuring ongoing accountability.

²⁸ Hüpkes et al. (2005), at 1579-80 and 1587-8.

²⁹ Therefore, input-oriented legitimacy contributes to increasing output-oriented legitimacy (see the classification by Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (1999), OUP, at 6-11).

³⁰ In many respect, the strategies adopted in administrative law resemble those that are enacted to address agency problems in company law. For a taxonomy and an overview see John Armour, Henry Hansmann, and Reinier Kraakman, in Reinier Kraakman et al. (eds.), *The Anatomy of Corporate Law. A Comparative and Functional Approach*, OUP (2009), at 37-45.

³¹ Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 *Journal of Law Economics and Organization* 93 (1992), at 95.

³² In this paper, the term “governance” refers to ESMA's internal (or corporate) governance (see e.g. Marc Quintyn, *Governance of Financial Supervisors and its Effects – A Stocktaking Exercise*, SUERF Studies 2007/4, at 7).

³³ Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 *Virginia Law Review* 431 (1989), at 440-4. See also Macey (1992), at 100 (the ability to structure the initial design of an agency is the most powerful device available to politicians).

³⁴ Donald T. Hornstein, *Complexity, Adaptation, and Administrative Law*, 54 *Duke Law Journal* 913 (2005), at 931.

4.1. The governance of ESMA

4.1.1. The governing bodies of the Authority

The founding Regulation has granted ESMA legal personality, as well as administrative and financial autonomy.³⁵ Although ESMA is not formally incorporated as an agency, as it is referred to as a “Union body” (Art. 5),³⁶ the new status eased the assignment of responsibility for interacting with other EU bodies and hence the establishment of a clear framework for accountability. ESMA, as well as the other ESAs and the ESRB, “shall be accountable to the European Parliament and the Council” (Art. 3 Regulation (EU) No 1095/2010). Beside this general principle, a number of specific provisions hold ESMA accountable to the EU institutions, including the Commission. Some ensure accountability on how ESMA performs its tasks and on the way it is globally managed, while others provide that the institutions are informed on – and may sometimes step into – the rulemaking and supervisory processes. We first analyse ESMA’s accountability from the standpoint of its organisation.

The governance of ESMA is articulated into a Board of Supervisors, a Management Board, a Chairperson, an Executive Director, and a Board of Appeal, which constitute the core of the organisation (Art. 6),³⁷ and comprises other internal bodies with ancillary functions, such as the Securities and Markets Stakeholder Group. The Board of Supervisors is the highest-ranking body of the hierarchical structure; it has the power to direct the activity of the Authority as a whole and bears the responsibility for the final adoption of the supervisory decisions (Art. 43), including the draft regulatory and implementing technical standards under Art. 10 and 15.

The Board of Supervisors is chaired by the Chairperson (who has no voting right) and is composed of the (voting) head³⁸ of one competent authority for each EU Member State. The Board also comprises other four non-voting members from the Commission, the ESRB and the other two ESAs respectively. While the attendance by the ESRB’s and ESAs’ representatives fosters the coordination

³⁵ This ensures that ESMA retains not only a regulatory and supervisory independence, but also an institutional and budgetary one (Quintyn and Taylor (fn. ...), at 275-7).

³⁶ In order to avoid any confusion in the future, the adoption of the term “agency” is foreseen by the common approach of the three EU institutions (see the Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, 12 June 2012, at 3 (hereinafter: 2012 Interinstitutional Joint Statement)).

³⁷ The adoption of a two-tier governance system by the ESAs founding Regulations, albeit not path-breaking, does not follow the traditional pattern for EU agencies, which are more often organized on the basis of a monistic (one-tier) system (Commission Communication COM(2008) 135 final, at 5). Dualistic (two-tier) governance is allowed, when required by efficiency reasons, by the 2012 Interinstitutional Joint Statement, at 5.

³⁸ However, [examples of members who are not “head” of national authorities].

among the European constituencies of the ESFS, the presence of a member appointed by the Commission facilitates the maintenance of the unity and the integrity of the EU policy in the field of financial regulation.³⁹ The Executive Director may also attend the Board meetings without voting power. Decisions are taken by simple majority, with the exception of those regarding the exercise of quasi-rulemaking powers and other sensitive measures, which require a qualified majority (art. 44). Decisions concerning the draft statements anticipating estimated revenues and expenditures for the incoming year fall into the latter,⁴⁰ but the final approval of the budget – one of the main accountability tools in the hand of the institutions⁴¹ – is remitted to the Council and the Parliament, since it is part of the General Budget of the EU (Art. 63).⁴² The general costs are financed in part (about 40 per cent⁴³) by the national authorities, depending on their respective weight in voting power, and for the rest by the General Budget (Art. 62); however, ESMA may also collect fees from some regulated entities, such as credit rating agencies⁴⁴.

The Chairperson is also a member of the Management Board, which comprises other six members “elected by and from” the heads of national competent authorities for a two-and-a-half years term, once renewable. Mandates of these members are overlapping – a staggered composition being de facto implemented – and subject to a rotating arrangement (Art. 45(1)). In order to extend accountability to functions other than high-level decisions allocated to the Board of Supervisors, power is granted to a representative of the Commission to attend, without voting power, the meetings of the Management Board. Once more, the Executive Director has the same power: having direct access to information regarding the Board’s discussion should increase coordination when it comes to executing the decisions representing the outcome of the debate.

The interaction between the decision-making and monitoring functions of the Board of Supervisors, on the one hand, and the steering and executive role of the

³⁹ See Commission Communication, The operating framework for the European Regulatory Agencies, COM(2002) 718 final, at 2.

⁴⁰ Another example are decisions taken upon recourse against a provisional ban on a financial activity decision (Art. 9(5)); see par.

⁴¹ See e.g. Shapiro (1997), at 288; David S. Rubenstein, “Relative Checks”: Towards Optimal Control of Administrative Power, 51 *William and Mary Law Review* 2169, at 2207 (harnessing the purse strings is crucial, as “an unfunded agency is a powerless one”).

⁴² See also Reg. (EU) No 1268/2012 enacting Art. 208 Reg. (EU, Euratom) No 966/2012.

⁴³ Eddy Wymeersch, The European Financial Supervisory Authorities or ESAs, in Eddy Wymeersch, Klaus J. Hopt and Guido Ferrarini (eds.), *Financial Regulation and Supervision. A Post-Crisis Analysis*, OUP (2012), at 311.

⁴⁴ Direct collection of funds enhances agency independence, in the light of the risks embedded in the budget approval by political bodies (Seligman (2004)).

Management Board, on the other hand, is made clear by the process for the adoption of the annual and the multi-annual work programmes of the Authority, as both documents are proposed by the Management Board and approved by the Supervisory Board (Art. 43 and 47). The two programmes are also transmitted for information to the European Parliament, the Council, and the Commission,⁴⁵ and are made available to the general public. Therefore, besides being an internal governance tool in the hands of the two Boards,⁴⁶ the work programmes also enhance ESMA's accountability to the other EU institutions and its stakeholders. This happens for various reasons. First, early disclosure of the regulatory and supervisory priorities allows a review of the policy that ESMA is concretely willing to pursue within the inevitably wide statutory objectives set by the founding Regulation (Art. 1(5) and 8),⁴⁷ as institutional tasks alone may hardly operate as an effective benchmarks against which performance can be measured.⁴⁸ Second, the ESMA agenda allows all the interested stakeholders to know that a consultation will be launched in the future on one or more specific topics they may be interested in, so that they can more effectively take part in the administrative process.⁴⁹ Third, the work programmes facilitate measuring ESMA's performances *ex post*, with respect to the targets that the Authority itself has deemed appropriate for its management.⁵⁰

Strong accountability to the EU Parliament is foreseen in the nomination process of the Chairperson and the Executive Director. The Chairperson (a full-time independent professional selected "on the basis of merit" and "following an open selection procedure"⁵¹) is appointed by the Board of Supervisors, but the European Parliament may intervene in the process: after having heard the selected

⁴⁵ According to the 2012 Interinstitutional Joint Statement, at 9, the Commission should issue a formal advice on the annual and multi-annual work programmes.

⁴⁶ Not only does the drafting of a working plan help prioritise the action of ESMA, thus rendering its supervision more focused and effective, but it also allow for internal control by the Board of Supervisors over the performance of the employees in the light of the devised programme.

⁴⁷ The dissemination of a business plan makes it easier to identify possible flawed analysis of market developments or misguided regulatory responses (see Luca Enriques and Gerard Hertig, *Improving the Governance of Financial Supervisors*, 12 *Business Organization Law Review* 357 (2011), at 375; see also OECD (2013), at 51).

⁴⁸ Eilís Ferran, *Examining the United Kingdom's Experience in Adopting the Single Financial Regulator Model*, 28 *Brooklyn Journal of International Law* 257 (2003), at 296-7.

⁴⁹ ESMA, *Public Statement on Consultation Practices* (ESMA/2011/11), January 2011, at 2.

⁵⁰ All the more so since the ESMA annual report (see below) sheds light on the performance of supervision (Enriques and Hertig (fn. ...), at 375; 2012 Interinstitutional Joint Statement, at 11). Key performance indicators may also facilitate *ex post* evaluation (see Eid., at 9; OECD (2013), at 63-40).

⁵¹ As opposed to what happened for CESR, the Chairperson is not expressed by any national competent authority (ESMA, (ESMA/2011/009), at 9).

candidate, the Parliament may object to the designation up to a month after the selection by the Board of Supervisors is made.⁵² An even stronger role of the EU Parliament is foreseen for the nomination of the Executive Director, as the appointment of the latter by the Board of Supervisors – “on the basis of merit” and “following an open selection procedure”,⁵³ as is the case for the Chairperson – requires the preliminary confirmation by the Parliament (Art. 51).

At the end of the five-years term, the Chairperson undergoes an evaluation performed by the Board of Supervisors, which assesses the results achieved during the tenure and to compare them against the duties and the requirements of the Authority for the coming years. On the basis of this exercise, the Board of Supervisors evaluates whether the first term of office should be extended (Art. 48(3)).⁵⁴ Moreover, the Chairperson is held accountable during the tenure through a section of the annual report intended to relate on his performance during the year (Art. 43(5) and 47(6)).

The annual report is also a key tool for the accountability of ESMA as a whole,⁵⁵ because it provides information on the institutional activities performed by ESMA, namely regulatory and supervisory activities, as well as on administrative and financial matters (Art. 53(7)). It is formally proposed by the Management Board for the approval by the Board of Supervisors, but it rests upon a draft report prepared by the Executive Director. The report, besides being transmitted to the European institutions, is also made public in order to allow scrutiny by stakeholders, that can check the actual performance described in the report against the policy setting envisioned by the previously issued work programmes.

While the annual report enhances ESMA accountability by shedding light on its regular activity, a more structural triennial review of ESMA (and ESAs) organization and achievements is also provided for by the founding Regulation.⁵⁶

⁵² European Parliament, Green light from Parliament for financial watchdog chiefs, 3 March 2011.

⁵³ See the 2012 Interinstitutional Joint Statement, at 6.

⁵⁴ Although the norm is not crystal-clear, the assessment seems to be only required at the end of the first five years of tenure (Art. 48(4)). However, nothing seems to prevent that a similar exercise be performed at the end of the extended terms of office, possibly in the annual report according to Art. 43(5). Although this would not be a device as effective as the evaluation of the first term for the agenda-setting, it would represent a mechanism for the accountability of the Chairperson, if only from a reputational standpoint.

⁵⁵ As well as of national authorities for infringement of Commission’s opinions or ESMA decisions issued in case of breach of EU law (Art. 18(8) Reg. 1095/2010).

⁵⁶ See also the 2012 Interinstitutional Joint Statement, at 13 (suggesting overall evaluation every five years). The review under Art. 81 will also give the chance to assess whether one or more recommendations of the Joint Statement shall be implemented in the ESAs’ governance (see the Roadmap accompanying the Joint Statement, at 3).

According to Art. 81, the Commission shall also examine⁵⁷ whether the ESAs' architecture remains the preferable solution, as opposed to more integrated supervisory models such as the "twin peaks" – also envisaged by the *de Larosière* Group as a possible long term arrangement⁵⁸ – or the single regulatory systems.⁵⁹ Finally, accountability towards the EU institutions is ensured on *ad hoc* basis by the power of the European Parliament and of the Council to solicit opinions from ESMA (Art. 34) or to request the Chairperson to make statements and to deliver written reports on specific topics (Art. 50).

The Board of Appeal, comprising six members and six alternates who step in whenever there is suspect that a member is not acting independently, is a joint body of the three ESAs in charge of reviewing decisions taken by ESMA according to its supervisory powers (Art. 60).⁶⁰ Each of the ESAs appoints two members and two alternates from a list of candidates proposed by the Commission on the basis of their expertise in finance and supervision (Art. 58),⁶¹ but the requirement that the members must be independent when ruling reduces the risk that the Commission itself may *de facto* second-guess ESMA's decisions (Art. 59(1) and (2)), which would be all the more problematic if one accepts the opinion that the scope of the review goes beyond questions of legality.⁶² For decisions taken by the Board of Appeal or, where this is not admitted, by ESMA itself, review by the Court of Justice of the European Union (CJEU) under Art.

⁵⁷ See EU Commission, Public consultation ESFS review. Background document (2013), at 2.

⁵⁸ See the *de Larosière* Report (fn. ...), at 58.

⁵⁹ See Giorgio Di Giorgio and Carmine Di Noia, *Designing a Regulatory and Supervisory Framework for Integrated Financial Markets*, in Pietro Alessandrini, Michele Fratianni and Alberto Zazzaro (eds.), *The Changing Geography of Banking and Finance* (2009), Springer, London, at 215; Carmine Di Noia and Maria Chiara Furlò, *The New Structure of Financial Supervision in Europe: What's Next?*, in Wymeersch, Hopt and Ferrarini (eds.) (2012), at 186-92 (suggesting a four-peaks model based on differentiation of institutional objective along the following criteria: macro-stability; prudential regulation; investor protection; competition). For a review of the literature, Eddy Wymeersch, *The Structure of Financial Supervision in Europe: About Single, Twin Peaks and Multiple Financial Supervisors*, 8 *European Business Organization Law Review* 239 (2007), at 239-40.

⁶⁰ See *infra par.* Decisions that can be appealed include requests for information, or investigations, as well as supervisory measures addressed to credit rating agencies and trade repositories (see Art. 61(3)(g) and 73(3) Reg. 648/2012; Art. 23b and 24 Reg. No. 1060/2009).

⁶¹ Although the relevance of supervisory experience may foster like-mindedness thus making controls more indulgent (Philippe-Emmanuel Partsch, *Les autorités européennes de surveillance et le système européen de surveillance financière: première analyse*, 47 *ALJB - Bulletin Droit et Banque* 41 (2011), at 48-9), the risk of self-reference is reduced by the Commission's previous selection of candidates.

⁶² Wymeersch (2012), at 295.

263 TFEU⁶³ also ensures judicial accountability (Art. 61),⁶⁴ so that preliminary scrutiny by the Board performs a filtering function against specious appeals.⁶⁵

Besides “vertical” accountability vis-à-vis the Parliament and the Council, and judicial accountability, “horizontal” accountability⁶⁶ within the ESFS is also facilitated by the Joint Committee, which operates both as a common forum among the three ESAs on topics where their respective competences overlap and as a platform for exchanging information with the ESRB.⁶⁷ Although the primary function of the Committee is to ensure coordination among the authorities, it may also produce wider benefits in terms of accountability on some sensitive issues that might be particularly prone to capture, such as accounting principles, since deeper confrontation among peers may prevent that misguided deliberations are passed by one (reputedly captured) authority. The mechanism is strengthened when the three ESAs have to reach an agreement before adopting measures on areas of common competence (Art. 56(2)), and horizontal accountability may also be provided by peer review exercises, or other forms of cooperation, with non-EU regulators.⁶⁸ Although no explicit provision is given by Reg. No. 1095/2010, as opposed to peer reviews promoted by ESMA itself among national competent

⁶³ Or according to Art. 265 in case of failure to act.

⁶⁴ A thorny issue for the incentives of supervisors is their liability regime. According to the founding Regulation, ESMA is responsible for damages caused by it or by its staff when performing statutory duties (Art. 69), jurisdiction being granted to the CJEU (the reproduction of Art. 340 TFEU is frequent in regulations setting up new EU agencies; Craig (2012), 157).

⁶⁵ Damien Geradin, *The Development of European Regulatory Agencies: What the EU Should Learn from American Experience*, 11 *Columbia Journal of European Law* 1 (2005), at 33.

⁶⁶ See also Thomas Schillemans, *Accountability in the Shadow of Hierarchy: The Horizontal Accountability of Agencies*, 8 *Public Organization Review* 175 (2008), at 190-1 (horizontal accountability involves control by either peers or stakeholders, and better performs its functions if accompanied by vertical accountability).

⁶⁷ Art. 54 and 56 Reg. No. 1095/2010 provide a list of such areas (financial conglomerates; accounting; auditing; cross-sectoral developments and risks; retail investment products; money laundering) but also refer, more in general, to the application of any other legislative act falling within the area of competence of more than one authority. See also Art. 32(4), which fosters coordination among the ESAs in the performance of stress-tests (that includes the development of common methodologies and the communication of the results).

⁶⁸ Peer review is increasingly adopted in order to ensure horizontal accountability among participants to supervisory networks. It relies on soft enforcement mechanisms such as peer pressure and the threat of exclusion of peers from the network (Georgios Dimitropoulos, *Holding National Administrative Bodies Accountable through Peer Reviews: the FATF Case*, in Sabino Cassese et al. (eds.), *Global Administrative Law. Cases, Materials, Issues* (2012), IV, at 12-3).

authorities (Art. 30), a similar result can be reached through ESMA membership within international organizations or networks of supervisors.⁶⁹

Next to the Joint Committee, the most straightforward form of horizontal accountability in the governance of ESMA is the Securities and Markets Stakeholder Group.⁷⁰

4.1.2. The Securities and Markets Stakeholders Group

Direct representation of stakeholders within the organisation of regulators has been gaining momentum, during the last decade, as an accountability tool and as a device aimed at rendering rulemaking more effective.⁷¹ Boards representing consumer and the regulated industry have been set up by many European regulators with the aim of improving the effectiveness of their regulations and to strengthen the grounds of their legitimacy.⁷² From the standpoint of accountability, engagement of multiple stakeholders in the governance of the agencies enhances regulators' responsiveness to the relevant constituencies, since these latter will have a say in the regulatory process, and may reduce the risk of capture by other, possibly conflicting, stakeholders. From the perspective of legitimacy, early involvement of the groups of interests which will be affected by new regulation increases the likelihood of spontaneous compliance, thus enhancing the effectiveness of the soon-to-come rules by providing incentives which go beyond the traditional command and control approach based on the deterrence of sanctions.⁷³ Finally, from the point of view of effective rulemaking, stakeholder engagement embeds wider expertise in the regulatory process,⁷⁴ thus increasing the quality of the information available to the authority and enhances the debate over proposed rules even in circumstances where some constituencies would otherwise be excluded because of the technical nature of the issues at

⁶⁹ E.g. ESMA is associate member of IOSCO, which encourages consistent implementation of its principles concerning disparate issues of financial markets regulation (see IOSCO Technical Committee, *Mitigating Systemic Risk. A Role for Securities Regulators* (OR01/11), 2001).

⁷⁰ Following Schillemans (2008), at 179, we consider accountability towards stakeholders as horizontal accountability (other possible classifications being downward, citizen, or societal accountability).

⁷¹ Eilís Ferran, *Building an EU Securities Market*, Cambridge University Press (2004), at 96.

⁷² Hüpkens *et al.* (fn. ...), at 1600-1.

⁷³ See the compliance pyramid outlined by Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, OUP (1992), at 35. See also Hornstein, (2005), at 959; OECD (2013), at 56.

⁷⁴ Past experience in EU financial regulation shows that involvement of private actors has often helped define appropriate policy responses (Eilís Ferran (2004), at 59-60 and 82-84).

stake.⁷⁵ Concerns for legitimacy, accountability, and effectiveness explain why stakeholder participation is often ensured by authorities on a self-regulatory basis, as was the case, before the creation of ESMA, for CESR's Market Participants Consultative Panel, which along with other expert groups set up on specific topics assisted CESR in the performance of its tasks.⁷⁶ Although other instruments, such as public consultations, may provide a reliable source of expertise and enhance stakeholders' engagement, our experience as former securities regulators shows that this is not sufficient.⁷⁷ Early involvement of private sector is pivotal in order to properly approach from the very beginning the matter to be addressed,⁷⁸ while gathering information only after an initial position is already crystallised in a draft position expose the regulatory process to confirmation biases and framing effects.⁷⁹ At the same time, confirmation biases on the appropriateness of regulatory measures already in force may also be reduced by continuous shareholder engagement, which can shed light on the need to review existing rules become obsolescent.⁸⁰

However, stakeholder participation is a double-edged sword. It can increase independence by allowing a cross-check among the interested constituencies, but it can also facilitate regulatory capture.⁸¹ Moreover, as in any other delegation of tasks, an agency problem arises between those involved in the regulatory process

⁷⁵ Labelling a subject matter as "technical" may shield the debate on the relevant draft measures from the public at large (Nicholas Dorn, *Render Unto Caesar: EU Financial Market Regulation Meets Political Accountability*, 34 *Journal of European Integration* 205 (2012), at 6-8).

⁷⁶ Joana Mendes, *Participation in EU-Rulemaking: A Rights-Based Approach*, OUP (2011), at 285-6.

⁷⁷ For a different view see Edoardo Chiti, *An important part of the EU's institutional machinery: features, problems and perspectives of European agencies*, in 46 *Common Market Law Review* 1395 (2009), at 1402.

⁷⁸ In the U.S. system, confrontation with interested stakeholders prior to the initiation of the notice-and-comment procedure is provided by the law, which codified a pre-existing informal practice (David Zaring, *Informal Procedure, Hard and Soft*, in *International Administration*, 5 *Chicago Journal of International Law* 547 (2005), at 579).

⁷⁹ See Stephen J. Choi and A.C. Pritchard, *Behavioral Economics and the SEC*, 56 *Stanford Law Review* 1 (2003), at 27-36 ("feedback on the proposal may get less weight than it would have if the information had been solicited before the SEC fixated upon a specific proposal").

⁸⁰ *Ibid.*, at 30 and 45.

⁸¹ Any reform involves redistribution of wealth, so that stakeholder participation is likely to drift into rent-seeking (Gerard Hertig, *Trading and Clearing Reforms in the EU: A Story of Interest Groups with Magnified Voice*, 23 *Zeitschrift für Bankrecht und Bankwirtschaft* 329 (2011); Ferran (2004), at 104-5). However, capture is a weak analytical tool, as one cannot easily tell regulatory measures which are grounded solely on the basis of a "public interest" (whatever it is) from those adopted under the pressure of other incentives (Lawrence G. Baxter, "Capture" in *Financial Regulation: Can We Channel It Toward the Common Good?*, 21 *Cornell Journal of Law and Public Policy* 175 (2011)).

in their quality of stakeholder representatives and the represented stakeholders themselves. Some devices which are deployed to foster accountability of the regulator may therefore be replicated, at a lower level, for stakeholder panels, in order to ensure that the latter are responsible towards both the delegating authority and the represented constituencies; the same applies in case one or more subgroups are created within a representative panel. Stakeholder representation within ESMA operates accordingly, so that accountability may be framed, in this respect, as a system where the smaller internal body replicates (some features of) the bigger in a Matryoshka-like structure.

In broad terms, direct representation may follow different patterns. For instance, it can be extended to academics or not, and stakeholder engagement may be ensured by establishing practitioner, consumer and academic panels either as separated bodies or as a single board.⁸² CESR's Market Participants Consultative Panel mainly comprised industries representatives, but its composition was flexible, absent a mandating statutory provision. As a matter of fact, the Panel was grounded on CESR Charter, which referred to "market participants, consumers and other end users of financial services", and thus did not impose academics' engagement.

Nowadays, the ESMA founding Regulation⁸³ ensures representation to investors, the industry, and the academia within the Securities and Markets Stakeholders Group (SMSG; Art. 37).⁸⁴ The concurrent participation of different constituencies in a multilateral context, as opposed to one-to-one meetings, is likely to enhance the quality of the dialogue by virtue of direct confrontation among potentially divergent positions,⁸⁵ although recourse to a stakeholder panel does not of course shift the governance of the Authority into a pure collaborative

⁸² According to the 2012 Interinstitutional Joint Statement, at 5 and 14, a separate group should be created when stakeholder representation is appropriate but representatives are not included in the highest body of the agencies, this latter being the default solution. An opposite – and wiser – position is followed by the OECD, which suggests creating *ad hoc* bodies for stakeholder representation, in order to avoid conflicts of interests (OECD (2013), at 46). See also EU Commission, Transparency/Relations with stakeholders (Analytical fiche No 30; 2010), at 4 (board representation of stakeholders may reach excessive size).

⁸³ The same applies to the other ESAs. Overall, there are currently four stakeholder groups because EIOPA has two such bodies: one related to insurance and the other to pension funds (Art. 37 Regulation (EU) No 1094/2010).

⁸⁴ No similar function is performed by other groups, such as the Committee on financial innovation (Art. 9(4) Reg. 1095/2010), where only the competent national authority are represented.

⁸⁵ Involvement of investors may in particular reduce the risk of capture by providing the regulatory process with an alternative perspective, to be added to those of regulators and the industry: Ian Ayres and John Braithwaite, *Tripartism: Regulatory Capture and Empowerment*, 16 *Law & Social Inquiry* 435 (1991).

model.⁸⁶ In order to make representation more effective, the Regulation sets numerical and qualitative limits for membership of the SMSG, either in a direct way, or indirectly through binding guidelines to the ESMA Board of Supervisors. The SMSG comprises 30 members representing in “balanced”⁸⁷ proportions financial market participants operating in the Union (at least ten members), their employees’ representatives as well as consumers, users of financial services and representatives of SMEs. At least five of its members shall be independent top-ranking academics⁸⁸.

The appointment procedure starts with a public call for application and ends, after a two-steps selection by ESMA’s staff and by the Management Board, with a decision by the Board of Supervisors, which is required to ensure, “to the extent possible”, that the SMSG has a balanced composition as regards the constituencies, the nationality, and the gender of its members in order to enlarge the representation. Both the Management Board and the Board of Supervisors can however access the information concerning all the candidates, and are not bound by previous selections.⁸⁹ The clarification of the selection procedure and of its criteria bestows greater transparency on the final decision by the Board of Supervisors; in the past, members of the Market Participants Consultative Panel within CESR were appointed without a public notice and according to unclear requirements.⁹⁰

In practice, in order to first appoint the SMSG, the Authority (at that time still operating as CESR) launched a public announcement looking for potential candidates wishing to apply for either the office or a list of alternates from which they would have been taken in case an acting position had to be replaced. The candidates were asked to classify themselves into different – while sometimes overlapping – categories, depending on the interests they represented.⁹¹ For some

⁸⁶ Collaborative governance entails direct engagement of participants in the decision making process, rather than mere consultation (Chris Ansell and Alison Gash, Collaborative Governance in Theory and Practice, 18 *Journal of Public Administration Research and Theory* 543 (2007), at 544 and 546).

⁸⁷ ESMA applies the “balance” as a selective criterion within the group of financial market participants rather than extending it to the equilibrium among the different constituencies, which would have been difficult to achieve because the overall number of members representing market participants is set by the Regulation itself.

⁸⁸ CESR’s Consultative Panel also set a minimum number (5) for representatives of retail investors (CESR, Call for expressions of interest regarding the setting up of ESMA’s Securities and Markets Stakeholder Group (CESR/10-1466), 26 November 2010, at 1.

⁸⁹ ESMA, Stakeholder Group Renewal Procedure 2013 (ESMA/2013/703), 10 June 2013, at 8.

⁹⁰ See Mendes (fn. ...) at 285-6.

⁹¹ The relevant categories of stakeholders give an idea of the range of the represented interests: financial services intermediaries; market infrastructure providers (regulated markets, MTFs, CCPs, CSDs and trade repositories); issuers (potentially including SME’s); institutional investors

categories, ESMA also required that the candidates had at least either four years of experience in the financial service field or, for those representing financial institutions, four years of direct professional experience. ESMA then appointed the first SMSG members (and potential alternates):⁹² 10 (6) members represent financial markets participants, 7 (5) represent users of financial services, 2 represent financial services employee, 5 (2) represent consumers, 1 represents SMEs, and 5 (2) the academia. Members of SMSG serve for a period of two and a half years. After their expiration, a new selection process takes place,⁹³ but existing components may apply for a second term (Art. 37(4)); individual accountability of members is fostered by the current SMSG Rules of Procedure, according to which records of attendance and participation should be considered when deciding whether to extend the first tenure (Art. 11(4)).

The appointment procedure limits ESMA's discretion in the selection of its counterparties in the regulatory dialogue and has the advantage of having already been tested, as it closely resembles that adopted by the European Securities Markets Expert Group (ESME), a stakeholder group which the EU Commission set up in 2005 and which led to the publication of a number of documents on the application of the financial services directives.⁹⁴

The ESMA founding Regulation ensures that the SMSG has a self-regulatory power to adopt the rules concerning its organization and operation (Art. 37(6)).⁹⁵ In October 2011, SMSG approved its own rules of procedures⁹⁶ (RoP), which further specify the governance structure of SMSG. For example, RoP provide for a chairperson, to be elected by consensus or by majority voting when this prove impossible, and a vice-chairperson (or two in case of a tie at the moment of the election) (Art. 2). While RoP encourage decision-making by consensus, a quorum of two-thirds of the members – which can also be reached by written procedure (Art. 8) – is in any case required both for convening the Group and passing

(insurance, pension funds or asset management firms); representatives of shareholders; users and distributors of financial information (auditors, accountants, information providers, rating agencies or analysts); IT developers for financial service firms; alternatives investment fund managers; representatives of financial service employees (employees' representatives from a firm/company or trade unions); representatives of retail investors or individual retail investors; individuals representing the interests of small and medium-sized enterprises (SMEs); top ranking academics.

⁹² See ESMA decision No. 123 of 12 April 2011.

⁹³ ESMA (ESMA/2013/703).

⁹⁴ A list of relevant documents was available on the ESME webpage in the Internal Market Directorate website which has been cancelled recently.

⁹⁵ Those rules, where they go beyond what is stated by the Regulation, are only binding for the SMSG in charge, while future groups are free to change them if they so wish. Continuity has however been recommended by the first SMSG (SMSG, Self-Assessment Report, ... 2013, at 9).

⁹⁶ See ESMA, Decision of the Securities and Markets Stakeholder Group (ESMA/2011/SMSG/1 final), 11 October 2011.

decisions, including the adoption and amendments to RoP; dissenting opinions supported by at least three members may also be included in the final statement (Art. 3(3) and 7). Early circulation of information among the members ensures that there is sufficient time to assess the documents submitted to the SMSG, the notice periods being three weeks in advance for the agenda and at least one week for the working documents (Art. 4(2) and 5(2)). As well as the ESMA as a whole, the SMSG also prepares an annual work programme and an annual report, to be included in the ESMA report (Art. 16 RoP). Its ability to set part of its own agenda and its direct accountability to the public at large, as well as to the Authority, increase the SMSG's independence from the Authority itself. Accountability is also enhanced by regular meetings, to be held at least twice a year, with the Board of Supervisors (Art. 40(2) Reg. 1095/2010), and by invitation to attend the meetings of the SMSG extended to the ESMA Chairperson and a representative of the Commission (Art. 11 RoP). A further analogy with ESMA Regulation lies in the fact that, just like the Authority reverts to the SMSG in order to have advice on a technical issue, the SMSG can on its turn invite external guests for the same reason (Art. 13 RoP).

In its self-regulatory capacity, the SMSG may establish working groups on technical issues in agreement with the Authority (Art. 37(4) Reg. 1095/2010; Art. 10(1)). Being set up in order to deal with specific issues, working groups are interim committees, due to be dissolved once their mandate is performed. The operating rules of working groups closely mirror those of the SMSG, and the same applies for the composition, which should where possible ensure representation of the same stakeholders that are part of the SMSG. No delegation of functions by the SMSG is provided for, so that working groups only operate as advisory committees, the final decision being left to the Group as a whole (Art. 10 RoP). In 2011 and 2012, twelve working groups – each of them chaired by a *rapporteur*, possibly independent from the stakeholders directly involved – have been established on various issues,⁹⁷ while the work programme published by SMSG anticipated that other working groups would have been subsequently set up.

The founding Regulation requests ESMA to provide adequate secretarial support. Furthermore, “adequate compensation” shall be granted to members representing non-profit organizations or the academia, while industry representatives are expressly excluded from the benefit. Although “compensation” can be, and actually is, interpreted as extending to remuneration, it would appear more sensible to limit its scope to reimbursement of travel expenses, as is also suggested by Art. 5(4) RoP. On the contrary, repayment is ruled out for the other

⁹⁷ ESMA SMSG, SMSG Annual Activity Report 2011-2012 (ESMA/2012/SMSG/53), 18 December 2012 at 9.

components of the group⁹⁸, who are funded by the stakeholders they belong to with no participation by ESMA. The underlying idea is that positive discrimination can establish a level playing field among participants, thus ensuring equal representation to all the stakeholders irrespective of the available financial resources,⁹⁹ and reflects historical underrepresentation of retail investors in the EU regulatory process.¹⁰⁰ Nonetheless, excluding any reimbursement of travel expenses for representatives of the industry may strengthen the influence, and hence the capture, by the relevant constituencies, because as long as these latter are bearing the costs of participation, they are more likely to expect specific results from members' participation to the SMSG work.

This leads to the issue of potential conflicts of interest of SMSG members as a consequence of their relationship with the relevant constituencies. Although no provision directly addresses this issue, the Regulation clearly states that SMSG member are "representing" the different stakeholders, while only academics are expressly referred to as "independent" members (Art. 37(2)). This statement is reinforced by the fact that the Board of Supervisors appoints the SMSG members "following proposals from the relevant stakeholders" (Art. 37(3)); although applications are in practice sent by individuals who qualify themselves as representatives of a constituency¹⁰¹, and there is therefore no certainty that all the members have the appreciation of the stakeholders they should represent, a direct link between a candidate and a specific subset of stakeholders is made clear from the outset. These rules, together with the principles for the funding of members, show that the SMSG is composed of stakeholders representatives facing no limitation in promoting the interests of a specific constituency. In the same vein, the SMSG RoP require that members disclose, before deliberations are taken, any conflict of interest other than that of belonging to their organisation (Art. 12), thus assuming that bringing forward the interests of these entities does not result in any breach of members' duties. The regulatory approach to representation realistically accepts the idea¹⁰² that providing a forum where interests can be expressed and consequently discussed within a transparent confrontation can improve the quality of regulation and reduce the incentives, for the Authority and the stakeholders, to

⁹⁸ ESMA, Call for expressions of interest regarding ESMA's Securities and Markets Stakeholder Group (ESMA/2013/702 Rev 1), 10 June 2013, at 3.

⁹⁹ According to Recital 49 of Reg. No. 1095/2010, adequate compensation should be granted to those representing academia and non-profit organisations in order to "allow persons that are neither well-founded nor industry representatives to take part fully in the debate on financial regulation". It is thus assumed that non-profit organisations, to the extent that they represent consumers or retail users, necessarily lack financial resources.

¹⁰⁰ Ferran (2004), at 105.

¹⁰¹ See the Application Form attached to ESMA (ESMA/2013/702 Rev 1).

¹⁰² See fn. ... and accompanying text.

indulge in concealed lobbying activity. At the same time, the SMSG rules of procedure state that all members serve in a personal capacity (Art. 1(2) RoP), so that they cannot be compelled to support any specific position, nor they can be substituted by the organisations they belong to. Any evaluation on the opportunity to promote a proposal which may affect such organisation is therefore left to the member and can be objected neither by the relevant constituency nor by the ESMA.

Finally – and, once more, as well as the ESMA itself – accountability of the SMSG is ensured also horizontally. The Stakeholder Group directly liaises with other user groups established in the area of financial services by the Commission or by Union legislation (Recital 48 Reg. 1095/2010; Art. 20 RoP).¹⁰³ Although the primary function of these interactions is to ensure coordination with similar committees set either within or outside other ESAs, direct confrontation among different stakeholder groups should reduce the risk of regulatory capture; in a multilateral context, flawed positions pursued by a captured committee are more likely to emerge and, in any case, less likely to affect the final regulatory outcome.

4.2. The performance of regulatory and supervisory functions

ESMA has tasks related to both regulation and supervision. The distinction between the two functions is relied upon by the legislative framework¹⁰⁴ and is theoretically clear. While regulation refers to the drafting of rules (i.e. normative acts), supervision concerns application of those rules in individual cases,¹⁰⁵ which encompasses administrative monitoring and enforcement. In practice, distinguishing the two may not be as easy,¹⁰⁶ for instance because supervisory acts concerning multiple market participants may not always be distinguished from rules having general effects towards an identified set of addressee.

The blurred boundaries between regulation and supervision have fundamental implications under the Treaties and the CJEU case-law. While the former can only

¹⁰³ Although the groups may share one or more members, multiple applications by candidates are not recommended (ESMA (ESMA/2013/703), at 7).

¹⁰⁴ See Wymeersch (2011), at 446.

¹⁰⁵ E.g. Wymeersch, *The Future of Financial Regulation and Supervision in Europe*, 42 *Common Market Law Review* 987 (2005), at 988.

¹⁰⁶ Jens-Peter Schneider, *A Common Framework for Decentralized EU Agencies and the Meroni Doctrine*, 61 *Administrative Law Review* 29 (2009), at 30 (rulemaking can no longer be strictly separated from administrative action concerning individual and concrete cases); Wymeersch (2007), at 242 (supervision often implies regulation and vice-versa). See also Eilís Ferran, *Understanding the New Institutional Architecture of EU Financial Market Supervision*, in Wymeersch, Hopt and Ferrarini (eds.) (2012),, fn. ..., at 140 (increasingly detailed regulatory measures reduce the room for subsequent discretion in supervision).

be delegated to the Commission – or exceptionally, for implementing measures only, to the Council: Art. 291 TFEU –, the latter may be entrusted with other EU bodies. Therefore, any measure which empowers ESMA to adopt decisions formally classified as supervisory may be questioned, either directly under Art. 263 or, once the relevant deadline expires, under Art. 267 TFEU, in case it substantially confers on the Authority the power to pass acts having force of law (or a normative nature).¹⁰⁷

The distinction between normative acts – which can only be adopted by the Commission – and supervisory measures is also relevant from the perspective of (quasi-)judicial accountability. From a substantial perspective, judicial oversight of normative measures is sometimes more lenient if compared to the assessment of individual measures, mainly because the traditional criteria of judicial review do not fit well with acts that lack immediate consequences for individuals and usually entail some administrative discretion¹⁰⁸. From a procedural standpoint, judicial review of ESMA supervisory acts requires previous appeal of the contested decision before the Board of Appeal (Art. 263(5) TFEU), while quasi-regulatory measures may be directly challenged at the CJEU. As is the case for non-privileged applicants in front of the CJEU, the Board of Appeal can be seized only for measures directly addressed to the claimant or which are of direct and individual concern to her (Art. 60(1) Reg. 1095/2010).¹⁰⁹ On the contrary, draft technical standards issued by ESMA can be challenged neither at the CJEU nor at the Board of Appeal because they are only preparatory measures,¹¹⁰ while full review is possible for the final standards as endorsed by the Commission.

In the following, we will rely on the traditional taxonomy when focussing on the procedural mechanisms through which ESMA operates, first in the regulatory and then in the supervisory activity. Attention will be paid in our analysis to the role performed by the EU institutions and by stakeholders in the administrative procedure, which will be regarded as a stage where multiple actors interplay. As demonstrated by the “enrolment analysis” of administration,¹¹¹ the dynamic interaction among those engaged in the regulatory and supervisory process helps understand the determinants of the administrative acts which are eventually adopted. From this standpoint, the traditional – and rather static – concept of

¹⁰⁷ See also *infra*, par. [on Romano].

¹⁰⁸ Alexander H. Türk, *Oversight of Administrative Rulemaking: Judicial Review*, 19 *European Law Journal* 126 (2013), at 126 and 136.

¹⁰⁹ See ECJ Case 25-62, *Plaumann & Co. v. Commission of the European Economic Community*, 15 July 1963; Hofmann, Rowe and Türk (2011), at 826-40

¹¹⁰ ECJ, Case C-60/81, *International Business Machine Corporation (IBM) v. Commission*, 11 November 1981, par. 10.

¹¹¹ Julia Black, *Mapping the Contours of Contemporary Financial Services Regulation*, 2 *Journal of Corporate Law Studies* 253 (2002), at 261-2.

accountability is enriched by the effects produced by the direct or indirect participation of the relevant actors to the process.

4.2.1. The regulatory powers of ESMA

4.2.1.1. The reformed regulatory architecture

The regulatory architecture enacted in the wake of the recent financial turmoil has not abolished the four-level structure of the financial services regulation which was adopted under the auspices of the Lamfalussy committee.¹¹² However, the weaknesses of this process in the establishment of a truly harmonised financial regulation across Europe were made evident even before the financial crisis, so much so that the Lamfalussy Review supported, already in 2007, the reinforcement of the legal status of the Level 3 committees and the strengthening of the Level 3 coordination, with a view to achieve further integration in the internal market for financial services.¹¹³

In order to take advantage of the benefits delivered by the existing multi-layered governance while improving on the past experience, Regulation (EU) No 1095/2010 has enriched the Lamfalussy process by extending the applicability of Art. 290 and 291 TFEU to part of the Level 3 measures.¹¹⁴ The reformed system therefore combines the nuanced Lamfalussy approach with the post-Lisbon Treaty rules on delegated and implementing acts in order to bestow more effectiveness on the regulatory and supervisory tools available to ESMA and the EU institutions at each layer of the procedure. This evolution is aimed at ensuring a consistent application of the European rules and at upgrading the quality of national – and, increasingly, cross-border – regulation and supervision, by also establishing a European single rule-book applicable to all financial market participants in the internal market¹¹⁵.

In this new framework, Level 1 legislation is meant to set delegated and implementing powers to be enacted not only in the context of Level 2 initiatives,

¹¹² Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, Brussels, 15 February 2001. The Report was endorsed by the Stockholm Council of Economics and Finance Ministers on 23 March 2001 (see the Results of the Council of Economics and Finance Ministers, 22 March 2001) and then agreed upon by the European Parliament on 5 February 2002 (European Parliament Resolution on the Implementation of Financial Services Legislation (2001/2247(INI)), 2002).

¹¹³ EU Commission, Review of the Lamfalussy Process. Strengthening Supervisory Convergence, 2007, (COM(2007) 727).

¹¹⁴ ESMA therefore follows the growing model of the European agencies rulemaking power which combines: (i) participation in the legislative rulemaking by way of an advisory role, (ii) adoption or drafting of technical rules, and (iii) adoption of soft law instruments (Edoardo Chiti, European Agencies' Rulemaking: Powers, Procedures and assessment, 19 European Law Journal 93 (2013), at 99).

¹¹⁵ Recital 5, Regulation (EU) No 1095/2010.

but also by a subset of Level 3¹¹⁶ measures referred to as “technical standards”.¹¹⁷ As far as regulation is concerned, enhanced harmonization is indeed mainly pursued by way of strengthened Level 3 instruments, part of which now fall into the scope of the TFEU non-legislative (or quasi-regulatory) delegated and implementing acts,¹¹⁸ and are therefore remitted to the Commission for formal adoption, while others, albeit tightened by virtue of a newly-framed “comply or explain” principle,¹¹⁹ still retain their soft-regulatory nature and fall into ESMA’s competence. But Level 2 measures, which have hitherto represented the bulk of delegated non-legislative acts, are still part of the architecture,¹²⁰ and are adopted according to the specific process set by the delegating rule under Art. 290 TFEU for delegated acts¹²¹ or under the new comitology procedure under Regulation (EU) No 182/2011 for implementing acts to be adopted under Art. 291 TFEU.¹²²

¹¹⁶ Categorisation of technical standards as Level 3 measures, albeit not unanimous, is followed by the majority of commentators (see e.g. Wymeersch (2012), 251; Marco Lamandini, I regolamenti europei istitutivi del comitato per il rischio sistemico e delle autorità europea di vigilanza su assicurazioni, banche, strumenti finanziari mercati, 35 Nuove Leggi Civili Commentate 211 (2012), at 219; Julia L. Raptis, European Financial Regulation: ESMA and the Lamfalussy process, the Renewed European Legislative Process in the field of Securities Regulation, 18 Columbia Journal of European Law Online 61 (2012), at 64). We base our classification on the fact that, according to the Omnibus Directive, these measures are made conditional on traditional Level 2 provisions, if any. Another taxonomy, based on their quasi-regulatory nature, would classify the said measures within the Level 2 (FSA, A Brief Guide to the European Union and its Legislative Processes, available at www.fsa.gov.uk (2011), at 27) or a new “Level 2+” layer (Daniela Weber-Rey, Lisbon Treaty: impact on EU decision-making, available at <https://eiopa.europa.eu> (2011), at 22).

¹¹⁷ Moloney (2011a), at 66.

¹¹⁸ See fn. ... below for the classification of these measures under Level 3.

¹¹⁹ See text accompanying fn. ... below.

¹²⁰ Level 2 measures are likely to maintain their dominant position in the future (Niamh Moloney, The European Securities and Markets Authority: a perspective from one year on, 68 Zeitschrift für öffentliches Recht (Austrian Journal of Public and International Law) 59 (2013), at 71).

¹²¹ The basic default features of the quasi-legislative process are outlined in EU Commission, Communication on Implementation of Article 290 of the Treaty on the Functioning of the European Union (COM(2009) 673 final), which also foresees the systematic consultation of experts (*ibid.*, at 4), although these will not be organised in a comitology committee. The Communication was subsequently endorsed and further detailed by a Common Understanding among the Commission, the Council and the Parliament.

¹²² The comitology procedure only applies under Art. 291 TFEU as implementing measures should in principle be left to Member States; therefore, only in this cases the need arise to ensure that Member States may control the Commission’s exercise of its powers. The comitology procedure adds further complexity to the relationships among the actors actually or potentially involved in the regulatory process (see fn. [Black]). However, although Art. 291(3) TFEU provides that the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers be set in advance by way of regulations, Art. 1

Non-legislative acts can therefore take a variable form, depending on their layer (Level 2 or 3)¹²³ within the Lamfalussy process, on the adopted instrument (directive or regulation), and on whether they are meant to either supplement or implement the Level 1 basic principles under the scope of Art. 290 and Art. 291 TFEU respectively. In the regulatory cascade from Level 1 to Level 3, the Level 2 layer can be skipped when the legislation delegates the Commission to directly adopt technical standards; when Level 3 measures are instead contemplated in order to develop or specify Level 2 acts, the hierarchical predominance of these latter shall be respected.¹²⁴ After the enactment of the new architecture, Directive 2010/78/EU (Omnibus Directive) revised the existing Level 1 instruments in order to reshape the coordination among the legislative and regulatory measures.¹²⁵ In some areas, the new Level 3 instruments have been simply added to Level 2 acts previously in force,¹²⁶ while the intermediate regulatory layer is no longer foreseen in other fields¹²⁷.

On the contrary, no enabling rule delegating the power to adopt guidelines or recommendations is *ex ante* needed, although the Level 1 legislation exerts some influence. First, reference is sometimes made at Level 1 to recommendations and guidelines in order to signal that further harmonisation through non-binding measures in a specific field would be beneficial, and therefore desirable.¹²⁸ Second, the power to adopt standards and recommendations is in principle ruled out in areas covered by regulatory or implementing technical standards (Recital 26 Regulation (EU) No 1095/2010).

and Recital 6 Regulation (EU) No 182/2011 implicitly allow for the granting of implementing power without the need to follow the comitology procedure.

¹²³ Hierarchical levels also determine the regulatory procedure, as the comitology procedure under Regulation (EU) No 182/2011, by default, applies neither to regulatory nor to implementing technical standards, unless otherwise established by the delegating act: see FSA, (fn. ...), at 28; Stéphane Kerjean, *Towards a Union Financial Sector RuleBook. The case of the banking sector*, European Central Bank, 2011, at 10, available at www.ecb.int. But see Moloney (fn. ...), at 75 (the European Securities Committee is involved in the adoption of implementing technical standard by way of a “comitology-style oversight”).

¹²⁴ See Recital 13 Directive 2010/78/EU.

¹²⁵ For a review of the affected rules see Dorothee Fischer-Appelt, *The European Securities and Markets Authority: the beginning of a powerful European securities authority?*, 3 *Law and Financial Markets Review* 21 (2009), at 22-3.

¹²⁶ See e.g. Art. 1(5) Directive 2003/6/EC (on uniform conditions for the exemptions from market abuse prohibitions in case accepted market practices are carried out).

¹²⁷ See e.g. Art. 4(3) Directive 2003/71/EC (on specification of exemptions from the duty to publish a prospectus).

¹²⁸ See e.g. Art. 16(2) Directive 2004/39/EC (ESMA may develop guidelines regarding the methods competent authorities should adopt when monitoring the ongoing compliance by investment firms with the conditions for the initial authorisation). See also Moloney (2013), at 71.

Within this framework, ESMA can be approximately considered the successor of CESR as a Level 3 authority, as it has inherited the tasks previously attributed to the latter. At Level 2, ESMA has retained the regulatory functions of CESR, as it is still charged with an advisory role *vis-à-vis* the EU Commission in drafting measures implementing the Level 1 directives or (increasingly) regulations (Art. 8),¹²⁹ when the legislative instrument so provides. At Level 3, ESMA is entrusted, as CESR was, with promoting convergence among national competent authorities through non-binding measures, but also contributes to the creation of a single rule-book through quasi-regulatory instruments.

Both technical standards and recommendations (or guidelines) may not exceed the purview of the matters set by the legislative acts specifically referred to by Art. 1(2) of the founding Regulation.¹³⁰ The list of the EU directives set forth by Art. 1(2) therefore circumscribes the ESMA's scope of regulatory (as well as supervisory) activity; to be sure, no direct constraint is provided, as reference is also made to "any [...] legally binding Union act [further to those listed in the provision] which confers tasks on the Authority", but the rule nonetheless curbs the powers of ESMA in that it clarifies that no action is allowed beyond what is prescribed by specific legislative measures.¹³¹ Moreover, one of the merits of the provision also lies in that it represents a single source of information which fosters the accountability of the Authority, as it makes easier for all the interested

¹²⁹ Moloney (fn. ...), at 65.

¹³⁰ Such areas are those within the scope of directives concerning investor compensation schemes, settlement finality, admission to listing, financial collaterals, market abuse, prospectuses, investment services, transparency requirements for listed companies, collective investment undertakings, banks (but without any prejudice to the competence of EBA on prudential supervision, alternative investment funds, credit rating agencies. Directives on financial conglomerates, money laundering and distance marketing of consumer financial services are also included to the extent that they apply to investment services or collective investment. ESMA powers also include "all directives, regulations, and decisions based on those acts".

¹³¹ Among these rules, three are worth mentioning. First, a general provision requires ESMA to prepare, if necessary, guidelines and recommendations additional to those adopted under Art. 1(2) in order to address systemic risk posed by key financial markets participants (Art. 22(3)), i.e. market participants that can affect the stability, integrity or efficiency of EU financial markets (Art. 4(1)(2)). Second, ESMA has the power to adopt guidelines and recommendations in the context of its wider efforts to ensure that national Investor Compensation Schemes under Directive 97/9/EC are adequately funded by financial markets participants (the importance of the principle requiring funding by market participants – rather than by taxpayers – is demonstrated, in the more sensitive field of depositors compensation schemes, by the decision rendered by EFTA Court, Case E-16/11, EFTA Surveillance Authority and European Commission v Iceland, 28 January 2013, par. 138-44). Third, ESMA may adopt guidelines and recommendations at the outcome of peer reviews of national competent authorities (Art. 30(3)).

stakeholders to know which fields of regulation and supervision ESMA is responsible for.¹³²

However, Art. 1(3) Regulation 1095/2010 empowers the Authority to “act in the field of activities of market participants” also on issues not directly covered in the acts referred to in Art. 1(2) – clearly, through measures that do not require specific delegation of powers.¹³³ Such issues include matters of corporate governance, auditing and financial reporting, to the extent that “actions by the Authority are necessary to ensure the effective and consistent application” of the acts listed by Art. 1(2).¹³⁴ While this expansion of authority is applicable, *mutatis mutandis*, to the other ESAs, ESMA is also granted exclusive competence on taking “appropriate action in the context of take-over bids, clearing and settlement and derivative issues”; as this enlarged competence may overlap with those of the other ESAs,¹³⁵ enhanced coordination is needed among the three Authorities in order to avoid conflicting measures. This is remarkably the only rule in the Regulation where the term “market participants” is used, while in the rest of the act the term “financial market participants” is instead used to refer to “any person in relation to whom a requirement in the legislation referred to in Article 1(2) or a national law implementing such legislation applies”. Absent a specific definition of “market participants”, the letter of the law may further enlarge the ESMA’s scope of activity, including entities not addressed by specific Level 1 or Level 2¹³⁶ instruments (as is the case, e.g., for proxy agents¹³⁷).

4.2.1.2. Strengthening regulatory harmonisation. The new quasi-rulemaking powers

Depending on the Level 1 mandate to the Commission, which retains the power to adopt the regulatory measures, ESMA may be entrusted with the elaboration of two kinds of technical standards – in the form of either regulation

¹³² The EU legislator has seemingly taken on the task of maintaining the provision up to date: see Directive 2011/61/EU (amending Art. 1(2) Regulation (EU) No 1095/2010 in order to replace, within the list of relevant sources of ESMA’s powers, the previous generic mention to future legislation on alternative investment fund managers with a specific reference to the relevant directive).

¹³³ For a critique of this limitation of the purview of technical standards see Di Noia and Furlò (2012), at 185.

¹³⁴ Reference to corporate governance is remarkable if one considers the US debate over the SEC indirect regulatory powers on this filed in the presence of a State competence on company law (see Mark J. Roe, Delaware and Washington as Corporate Lawmakers, 34 Delaware Journal of Corporate Law 1 (2009), at 12).

¹³⁵ Wymeersch (2012), at 248.

¹³⁶ *Ibid.*

¹³⁷ ESMA, Final Report. Feedback statement on the consultation regarding the role of the proxy advisory industry (ESMA/2013/84), 19 February 2013. See also Moloney (2013), at 73-4.

or decision¹³⁸ – to be submitted for endorsement to the Commission: regulatory technical standards (Art. 10), representing “delegated” non-legislative act under Art. 290 TFEU, or implementing technical standards (Art. 15), which fall into the purview of Art. 291 TFEU. Whether the former or the latter shall be adopted is up to the Level 1 measures to define.¹³⁹

The reference to either regulatory or implementing technical standards affects the scope of ESMA’s and Commission’s discretion in the preparation (and amendment) of the measures, as well as the quasi-rule making procedure that shall be followed at Level 3. In cases where the European Parliament and the Council grant the Commission the power to adopt non-legislative measures by means of delegated acts under Article 290 TFEU, ESMA may develop draft regulatory technical standards aimed at supplementing or amending non-essential elements¹⁴⁰ of the legislative act, in order to ensure consistent harmonisation in the regulated matters.¹⁴¹ On the contrary, when reference is made to implementing technical standards, only measures strictly implementing the Level 1 legislation are allowed (Art. 291 TFEU).¹⁴²

Characterising the ontological differences between regulatory or implementing technical standards is, however, far from easy.¹⁴³ According to their nature, both measures shall not go beyond the scope set by the legislative act they are based on, and shall not in any case “imply strategic decisions or policy choices” (Art. 10(1) and 15(1)).¹⁴⁴ Moreover, if a measure amending the Level 1 act can be

¹³⁸ Technical standards in form of decision may fit the adoption of waivers from general obligations (see Wymeersch (2012), at 252).

¹³⁹ For the legislative acts in force as at the date ESMA was established, an *ad hoc* review performed by the Omnibus Directive has determined the areas where ESMA is called to prepare one or the other draft technical standard. At the time we are writing, the proposal for a second Omnibus Directive aimed, *inter alia*, at widening the areas covered by the ESMA technical standard in the field of prospectus regulation is pending (see Commission Proposal for a Directive amending Directives 2003/71/EC and 2009/138/EC (COM(2011) 8 final), 19 January 2011).

¹⁴⁰ See ECJ decision on case C-240/90, Germany v. Commission, I-05383 European Court reports (1992), § 36-7 (rules establishing “essential elements” are rules “essentials to the subject-matter envisaged” and “which are intended to give concrete shape to the fundamental guidelines of Community policy”).

¹⁴¹ For instance, the power to develop draft regulatory technical standards is envisaged for the definition of the requirements – namely reputation and expertise – that prospective managers must satisfy in order for their investment firm to obtain the authorisation to perform investment services on a professional basis (art. 7(4) Directive 2004/39/EC).

¹⁴² See e.g. Art. 9(6) Reg. (EU) No 648/2012 (EMIR) (ESMA shall draft implementing technical standards in order to establish the format and frequency of reports to be filed by counterparties of derivative contracts with trade repositories).

¹⁴³ Fischer-Appelt (2009), at 25.

¹⁴⁴ See also Recital 22, Regulation (EU) No 1095/2010. On the other hand, one may easily argue that both regulatory and implementing technical standards cannot but entail political consequences

easily recognised as such, the boundary between a measure supplementing and another implementing a legislative act is admittedly a blurred one, as every enacting rule always adds some further prescriptions to the enacted provision,¹⁴⁵ thereby slightly changing the framework of a legislative basic act the rules of which do not provide, in that respect, full and comprehensive regulation.¹⁴⁶ Some help could possibly be provided by a distinction grounded on the idea that delegated acts should be used when the Commission is empowered to determine what the concerned entities should do, while implementing act would be confined to cases where the non-legislative measure is aimed at pinpointing how the said entities shall carry out an obligation set within the basic act, as might be the case for a provision setting out a standard communication format.¹⁴⁷ However, such a provision may also be regarded as a way to add other obligations,¹⁴⁸ and the distinction would turn out to be quite subjective.

Concerns about the procedure to be followed, and in particular about the role of the institutions, are thus likely to influence the Level 1 choice between the two subsets of technical standards.¹⁴⁹ To the extent that ESMA is called, in its capacity as a Level 3 body, to develop draft regulatory technical standards, the European Parliament and the Council retain a veto power on the measures adopted by the Commission,¹⁵⁰ while this is not the case when implementing technical standards

(*Moloney* (fn. ...), at 68); once again, distinguishing between the two may therefore prove difficult, while institutional control by the European Parliament and the Council on the compliance by ESMA and the Commission on their technical – as opposed to political – mandate only addresses regulatory technical standards (see below, text accompanying fn. ...). See also fn. [on Art. 28 and *Chamon*].

¹⁴⁵ Paul P. Craig, *Delegated Acts, Implementing Acts and the New Comitology Regulation*, 36 *European Law Review* 671 (2011), at 673.

¹⁴⁶ An attempt to draw a distinction between the scope of Art. 290 and 291 based on discretion left to the delegated institution – and therefore on its ability to change the framework of the legislative act – is carried out by the EU Commission (see fn. ([*Comm. 673*]), at 4).

¹⁴⁷ Such as the one provided for by Art. 12(9) Directive 2004/109/EC, which enables the Commission to adopt standard forms, templates and procedures to be used when notifying major holdings in listed companies.

¹⁴⁸ I.e. using a specified format or a particular means of communication.

¹⁴⁹ See in general *Hofmann, Rowe and Türk* (2011), at 238 and 532-4.

¹⁵⁰ Art. 290(2)(b) TFEU. If the Commission adopts the technical standards endorsing the ESMA proposal, the period during which the other institutions may object is reduced from three months to one, with the possibility to extend the time span by one further month. See also Art. 12 Regulation (EU) No 1095/2010, which enables the European Parliament and the Council to revoke at any time the delegation of quasi-rulemaking power (Art. 290(2)(a) TFEU): however, opposition rather than revocation is the ordinary means of control over delegated acts (*Commission Communication COM(2009) 673 final*, at 7). In order to exercise the veto power or to revoke the delegation, the European Parliament shall act by a simple majority, and the Council by a qualified one (Art. 290(2) TFEU).

are at stake. The ability to prevent the entry into force of the technical standards is remarkable in the perspective of (increased) accountability by ESMA, but may raise some question on the possibly reduced independence of the quasi-regulatory procedure as a whole.¹⁵¹ How independent the rulemaking activity will be is indeed up to the institutions to decide, as the real scope of the scrutiny by the Parliament and the Council is crucial in this respect.¹⁵² In particular, a relatively higher level of independence may be expected if objections are raised not so much to second-guess the merit of the technical standards, although the institutions encounter no limit in this respect,¹⁵³ but rather to assess whether such standards involve, as a matter of fact, policy issues.¹⁵⁴

Along these lines, ESMA (and the Commission) are held accountable for their technical mandate more strictly than it is the case when implementing technical standards shall be adopted, as these latter quasi-regulatory measures are not subject to a formal veto. The distinction between regulatory and implementing technical standards is therefore remarkable from the standpoint of accountability and independence, although the practical intensity of the scrutiny by institutions and interested stakeholders may be less divergent than in might appear at first sight. Veto power aside, the quasi-rulemaking procedures for the adoption of technical standards, whichever their nature, are in fact substantially the same for the rest.¹⁵⁵ Within such procedures, accountability to the institutions and the interested stakeholders is ensured by an array of devices. ESMA may submit the standards only upon public consultation and after requesting the opinion of the SMSG. Consultation may only be avoided when it is “disproportionate” in relation to either the scope and impact of the technical standard concerned or the particular urgency of the matter (Art. 10(1) and 15 (1)).¹⁵⁶

The European Parliament and the Council are also steadily involved in the cumbersome quasi-rulemaking procedures that lead to the adoption of technical standards. They receive the draft standards from the Commission as soon as the

¹⁵¹ Independence of ESMA from the Commission is an even more sensitive issue: see text accompanying fn.

¹⁵² At the same time, the exercise of veto power by collective decision-makers, such as the Council and the Parliament, face structural limitations that may reduce its effectiveness (Spence (1997), at 436).

¹⁵³ Commission Communication COM(2009) 673 final, at 9.

¹⁵⁴ Nicholas Dorn, *Render Unto Caesar: EU Financial Market Regulation Meets Political Accountability*, 34 *Journal of European Integration* 205 (2012), at [12-3].

¹⁵⁵ Raptis (fn. ...), at 66.

¹⁵⁶ The same applies in exceptional circumstances where ESMA does not deliver the draft measures within the expected deadline. This being the case, the Commission regains its original power to adopt the technical standards, but it has to comply with the same default procedure when it comes to consulting the interested parties and the Stakeholder Group (Art. 10(3) and 15(3)).

ESMA submits them for endorsement. As the final responsibility for the adoption of the Level 3 measures lies with the Commission, the latter is by no way compelled to endorse the draft standards in full. On the contrary, the draft measures may “in very restricted and extraordinary circumstances”¹⁵⁷ be endorsed in part, with amendments, or not be endorsed at all; however, in no case the Commission may change the content of the draft regulatory technical standards prepared by ESMA without triggering a special coordination procedure whereby ESMA may amend the standards and resubmit them in the form of an opinion.¹⁵⁸ Whenever the Commission does not endorse a draft regulatory technical standard, it shall immediately inform the Parliament and the Council (Art. 14(1)).¹⁵⁹ Both are also informed of the opinion which ESMA is subsequently required to deliver (with no distinction in this case between regulatory and implementing technical standards).¹⁶⁰

Restrictions in the Commission’s ability to reject the draft standards mirror, at the normative level, the underlying and substantial equilibrium where ESMA drafts enjoy an inherent strength as a consequence of both specialized skills of its staff and the legitimacy bestowed by stakeholder engagement.¹⁶¹ This is remarkably made explicit by Recitals 23 and 24 of Regulation (EU) No 1095/2010, according to which the Commission should refuse full endorsement of the ESMA draft measures only by way of exception “since the Authority is the

¹⁵⁷ See also Recital 23 of the founding Regulation, stating that “draft regulatory technical standards would be subject to amendment if they were incompatible with Union law, did not respect the principle of proportionality or ran counter to the fundamental principles of the internal market for financial services as reflected in the *acquis* of Union financial services legislation.” See also fn. ... below.

¹⁵⁸ Ferran (2012), at 143. Limitations to the possibility to have a say in the preparation of draft regulatory measures are all the more important because the Commission’s power to adopt quasi-regulatory measures is ousted when the Level 1 delegations grant the power of initiative to ESMA (see Madalina Busuioc, Rule-Making by the European Supervisory Authorities: Walking a Tight Rope, 19 *European Law Journal* 111 (2013), at 115).

¹⁵⁹ Communication to the other two EU institutions of Commission’s dissenting opinions which refuse full endorsement is surprisingly not foreseen when implementing technical standards are at stake (sure?). Informal communication channels aside, the Council and the Parliament may therefore know that the procedure is in a deadlock only at the time they receive the subsequent ESMA’s opinion. Another – this time motivated – distinction between the two procedures lies in the fact that a formal mediation procedure is envisaged for dissents on regulatory technical standards only (Art. 14(2)).

¹⁶⁰ Once again, this information is also provided when the Commission adopts the technical standards without a draft from ESMA according to Art. 10(3) and 15 (3) (fn. ...).

¹⁶¹ See Lorna Schrefler, The Usage of Scientific Knowledge by Independent Regulatory Agencies, 23 *Governance: An International Journal of Policy, Administration, and Institutions* 309 (2010), at 315 (scientific knowledge may also serve the purpose of increasing the agencies’ standing in the political arena).

actor in close contact with and knowing best the daily functioning of financial markets” and “given the technical expertise of the Authority in the areas where regulatory technical standards should be developed, note should be taken of the Commission’s stated intention to rely, as a rule, on the draft regulatory technical standards submitted to it by the Authority.”¹⁶² In case of disagreement, both the statements strongly shift the burden of proof on the Commission; according to ESMA, the Commission should restrict itself to checking that the draft measures are in the Union interest and are compatible with EU law,¹⁶³ but this wish is slightly in contrast with the fact that the Commission has historically not restrained from amending CESR’s Level 2 technical advices when it deemed it appropriate.¹⁶⁴

When the Parliament and the Council are into the information flow, whichever their formal role under either Art. 290 or 291 TFEU, they are likely to step in and influence the process if they are not satisfied that the draft measures comply with the Commission’s and ESMA’s mandate. Furthermore, in case a disagreement exists between the Commission and ESMA, they may also back one of the two against the other. In a similar scenario, ESMA is more likely to receive support,¹⁶⁵ as the Commission has in any instance the upper hand by virtue of the ability to block the draft technical standards on an autonomous basis.¹⁶⁶ In any event, the equilibrium of the regulatory procedure is affected by the combination of the information and expertise of the supported disputant (be it ESMA or the Commission), on the one hand, with the authority and legitimacy of the Council or the Parliament, which are very likely to orient the final outcome of the process, on the other hand.¹⁶⁷ All the more so, of course, when either the Council or the Parliament may act as vetoing institutions.¹⁶⁸

With a view to promoting the safety and soundness of markets and convergence of regulatory practice (Art. 16), ESMA can also resort to the soft law tools that constituted the typical Level 3 measures under the CESR founding

¹⁶² This equilibrium underpins the theoretical framework that highlights how the interaction among the actors of the procedure is affected by both formal and informal elements [see par. supra].

¹⁶³ ESMA, (ESMA/2011/009), at 4-5.

¹⁶⁴ See Ferran (2004), at 88.

¹⁶⁵ Moloney (fn. ...), at 77.

¹⁶⁶ According to a commentator, should the Commission be willing to retain as far as possible its regulatory capacity, it could decide to make wide recourse to its powers to refuse full endorsement of technical standards (Busuioc (2013), at 122-3).

¹⁶⁷ See par. [enrolment analysis].

¹⁶⁸ In assessing the reciprocal interactions among the constituents of the process, potential regulatory capacity is almost as important as the actual enrolment (Black (2002), at 264).

documents.¹⁶⁹ guidelines and recommendations.¹⁷⁰ The entry into force of guidelines and recommendations does not require *ex post* endorsement by the Commission, nor do the Parliament and the Commission enjoy any formal power to step into the drafting process. Once again, ESMA's position has been strengthened if compared to that of CESR.¹⁷¹ First, ESMA may ask both national competent authorities and financial markets participants whether they comply with a guideline or a recommendation; competent authorities that do not comply are named (and shamed) by way of an *ad hoc* publication and in the ESMA annual report. Second, national supervisors may also be asked to state the reasons for the lack of compliance, which may also be made public if ESMA so decides. Third, the annual report shall outline how ESMA intends to ensure that its guidelines or recommendations are complied with in the future (Art. 16(4)), what makes the regulatory model less flexible than a pure "comply or explain" system. At the same time, accountability has also been reinforced,¹⁷² in order to ensure that the whole architecture is balanced, as open consultation shall be performed and the Securities and Markets Stakeholders Group shall release its opinion or advice before guidelines and recommendations are adopted, where ESMA deems it appropriate¹⁷³.

In its quasi-regulatory capacity, ESMA has also used more flexible instruments, even in the absence of an express enabling provision. An example is the publication of Q&A documents, which are updated on a continuous basis in

¹⁶⁹ Non-binding instruments will supposedly maintain a central role in the European financial regulation whenever regulators will not be able to reliably assess the possible effects of a proposed measure (Wymeersch (2011), at 449).

¹⁷⁰ Standards are no longer included in the lists of non-binding measures (see Art. 3 of Commission decision 2009/77/EC establishing the Committee of European Securities Regulators, now repealed). According to the new taxonomy, this instrument now falls into the scope of the measures adopted under Art. 290 or 291 TFEU.

¹⁷¹ Moreover, "national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding [Union] provisions" (ECJ, Case C-322/88, Salvatore Grimaldi v Fonds des maladies professionnelles, 13 December 1989, par. 18).

¹⁷² However, judicial accountability is still limited: see fn. [Hofmann – Türk].

¹⁷³ ESMA therefore retains a remarkable discretion on the procedure to be followed when issuing soft regulatory measures, as opposed to draft technical standards, since consultation and advice for recommendations and guidelines are only needed insofar as they are deemed appropriate, while draft technical standards may not be released without stakeholder involvement unless this would be disproportionate. Such a diverging approach has raised concerns on the ability to ensure that all the relevant information is provided and all the engaged stakeholders are represented in the process for the adoption of soft law (Chiti (2013), at 105-6).

order to solve regulatory uncertainties in specific matters.¹⁷⁴ In a similar vein, soft guidance can also be issued within feedback statements, in order to foster the adoption of self-regulatory measures by anticipating that ESMA is willing to adopt more formal measures, including formal recommendations, in case market participants do not deliver satisfactory results.¹⁷⁵

4.2.2. The role of the Securities and Markets Stakeholder Group

A key accountability device for the exercise of regulatory powers is the SMSG. When performing its tasks, SMSG carries out both compulsory and optional activities. While these latter are conducted on the SMSG's own initiative, the former are typically fulfilled in reaction to an input by ESMA, especially in connection with consultations.

SMSG is consulted on initiatives concerning the adoption of technical standards as well as guidelines and recommendations. The opinion of SMSG is always compulsory before draft technical standards can be adopted. Remarkably, SMSG retains its power to deliver an opinion even in the exceptional circumstances where public consultation does not take place as it would be disproportionate in the light of the scope and impact of the draft technical standards.¹⁷⁶ Of course, this is not the case when public consultation is avoided because actions by ESMA must be taken urgently; in such circumstances, SMSG shall be informed as soon as possible instead. SMSG shall also be consulted in the exceptional cases where the European Commission can adopt technical standards without a draft from ESMA (Art. 10(3) and 15(3)).¹⁷⁷

In the case of guidelines and recommendations ESMA has wider discretion, as it will ask the opinion or the advice only "where appropriate" (Art. 16(2)). This rule mirrors the general regime for public consultation on non-binding measures, but it remains open to question whether ESMA is free to decide how to combine the two instruments in the most efficient manner, which might suggest performing public consultations without recourse to SMSG opinion or vice versa.¹⁷⁸ On the contrary, no discretion is granted when guidelines and recommendations concern individual financial markets participants, as in this case no SMSG opinion is required, in order to avoid both the emergence of possible conflicts of interests

¹⁷⁴ See e.g. ESMA, Questions and Answers – Prospectuses (ESMA/2013/594), 23 May 2013 (or Questions and Answers on EMIR).

¹⁷⁵ ESMA, (ESMA/2013/84), at 27 (proxy advisors?).

¹⁷⁶ See text accompanying fn.

¹⁷⁷ See text accompanying fn.

¹⁷⁸ As we show below, rules applicable to technical standards seem to give a slight preference to the SMSG's opinions, which may be required even in case consultations are not performed because disproportionate.

and the communication of individual news among other stakeholders, possibly competitors.

The aim of the SMSG is to “help facilitate consultation with stakeholders in areas relevant to the tasks of the Authority” (Art. 37). The rule is not interpreted as meaning that SMSG has an obligation to answer to public consultations. Although the provision of similar answers is an option,¹⁷⁹ especially when preliminary advice is given without formality and requires some documentation, this might sometimes be problematic given the wide stakeholder representation within the Group, which can easily lead either to empty answers, in order to find a floor consensus among the members, or to collections of minority opinions of no use. Furthermore, replies by the SMSG are likely to overlap with individual responses by the SMSG constituencies directly addressed to ESMA. On the contrary, reference to facilitation of consultations suggests that the SMSG’s preferential role should be having a dialogue with ESMA before a consultation document is issued, as made possible by the availability of “all the necessary information” not covered by professional secrecy (Art. 37(4)). SMSG may thus step in at a very early stage (before the document is discussed by the Board) or afterwards, by the delivery of an opinion on a draft consultation document before it is finally approved,¹⁸⁰

This is also made clear by the 48th Recital of the founding Regulation, which requires that SMSG be involved in the impact assessment that shall support the technical standards – contextual development of the proposal and their respective cost-benefit analyses represents a best practice.¹⁸¹ Impact assessment exercises are among the most effective accountability tools,¹⁸² also for delegated and implementing measures,¹⁸³ and SMSG can play a key role in making them effective. Its ability to enter the process at an early stage, before a consultation document crystallises the initial ESMA position, greatly enhances its influence on

¹⁷⁹ See e.g. ESMA, Final Report. Guidelines and Recommendations on the Scope of the CRA Regulation (ESMA/2013/720), 17 June 2013, Annex I.

¹⁸⁰ This is also the opinion of the SMSG currently in place: “Such facilitation of consultation implies the Group being asked to give its advice in advance of the issue of any such consultation by the Authority” (see RoP, Recital 2).

¹⁸¹ Alberto Alemanno and Anne Meuwese, Impact Assessment of EU Non-Legislative Rulemaking: The Missing Link in ‘New Comitology’, 19 *European Law Journal* 76 (2013), at 85.

¹⁸² Regulatory impact assessment is commonly regarded as an effective accountability mechanism which provides justification to the regulatory action by allowing a comparison between divergent hypothetical rules. See in general OECD, *Introductory Handbook for Undertaking Regulatory Impact Analysis (RIA)* (2008); Susan Rose-Ackerman, *Public Choice, Public Law and Public Policy*, Paper Presented at the First World Meeting of the Public Choice Society (2007), at 12.

¹⁸³ See Alemanno and Meuwese (2013), fn. ..., at 86-8 on the relationship between legislative and non-legislative impact assessments.

the final decision, because minor variations in the initial conditions of the regulatory work may significantly affect the outcomes.¹⁸⁴

The second area of intervention of the SMSG relates to the activities performed on its own initiative. Although no specific act is mandated in this area (SMSG “may” submit), the Regulation suggests that the overall advisory role of the Group represents a duty. An implicit indication is the compulsory number of meetings (“at least four times a year”) which the SMSG has to hold, irrespective of ESMA’s requests to intervene into the consultation process. This is also an area where the Group may fully deploy the expertise ensured by its diverse composition and to build upon the different experiences it gathers, because of the freedom to analyse relevant topics in advance of ESMA’s official initiatives and of the possibility to trigger the supervisory process as a first mover, rather than focusing on specific aspects of draft technical standards.

Among the activities performed by SMSG on its own initiative, it is worth mentioning the power to point out possible violations of Union law by national competent authorities, so that ESMA may decide to launch a procedure under Art. 17.¹⁸⁵ This allows SMSG to enhance accountability of national competent authorities, and possibly of Member States themselves, because although the power of ESMA (and therefore of SMSG) does not refer to non-compliance by these latter, the distinction may not be crystal clear insofar as national supervisors are violating EU law while complying with national provisions.¹⁸⁶

In delivering its positions, SMSG may submit “opinions” or “advice”: the former relate to specific topics already at the ESMA’s agenda, while reference to advice shows that SMSG may also provide reasoned positions on more general matters. SMSG may address opinions and advices to ESMA “on any issue related to the tasks of the Authority”, and in particular when the Authority exercises its quasi-rulemaking powers or is involved in the harmonisation of divergent supervisory approaches (Art. 29), in peer reviews of competent authorities (Art. 30), and in the assessment of market developments (Art. 32), namely in high-level analysis of the financial market industry. However, the width of the formula also seems to allow SMSG to intervene on more general aspects, such as ESMA organization, or even to comment on procedural aspects like possible short timing left by draft Level 1 measures to ESMA for the performance of its quasi-regulatory functions.

4.2.3. The supervisory powers of ESMA

¹⁸⁴ Hornstein (2005), at 926.

¹⁸⁵ See text accompanying fn.

¹⁸⁶ Wymeersch (2011), at 458-9.

4.2.3.1. Cross-sectoral supervisory powers: addressing national competent authorities and market participants

ESMA also plays a crucial role in supervision. In some instances, along the experience of CERS' role as a network of supervisors,¹⁸⁷ ESMA is entrusted with the task of coordinating national competent authorities, so that its action in the supervision is indirect and is mainly connected to the ability to influence local supervisors. Among the tools that help harmonization are peer reviews (Art. 30), colleges aimed at coordinating multiple competent authorities (Art. 21), opinions directed to national supervisors, personnel exchanges, and training programmes (Art. 29). ESMA discretion in this field is widened by the possibility to resort to instruments not envisaged by the founding Regulation, when needed (Art. 29(2)).

However, ESMA (as well as the other ESAs) has also been entrusted with more intrusive powers which permit to address financial markets participants, either through the national competent authorities or, in case of local inertia, directly. These supervisory powers are cross-sectional and can therefore be exercised irrespective of the field of regulation involved – of course within the general limits set forth by Art. 1(2) and (3) of the founding Regulation – but sometimes an express enabling provision is needed. ESMA's power to take individual decisions directly addressed to financial market participants in some specific cases is of particular relevance because it can easily result in the performance of direct enforcement vis-à-vis private entities, which might create some legislative tensions in the absence of a conferral to EU bodies within the Treaties.¹⁸⁸ We describe the relevant provisions below with a focus on the role of the EU institutions, in order to show how accountability easily turns into direct participation.

The most relevant power of ESMA towards national competent authorities and market participants relates to the breach of Union law, including the regulatory and implementing technical standards (Art. 17). In particular, ESMA has the power to investigate, after having informed it, whether a competent authority¹⁸⁹ has not applied the relevant EU acts (referred to in Article 1(2)¹⁹⁰), or has applied

¹⁸⁷ See in general Majone (2002), at 336; Wolfgang Weiß, *Agencies Versus Networks: From Divide to Convergence in the Administrative Governance in the EU*, 61 *Administrative Law Review* 45 (2009), at 47-8 and 59-60; Martin Shapiro, *Independent agencies*, in Paul Craig and Gráinne de Búrca (eds.), *The Evolution of EU Law* (2011), OUP, at 119. See also text accompanying fn. [board of supervisors] and [interplay in supervisory functions].

¹⁸⁸ Shammo, *EU Prospectus Law*, Cambridge University Press, 2011, at 238.

¹⁸⁹ The authority under investigation shall provide ESMA with all the required information (Art. 17(2)(2)).

¹⁹⁰ No reference is made to Art. 1(3). This curtails ESMA's ability to enforce Union law which is only referred to in this norm, such as takeover law, so that any action in the field should be left to the Commission under Art. 258 TFEU (see Art. 1(4)). The same seems to apply for ESMA

them in a way which appears to ESMA as breaching Union law, “in particular by failing to ensure that a financial market participant satisfies the requirements laid down in those acts”. Investigations may be initiated spontaneously or upon request. In both instances, ESMA has no strict duty to perform an inquiry, so that any evaluation of the plausibility of the accusation is up to the Authority itself, according to the traditional principle of independence with accountability, even though the willingness to conduct thorough inquiries may be curbed by the governance of the Authority.¹⁹¹ According to the internal procedure set up by ESMA, a preliminary evaluation of the admissibility is first performed and, in case a positive decision is taken, a second assessment is carried out in order to establish whether the request deserves further investigation (both steps are delegated to the Chairperson and her deputy).¹⁹² Requests for investigation may be brought by one or more national competent authorities, the European Parliament, the Council, the Commission or, notably, the Securities and Markets Stakeholder Group. The SMSG’s ability to file a request against a national competent authority for inadequate application of EU law may represent a powerful tool in the hand of investors and the financial industry. This may prove particularly attractive whenever, as is often the case, petitioning a national court would create an adversarial relationship with the local supervisor; on the contrary, the governance of SMSG, and the independence of its members,¹⁹³ can shield the constituency that originated the conveyed request from being identified as an antagonist of the local authority. Submissions by individuals or private entities are not explicitly contemplated, but are not ruled out either,¹⁹⁴ and can therefore be taken into account.¹⁹⁵

Investigation may have different outcomes, depending on the ground of allegations, on the reaction by the national competent authority, and on the nature of the rule whose violation is claimed: the remedies are hierarchically coordinated, so that resorting to the more coercive act – addressing market participants – is only possible when the lighter touch of the previous intervention has proven insufficient. As a first step, in case the inquiry has demonstrated to the satisfaction of ESMA that a violation has occurred,¹⁹⁶ ESMA itself may address a

decision which, although necessary to ensure the effective and consistent application of the directives referred to in Art. 1(2), are not expressly envisaged by these latter acts (see Art. 1(3)).

¹⁹¹ See *infra* par. ... for wider reflections on the exercise of supervisory powers.

¹⁹² See ESMA decision on Breach of Union Law Investigations (ESMA/2012/BS/87), Art. 2 and 3.

¹⁹³ See *supra*, text accompanying fn.

¹⁹⁴ Art. 2(2) ESMA decision (ESMA/2012/BS/87) (fn. ...); Wymeersch (2011), at 458.

¹⁹⁵ See the case addressed by the first Board of Appeal’s decision (SV Capital OÜ v. EBA, 24 June 2013).

¹⁹⁶ In order to avoid permanent investigations, the inquiry cannot last for more than two months (Art. 17(3)).

recommendation to the competent authority, setting out the action necessary to comply with Union law.¹⁹⁷ However, if the (alleged) non-compliance persists, enforcement is passed to the Commission, that within one month (and in any case no later than 3 months after the ESMA recommendation was adopted) may issue a formal opinion requiring the competent authority to take the action necessary to comply with Union law (Art. 17(4)).¹⁹⁸

The relationship between ESMA and the Commission under Art. 17(4) is telling. It shows that, when the going gets tough and a pure recommendation is not able to achieve significant results, the tough gets going by threatening a possible recourse to the mechanisms provided for by Art. 258 TFEU.¹⁹⁹ Indeed, the Commission maintains wide discretion in many respects. Not only can it deliver the formal opinion on its own initiative, so that the enforcement action may proceed in circumstances where ESMA would agree that the competent authority has eventually complied with the law,²⁰⁰ but the reverse is also true, so that the same procedure is interrupted if the Commission deems that the breach of the law, if ever existed, has come to an end. Furthermore, between these two extremes, the Commission also enjoys discretion as for the action required to the competent authority because it can depart from ESMA recommendations, which only has to be taken into account.²⁰¹

The third step of the procedure, which once more may be resorted to insofar as the previous phase is performed unsuccessfully, is back again under ESMA's control. If the national competent authority does not comply with the formal opinion of the Commission, and the necessity arises of remedying "in a timely manner such non-compliance in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system", ESMA may by-pass the national supervisor by adopting an

¹⁹⁷ The competent authority shall, within ten working days of receipt of the recommendation, inform ESMA of the steps it has taken or intends to take to ensure compliance with Union law.

¹⁹⁸ As is the case for the ESMA recommendation, the competent authority has ten working days to provide information on its future compliance with the EU law.

¹⁹⁹ Art. 258 is also wider in scope, because it applies to violations of EU law by Member States, including their respective legislators, and may therefore be triggered in cases where national authorities cannot be faulted (Wymeersch (2012), 256). See also text accompanying fn. [on blurred boundaries btw breach of law by MS and by supervisors]

²⁰⁰ A similar enforcement by the Commission is more likely to concern major and crystal clear infringements (Wymeersch (2011), at 455).

²⁰¹ A different wording is remarkably used, as we will see, as regards the content of the third act of the enforcement process, namely the ESMA decision directly addressing a financial market participants, which "shall be in conformity with the formal opinion issued by the Commission" (Art. 17(6)(2)).

individual decision directly addressed to a financial market participant, thereby requiring the necessary action to comply with EU law (Art. 17(6)).²⁰²

Of course, ESMA does not have exclusive control of the enforcement mechanisms; since under the TFEU the primary function to detect and prosecute breaches of EU law lies with the Commission, this latter retains the power to bring the matter in front of the CJEU (Art. 258 TFEU). The boundaries of ESMA powers therefore determine to what extent the action of the Authority and the Commission can overlap. In this respect, according to Art. 17(6), ESMA may address financial market participants only if the (allegedly) violated law sets requirements which are directly applicable to them. The expression is used in the TFEU in a narrow sense so as to only cover EU law instruments which do not require implementation in national jurisdiction, namely regulation (Art. 288 TFEU), but it is sometimes mentioned by the CJEU case-law to describe measures having direct effects.²⁰³ An interpretation aligned with Art. 288 TFEU would provide safer legal basis to ESMA action²⁰⁴ and is therefore preferable, also in the light of Recital 29 Regulation 1095/2010, but it would also curb supervisory powers whenever the piece of EU legislation is a directive having direct (vertical) effects.²⁰⁵ In such instances, enforcement would be entrusted with the Commission according to Art. 258 TFEU and would therefore address Member States rather than market participants, thus preventing access to the swift and prompt remedy devised by Art. 17(6).²⁰⁶

Along with enforcement of EU law under Art. 17, the second case where ESMA has direct supervisory powers on a general basis relates to action in emergency situations (Art. 18). Namely, whenever “adverse developments” may undermine the orderly functioning and the integrity of financial markets or the stability of the EU financial system, ESMA may foster actions by national

²⁰² The injunction may also dictate the cessation of one or more specific practices (see *infra* fn. [on 9(5)] and accompanying text).

²⁰³ See Koen Lenaerts and Piet Van Nuffel, *European Union Law*, 3rd ed., Sweet & Maxwell, 2011, at 812-3 and 895.

²⁰⁴ Note that this first interpretation would not be unproblematic for regulations lacking direct effects (as is the case whenever a margin of discretion is left to Member States: see ECJ Case C-403/98, *Azienda Agricola Monte Arcosu v. Regione Autonoma della Sardegna*, 11 January 2001, par. 26-8; Lenaerts and Van Nuffel (fn. ...), at 895; Craig and De Burca (fn. ...), at 190). In such circumstances, the question arises whether ESMA should override national legislators or – more likely – confine itself to enforcing EU legislation which has both direct applicability and direct effects.

²⁰⁵ See ECJ Case 41/74, *Van Duyn v. Home Office*, 4 December 1974, par. 12-4; Case 148/78, *Pubblico Ministero (Public Prosecutor) v. Tullio Ratti*, 5 April 1979, par. 21-4. Also covered by Art. 17 are EU primary law provision with direct effects (Wymeersch (2012), at 257; ECJ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 5 February 1963).

²⁰⁶ Ferran (2012), at 147.

competent authorities (if more than a supervisor is involved, ESMA shall also facilitate a coordinated effort). If the emergency situation is certified by the Council – whose decision may be triggered by the Commission, the ESRB or ESMA itself – the Authority may in the same circumstances also address individual decisions to national supervisors and, in case these latter do not comply, to financial market participants, thereby requiring the action or inaction which is deemed necessary to comply with their obligations under that legislation (Art. 18(2-4)). As is the case for enforcement of EU law, ESMA market participants may only be addressed when the applicable legislative or quasi-legislative measure sets requirements which are directly applicable to them. Although this limitation may be substantial, the main hurdle to the enactment of Art. 18 seems to be the lengthy process required in order for ESMA to be enabled to direct intervention, which is obviously incompatible with the timing of emergency situations seriously affecting one or more key market participants.

The third case where ESMA can directly address market participants on the basis of a general capacity relates to the power to settle disagreements between competent authorities in cross-border situations,²⁰⁷ where a Level 1 provision so provides²⁰⁸ (Art. 19). In comparison with the other examples of direct intervention, the EU institutions do not play a decisive role when ESMA performs this facilitating function, in spite of the fact that the decision may involve the use of wide discretion²⁰⁹ and divergent views will often reveal a breach of the Union law by a disputant. In the first step of the procedure, which can be activated either *ex officio* or upon request, ESMA operates as a mediator for the settlement of the disagreement (Art. 19(2)). If the concerned competent authorities fail to reach an agreement within the conciliation phase, ESMA may deliver a decision requiring them to take specific action, or to refrain from action, with binding effects for the competent authorities. If the decision of ESMA is not observed, the Authority may adopt an individual decision addressed to a financial market participant ordering the action necessary to comply with its obligations under Union law, including the cessation of any practice (Article 19(4); the usual limitation to directly applicable rules applies).

ESMA shall ensure that its decisions in emergency situation or settlement of disagreements do not impinge fiscal responsibilities of member states (Art. 38). This limitation to ESMA's powers draws an important boundary between national and supranational competences, as it shows that the final responsibility for

²⁰⁷ On the contrary, the joint committee may settle disagreements between competent authorities across sectors (banks, securities and insurance): Art. 20; ESMA, (ESMA/2011/009), at 6.

²⁰⁸ See e.g. Art. 35 Dir. 2011/61/EU (on disagreements concerning the conditions for marketing units or shares of third countries alternative investment funds in the EU).

²⁰⁹ Shammo, *EU Prospectus Law*, Cambridge University Press, 2011, at 235-6.

supervision rests with the Member States in any case where a decision could have an impact on state budgets.²¹⁰ Where a Member State considers that an action taken under Art. 18 and 19 impinges on its fiscal responsibilities, it may notify ESMA and the Commission²¹¹ that such decision will not be implemented. The decision is then suspended and it is up to ESMA to decide further actions: when it is upheld, the Council has the final say. One can clearly see that the suspension itself may deprive European intervention of any effectiveness: in order to avoid an instrumental use of the right of notification, certain measures which are clearly unable to have “a significant or material fiscal impact” (Art. 38(5)), such as short selling restrictions or trading halts, should be excluded from Art. 38 by way of explicit provision.

Of course, in fields where decisions involve budgetary consequences for Member States, externalities may *ex ante* distort the incentives of supervisors, and allocate fiscal burdens unevenly *ex post*, as the recent financial turmoil has demonstrated. In similar circumstances, while a fully-fledged centralised supervision is not viable (and perhaps not even desirable), a strengthened cooperation is nonetheless required whenever the subsidiarity test is met (Art. 5 TEU). This is particularly true for supervision on transnational groups, as a consequence of the spill-over effects that are likely to stem from inadequate supervisory practices in one or more Member States. In similar circumstances, the preferential regulatory tool adopted by EU legislation is the creation of a college of supervisors for every market participant, or conglomerate of market participants, involved in the supervision.²¹² ESMA shall ensure the streamlined

²¹⁰ See EU Commission Communication, European financial supervision (COM(2009) 252 final), 27 May 2009, at 9. Fiscal responsibility is the most important driver for decisions where to allocate supervisory powers on EU financial markets, so that Member States maintain their powers whenever the costs of a possible insolvency of by the market participants would be borne by them. On the contrary, conferral and subsidiarity (Art. 5 TEU) are not that crucial (Shammo (2012), at 10). However, experience has already demonstrated that the home country control principle already violates the link between power and risk whenever systematically relevant branches fail (Marco Lamandini, *When More is Needed: The European Financial Supervisory Reform and Its Legal Basis*, 6 *European Company Law* 197 (2009), at 201).

²¹¹ Notification shall be performed, for urgent matters or for settlements of disagreements respectively, within three days or two weeks after notification of ESMA’s decision to the national competent authority.

²¹² After the transfer of supervision on credit rating agencies to ESMA (see par. ... below), the main example is that of central counterparties (CCPs), which are supervised by the national competent authority with the involvement of a college comprising both ESMA and other national authorities supervising the entities that are most likely to be affected by the operations of the CCPs (Art. 18 Regulation (EU) No 648/2012). The college releases an opinion on the authorisation of the CCP, which rests with the national competent authority (Art. 19). The opinion has diverging effects depending on its direction (if positive, a denial of the authorisation is subject to a “comply or explain” rule; if negative, the authorisation cannot be released) and on the approving majority

functioning of every college as well as a consistent supervisory approach by different colleges,²¹³ this reducing the risks of inconsistent actions that will inevitably arise until this baroque mechanism²¹⁴ will be superseded by full centralization.²¹⁵ With a view to exploiting all the potentials of a cross-border coordinated supervision, the founding Regulation also defines a set of tasks ESMA shall perform along with those specifically established by the legislative acts referred to by Art. 1(2). In particular, ESMA may initiate Europe-wide stress tests taking into account the systemic risk posed by financial market participants referred in Art. 23²¹⁶ and oversee the activities carried out by national competent authorities (Art. 21 Reg. 1095/2010).

Finally, ESMA has a competence representing a mix of regulation and supervision in consumer protection and financial activities.²¹⁷ Some of the relevant tasks are drafted in general terms (Art. 9(1)). In particular, the Authority shall take a leading role in promoting transparency, simplicity and fairness in the market for consumer financial products or services across the internal market, including by: collecting, analysing and reporting on consumer trends; reviewing and coordinating financial literacy and education initiatives by the competent authorities; developing training standards for the industry; and contributing to the development of common disclosure rules. ESMA shall also monitor new and existing financial activities and may issue warnings in the event that a financial activity poses a serious threat to its statutory objectives as laid down in Article 1(5).²¹⁸

Other more detailed powers enable ESMA's direct intervention in the market. For example, the Authority may temporarily prohibit or restrict certain financial

(in case of qualified majorities rebutting the request for authorisation, a referral to ESMA is possible under Art. 19 Regulation 1095/2010).

²¹³ In order to achieve these aims, ESMA may perform its mediating functions according to Art. 19.

²¹⁴ See critically Lamandini (2009), at 202.

²¹⁵ Emiliios Avgouleas, *Governance of Global Financial Markets. The Law, the Economics, the Politics* (2012), Cambridge University Press, at 320-1.

²¹⁶ Art. 23 Regulation No 1095/2010 deals with the identification and the measurement of systemic risk, and provides that the Authority shall, in consultation with ESRB, develop supervisory criteria for these two matters and an adequate stress-testing regime which includes an evaluation of the possibility that systemic risks posed by financial market participants increase in situation of stress. Financial market participants that may pose systemic risks shall be subject to strengthened supervision and, where necessary, to the recovery and resolution procedures referred to in Art. 25.

²¹⁷ These tasks were not inserted in the original Commission proposal and were added by the European Parliament.

²¹⁸ See text accompanying fn.

activities (including, we believe, financial products²¹⁹) that “threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union”, in the cases specified and under the conditions laid down in the relevant legislative acts or if so required in the case of an emergency situation according to Art. 18 (Art. 9(5)). The provisional effects of these decisions, which require that a review be performed at least every 3 months, may prove particularly efficient when the issue addressed is affected by uncertainty because of the absence of a scientific *communis opinio*.²²⁰ since the effects of short selling restrictions are highly controversial,²²¹ it is not by chance that Art. 28 Regulation (EU) No 236/2012 is among the rules allowing direct intervention on the basis of Art. 9(5), thus enabling ESMA to prohibit – or to impose conditions (including notification duties) on – the acquisition of net short positions on certain financial instruments.²²² Temporary restrictions may in any case be adopted only on a subsidiary basis, i.e. in the absence of effective measures taken by national competent authorities.²²³ Absent an enabling rule such as Art. 28, the Authority may nonetheless assess the need to prohibit or restrict certain types of financial activity and, when this is the case, inform the Commission in order to facilitate the adoption of any such measures. Prohibitions or restrictions accordingly adopted do not face time constraints and can be drafted as normative acts, as opposed to what happens for *ad hoc* measures (Art. 9(5)).²²⁴

4.2.3.2. ESMA as single EU supervisor: the case of credit rating agencies

It is however in the field of credit rating agencies (CRAs) that ESMA’s supervisory powers are closer to those of a truly independent pan-European watchdog, as in this case supervision, including enforcement,²²⁵ requires no intermediation by national competent authorities.²²⁶ The direct day-to-day supervision is currently confined to areas where the cross-border implications of

²¹⁹ Similar powers are foreseen by Art. 31-3 of the Commission Proposal for a Market in Financial Instrument Regulation (COM(2011) 652 final), 20 October 2011 (see Moloney (2013), at 76-8). See also, implicitly, Wymeersch (2012), at 274.

²²⁰ See Choi and Pritchard (2003), at 43. Periodical review of regulations in place is recommended by OECD (2013), at 21, and represents a best practice in supranational financial regulation (Zaring (2005), at 578).

²²¹ See fn.

²²² Oskari Juurikkala, Credit Default Swaps and the EU Short Selling Regulation: A Critical Analysis, 9 European Company and Financial Law Review 307 (2012), at 322 and 334-6.

²²³ For further comment on Art. 28 and its relevance under the *Meroni* doctrine see par.

²²⁴ On the relevance of the scope of this power and the discretion it entails see *infra*, par.

²²⁵ In other matters, direct enforcement outside the circumstances analysed in par. ... is only allowed upon delegation by national competent authorities (Art. 28(3)).

²²⁶ Among the three ESAs, only ESMA has been granted with direct and exclusive supervisory powers.

the regulated activity is high and, at the same time, possible resolutions of the interested market participants would have limited financial implications (particularly in the case of bail-outs by Member States).²²⁷ Therefore, although the Commission proposal was more ambitious – as it tried to assign supervision on entities with Europe-wide reach, including clearing houses²²⁸ – ESMA has been granted with direct supervision over a small set of market participants.²²⁹ The CRA Regulation (Reg. No 1060/2009, as amended) entrusts ESMA with the responsibility of the initial registration and the ongoing supervision of CRAs – while national supervisors maintain their competences on the use of ratings²³⁰ – and provides the Authority with a wide range of supervisory tools including requests for information and the power to conduct investigations and on-site inspections (Art. 23b, 23c and 23d).²³¹ ESMA supervisory powers in the field of credit rating are accompanied by enhanced accountability towards the EU institutions, since an *ad hoc* annual report is prepared on the supervisory measures²³² adopted under CRA Regulation, including fines and periodic payments (Art. 36a and 36b) inflicted for violations of the applicable rules (Art. 21(6)).²³³

With a view to our analysis of ESMA’s relationship with the Commission, it is worth highlighting the regulatory framework for the application of such measures, as the mechanism is likely to represent a model in case similar powers are conferred on ESMA in the future: an analogous set of rules applies for the supervision of trade repositories (Art. 64 Reg. EMIR). While according to the initial regulation proposal the Commission would have maintained the power to apply penalties, the final Regulation entrusts ESMA with this task. However, in

²²⁷ See fn. ... above. See also Moloney (2011b), at 211.

²²⁸ Commission Communication COM(2009) 252 final (fn. ...), at 11.

²²⁹ See e.g. Art. 55-74 Reg. EMIR, entrusting ESMA with the supervision of trade repositories. Trade repositories do not pose significant risks in case of bankruptcy, since they operate as collectors and storage mechanisms of data concerning derivative transaction (either over-the-counter or cleared through a CCP) and provide aggregate data to the public and detailed information to qualified entities (such as ESMA itself and other regulators).

²³⁰ Niamh Moloney, Reform or revolution? The Financial Crisis, EU Financial Markets Law, and The European Securities and Markets Authority, in 60 *International and Comparative Law Quarterly* 521 (2011), at 528.

²³¹ According to Regulation (EU) No 513/2011, all powers and responsibilities concerning supervision and enforcement with respect to CRAs have moved to ESMA from 1 July 2011.

²³² Supervisory measures in case of infringements include, e.g., temporary prohibitions from issuing a rating, suspensions of the use of credit ratings for regulatory purposes throughout the EU, and withdrawal of registration (Art. 24).

²³³ See ESMA, Credit Rating Agencies Annual Report 2012 (ESMA/2013/308), 18 March 2013. A thematic work plan is also prepared (ESMA, 2013 CRA Supervision and Policy Work Plan (ESMA/2013/87), 23 January 2013).

order to comply with the restrictions imposed by the *Meroni* doctrine,²³⁴ the Regulation provides a complete list of the possible infringements (Annex III) as well as of the criteria to be followed in order to select the supervisory measure and to set the applicable Level of the pecuniary sanction (including a catalogue of aggravating and mitigating factors – Annex IV).²³⁵ As a result, a very narrow – albeit not negligible – discretion is left to ESMA, whose main task therefore consists in the ascertainment of the relevant facts, rather than in the calibration of the applicable sanction.

5. Evaluating the regulatory and supervisory architecture: in the shadow – or in the light? – of Meroni

5.1. Meroni and the institutional tensions framing ESMA powers: legal perspective

Thus far, the analysis has shown how ESMA is held accountable towards the EU institutions and other stakeholders through a wide array of techniques, which operate both on a structural (governance) and on a functional (procedural) basis. However, in other instances, the normative tools do not fit into the category of accountability, that necessarily refers to control over the exercise of delegated powers, but rather show limitations in the delegation itself that are imposed by the EU Treaties, as interpreted by the CJEU.²³⁶ The emerging image is, overall, that of an Authority which enjoys a multitude of significant powers – in particular if compared with CESR’s – but has limited independence in some key areas, especially in the regulatory sphere.

The CJEU jurisprudence has indeed played a crucial role in shaping the relationship between ESMA and the Commission. The *Meroni* decision²³⁷ has *inter alia*²³⁸ established that powers may be delegated from the Commission to

²³⁴ See par. ... below.

²³⁵ See Raquel García Alcubilla and Javier Ruiz del Pozo, *Credit rating Agencies on the Watch List*, OUP, 2012, at 111-3 and 119-24.

²³⁶ For ESMA, as well as for the ESAs in general, the high level of accountability is not matched by an equal independence. For a quantitative analysis see Donato Masciandaro, Maria J. Nieto, and Marc Quintyn, *Exploring the Governance of the New European Banking Authority – A Case for Harmonization?*, 7 *Journal of Financial Stability* 204 (2011), at 210 (“the score for accountability [...] seems excessively high given the modest level of the Authority’s independence”).

²³⁷ ECJ, Case 9-56, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, 13 June 1958, at 152.

²³⁸ Other important principles set by the decision are that “a delegation of power cannot be presumed” (*Meroni* decision, at 151), so that it must be explicitly stated, and that the delegated entity cannot be entrusted with “powers different from those which the delegating authority itself received under the treaty”. Hence, the need arises to ensure that the accountability tools to which the delegating institution is subject still apply to the delegated entity (*ibid.*, at 149-50).

other EU bodies only if this does not entail any conferral of discretion amounting to actual policymaking. In the Court’s wording, delegation of powers “can only relate to clearly defined executive powers”. If, on the contrary, the delegated entity enjoyed a wide margin of discretion entailing the “execution of actual economic policy”, then the institutional equilibrium of powers enshrined into the Treaties would be breached, as no legislative or discretionary executive power is granted to bodies other than the EU institutions. Furthermore, according to the ECJ decision rendered in *Romano*,²³⁹ these bodies may not be empowered to adopt acts “having the force of law”.²⁴⁰ Both decisions, and *Meroni* in particular, are still considered “good law” by the majority of scholars and, most important, by the Commission²⁴¹ and the other EU institutions.

When weighting the actual relevance of *Meroni*, some consideration shall be given to the main concern that apparently drove the judges at the time the decision was rendered, i.e. the need to ensure that no substantial exercise of power could escape the judicial review of the CJEU. Before the Lisbon treaty was adopted, no review of legality was explicitly²⁴² envisaged for the acts adopted by bodies other than the EU institutions, so that any substantial transfer of powers would have deprived the persons concerned of the standing to sue with regard to delegated acts.²⁴³ However, new Art. 263 and 267 now cover acts of bodies, offices, and agencies of the Union, too, and the rationale for ensuring legal protection to natural and legal persons within the EU appears much less of a concern. Therefore, the relevance of *Meroni* nowadays mainly depends on the fact that its ruling reflects the perspective that agencies are executive or (quasi-)regulatory bodies detached from the central EU administrative body, which was confirmed by the limitations that the new Art. 290 and 291 TFEU pose to delegated policymaking.²⁴⁴ On its turn, this perspective hinges upon the nature of EU

²³⁹ ECJ, Case 98/80, *Giuseppe Romano v Institut national d'assurance maladie-invalidité*, 14 May 1981, par. 20.

²⁴⁰ In other languages, the decision rather refers to acts having a normative nature (*Shammo* (2011), 1892-3). As opposed to *Meroni*, *Romano* involved delegation of powers by the Council and the European Parliament.

²⁴¹ Chiti (2009), at 1421-2. See also e.g. the Impact Assessment accompanying the proposal for Regulation (EU) No 513/2011 (SEC(2010) 678), 2 June 2010, at 13 and 30.

²⁴² Judicial accountability was deemed admissible under the case-law of the CJEU (Case T-411/06, *Sogelma v. European Agency for Reconstruction (EAR)*, 8 October 2008, par. 36-7), but the Lisbon Treaty has removed residual doubts (*Hofmann, Rowe and Türk* (2011), at 801; *Laurence Coutron, L'infiltration des garanties du procès équitable dans le procédures non juridictionnelles*, in *Caroline Picheral* (ed.), *Le droit à un procès équitable au sens de droit de l'Union européenne*, Limal, 2012, 181 ss.).

²⁴³ See *Meroni* decision, at 152. On the importance of judicial review as a rationale of *Meroni* see *Chamon* (2010), at 297.

²⁴⁴ See *Craig* (2012), at 154-7.

institutions as entities entrusted with powers assigned by Member States under the Treaties,²⁴⁵ so that sub-delegation should be allowed within the limits set by the same treaties. Some scholars have stressed that, in the case of the ESAs, *Meroni* is not pertinent because delegation is actually made by (authorities within) Member States, rather than by the Commission,²⁴⁶ a process which makes the Europeanization of competences easier because of the involvement of national supervisors within the agencies, or because delegated powers are not always clearly conferred on the Commission by the Treaties.²⁴⁷ Notwithstanding this line of reasoning, the rationale of the decision is still generally deemed applicable on a convincing basis, as according to the Treaties the said powers would be in principle granted to one of the EU institutions,²⁴⁸ and only in a subsequent logical – albeit not chronological – moment, they can be conferred to the agencies.²⁴⁹ On the contrary, conferral of executive powers entailing wide discretion on bodies other than the EU institutions – or, one might even argue, other than the Commission²⁵⁰ – would surreptitiously amend the Treaties by way of secondary legislation.²⁵¹

Similarly, it has also been stressed that *Meroni* is already repeatedly violated by the founding Regulations of many EU agencies, which are entrusted with tasks going well beyond a pure executive function;²⁵² the same line of reasoning also highlights that the Court of First Instance (now General Court) has already recognised, without deeming it unlawful, the attribution of similar powers to EU agencies.²⁵³ However, although the evolution of the administrative governance inevitably pushes towards the enlargement of independent agencies' powers, it should also be stressed that the new trends do not entail the conferral of any

²⁴⁵ See also, for a more flexible stance, Majone (2002), at 328.

²⁴⁶ See e.g. Geradin (2005), at 10; for a review Shammo (2011), 1893.

²⁴⁷ See e.g. Chiti (2009), at 1422.

²⁴⁸ The greater flexibility that the ECJ has adopted when assessing the EU institutional balance (see Chiti (2009), 1423-4; for further references see also Shammo (2011), 1894), although well grounded in the lack of a sharp separation of powers within the EU (Majone (2002), at 323-4), cannot therefore be easily invoked in order to restrict *Meroni*, because the issue at stake is, rather than the position of an institution vis-à-vis the others, the conferral of powers to one institution in particular, namely the Commission, under the Treaties (Art. 17(1) TEU).

²⁴⁹ Convincingly, Schneider (2009), at 37-8; Shammo (2011), 1894.

²⁵⁰ In line with the principle of the unity and integrity of the executive functions: see fn. [on COM(2002) 718 final]. For a convincing critique see Chiti (2009), at 1441.

²⁵¹ See also Neergaard (2009), at 609-15.

²⁵² Chamon (2010), 293.

²⁵³ Chamon (2010), 294, referring to the decision rendered in the Case T-187/06, *Schröder v. Community Plant Variety Office (CPVO)*, 2008. The decision is also noteworthy because it clearly sets the limit of judicial review of administrative decisions involving technical appreciations. See also Hofmann, Rowe and Türk (2011), at 244.

discretion with regard to economic policy, as no balance of rival interests is performed by the EU agency, at least formally, or is explicitly or implicitly allowed by the CJEU decisions.²⁵⁴

The continuing relevance of the traditional CJEU case-law²⁵⁵, not only for executive agencies,²⁵⁶ is made clear by the action brought on June 2012 by the United Kingdom against the EU Parliament and the Council which questions the legality of Art. 28 Reg. (EU) No 236/2012 on short selling, which allows ESMA to take *ad hoc* measures limiting short selling and other equivalent practices when required by the need to safeguard the financial stability of the Union.²⁵⁷ The applicant's plea is mainly grounded on alleged violation of the *Meroni* and *Romano* decisions. As for the former, it is claimed that ESMA enjoys excessive discretion with respect to the evaluation of the triggering events,²⁵⁸ the selection of the measure to adopt, and their respective scope of application. As for the latter, the nature of the said measures is called into question, since according to the claimant the conditions set by ESMA in order to limit the acquisition of net short positions may have the force of law to the extent that they are addressed – as the case may be – to a wide set of market participants and concern an equally wide array of financial instruments.

²⁵⁴ The *Schröder* decision was rendered in a case involving the refusal, by the CPVO, to acknowledge the existence of a new plant variety for which a right was sought for; although the evaluation may result in wide technical appreciation, it does not amount to any sort of policy discretion. For a similar distinction see Shammo, *EU Prospectus Law*, Cambridge University Press, 2011, at 33-4; Craig (2012), at 174. On conflicting objectives in regulators' activity see OECD (2013), at 25.

²⁵⁵ See Chiti (2009), at 1421; Griller and Orator (2010), at 20; Craig (2012), at 155, all referring *inter alia* to C-301/02, *Tralli v. ECB* (2005), and T-369/94 and 85/85, *DIR International Film and others v. Commission* (1998), as case-law confirming the validity of *Meroni*.

²⁵⁶ See Art. 6(1) Council Regulation (EC) No 58/2003.

²⁵⁷ Case C-270/12, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, European Parliament. See also text accompanying fn. ... above.

²⁵⁸ See however the Level 2 measures further detailing the circumstances where a threat to the orderly functioning and integrity of financial market (Art. 24(3) Regulation (EU) No 918/2012). It is also worth stressing that, although ESMA's technical discretion is undoubtedly wide, the objective of the measures to be adopted is one, and one only, namely safeguarding the financial stability, so that ESMA's decisions do not seem to entail any policymaking (in general, Weiß (2009), at 58). The discretion only amounts to decide whether short selling bans may or may not, in specific market conditions, have net positive outcomes, in the light of the highly debatable global effects of such measures on liquidity and volatility (see e.g. Matthew Clifton and Mark Snape, *The Effect of Short-Selling Restrictions on Liquidity: Evidence from the London Stock Exchange* (2008), available at ...; Alessandro Beber and Marco Pagano, *Short-Selling Bans around the World: Evidence from the 2007–09 Crisis*, 68 *Journal of Finance* 343 (2013); Emiliós Avgouleas, *A New Framework for the Global Regulation of Short Sales, Why Prohibition is Inefficient and Disclosure Insufficient*, 15 *Stanford Journal of Law, Business and Finance* 376 (2010)).

5.2. Evaluation of efficiency

As the previous analysis shows, the ESAs are, within the plethora of EU agencies, among those which have been granted with the most extensive powers. However, commentators tend to consider that the existing architecture, while improving the previous system, is far from perfect²⁵⁹. According to this view, European authorities should enjoy wider independence in the rulemaking activity²⁶⁰ and greater discretion in the application of penalties.²⁶¹ A similar evolution would indeed render ESMA more similar to the traditional model followed by national independent authorities,²⁶² and it appears that the accountability mechanisms in place under Reg. 1095/2010 are adequate enough to support an increased level of autonomy.²⁶³

In the following, we evaluate whether, and to what extent, the ESFS should be improved.

5.2.2. ESMA independence and accountability. The preferable equilibrium: regulation.

Opinions supporting increased discretionary powers for ESMA and the other ESAs have merits. An enhanced autonomy would avoid duplication of work and, therefore, would facilitate concentration of the available skilled resources within a single entity.²⁶⁴ On the contrary, the existing division of roles between ESMA and the Commission in the adoption of technical standards avoids any direct judicial accountability for the former, which formally only finalises a preparatory act,²⁶⁵ and only focuses on the latter, which might simply rubber-stamp draft technical

²⁵⁹ According to Wymeersch (2012), at 238, the current system is “untenable” in the long run.

²⁶⁰ See in general Majone (2002), at 332; Geradin (2005), at 16. For a more positive view with reference to the ESAs see Di Noia and Furlò (2012), at 184.

²⁶¹ E.g. Ferran (2012), at 142; Moloney (2011a), at 78; Ead. (2011b), at 222, who however also cautions against the risks of an excessive centralisation of financial supervision.

²⁶² All the European agencies cannot be equated to national independent authorities because they lack independence from the Commission (Chiti (2009), at 1399). As opposed to what the same Author stresses (*ibid.*, at 1400-2), we believe that stakeholder involvement – which is widely resorted to by independent authorities at national level: see e.g. Financial Conduct Authority (FCA), Corporate governance of the Financial Conduct Authority, April 2013, at 4 and 37; Sec. 9 and 10 UK Financial Services and Markets Act 2000, as amended – does not do not compromise independence (see also text accompanying fn. [no trade-off]).

²⁶³ See fn. [Masciandaro-Nieto-Quintyn].

²⁶⁴ See fn. [pooling] above. However, it would be naïve to expect staff reductions by national competent authorities as a consequence of the increased centralization of regulatory and supervisory functions.

²⁶⁵ As a consequence, draft technical standards may be appealed neither under Art. 263 TFEU nor under Art. 60(1) Reg. 1095/2010 (fn. [IBM decision]).

standards whose substance has been determined by a separate entity endowed with better technical expertise on the topic. In order to avoid formal and automatic endorsement, the same opinion goes on, the Commission should hire further skilled staff should be hired, thus calling into question the reason why some administrative functions are outsourced to external entities.²⁶⁶ Moreover, a simplified architecture for the adoption of quasi-regulatory measures and for the exercise of direct supervisory powers against market participants could streamline the administrative process, making it quicker and less prone to political bargaining – and, possibly, to turf wars – involving the three EU institutions.

The complexity of the procedure established by Art. 17(4) Reg. 1095/2010 and of the quasi-regulatory functions of ESMA well illustrates these points. In both cases there is a duplication of tasks for ESMA, who is directly involved with the interested parties and, when applicable, with the stakeholders (let alone the issue of expertise), and for the Commission, that in order to substantially fulfil its role must repeat, at least in part, the evaluations made by ESMA at an earlier stage. The incomplete transition towards a supervisory architecture which is increasingly vertically centralized, as a consequence of transfers of powers from Member States to ESMA, but horizontally decentralised at its high level therefore amplifies the costs of the administrative machinery and reduces the advantages of regulatory autonomy. As long as these arrangements are maintained, part of the benefits arising from the long-term credibility of independent authorities are lost, since the Commission, which is more prone to political pressure²⁶⁷ and, reportedly, to lobbying activity,²⁶⁸ may be exposed to problems of time inconsistency.²⁶⁹

On the other hand, the risk should not be neglected that an increased delegation of powers to ESMA could also have some side effects. Although regulatory

²⁶⁶ Chamon (2010), at 292.

²⁶⁷ Especially in the wake of financial crises, independent authorities may of course also suffer, although to a lesser extent, from impulsive reactions that can break previous supervisory or regulatory patterns (Enriques (2009)).

²⁶⁸ See Ferran (2004), at 104.

²⁶⁹ Although particularly dangerous for the monetary policy (see fn. ... supra), sudden variations in the regulatory policy are also unwelcome by investors. For an example, compare Charlie McCreevy, The future of regulation, 13 May 2009 (policymakers should not swing the pendulum of re-regulation too far, nor they should fall prey to populist tendencies; the Commission will not adopt regulation that may encourage risk aversion) with Michel Barnier, Speech at the European Parliament – ECON Committee, 31 January 2010 (“no market, no financial player, no product, no territory should be able to escape anymore relevant regulation”). See also Eilís Ferran, Crisis-driven regulatory reform: where in the world is the EU going?, in Eilís Ferran et al. (eds.), *The Regulatory Aftermath of the Global Financial Crisis*, Cambridge University Press (2012b), at 81.

competition is no panacea,²⁷⁰ an agency having a monopolistic access to quasi-normative instruments may pursue self-interested policies²⁷¹, disregard innovation,²⁷² or indulge in excessive regulation,²⁷³ either in the form of establishing excessively restrictive measures when a delegation of powers is needed under Art. 290 and 291 TFEU, or by adopting non-binding standards, thus charging national supervisors and market participants with a “comply or explain” obligation,²⁷⁴ not to mention that the vanishing of any regulatory competition among national authorities – and between these latter and ESMA – as a consequence of the single EU-wide rulebook would exacerbate this risk.²⁷⁵ Most important, ESMA possible perverse incentives would not be counterbalanced, at the EU level, by the most straightforward accountability mechanism, namely the designation (and renewal) of office holders at top-level positions within the Authority,²⁷⁶ as the Commission has no say in the appointment of the members of the Board of Supervisors, that in this respect remain accountable towards their national governments.²⁷⁷ Although the head of a local regulators could not be deemed responsible at Member State level for having pursued the ESMA institutional objectives at the detriment of national interests,²⁷⁸ she would encounter no risk of being removed – or not to be renewed – should she choose

²⁷⁰ Chiti (2009), at 1426 (“it is not demonstrated that administrative competition among national authorities induces the latter to modify their practice in relation to the mobility of the regulates”).

²⁷¹ Ferran (2004), at 91.

²⁷² Jonathan R. Macey, Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty, 15 *Cardozo Law Review* 909 (1994), at 934.

²⁷³ Excessive regulation may also pursue self-interested strategies to the extent that it responds to the misplaced desire to exclude frauds regardless of the costs, as a consequence of the skewed public perception of the agencies’ performance (Gonzalo Gil, *Independent Financial Regulators*, CNMV Bulletin 2007 (Quarter III) 37 (2007), at 47-8). See also fn. [Goodhart].

²⁷⁴ See e.g. Choi and Pritchard (2003), at 45; Enriques and Tröger (2008), at 550. In the US, where a single regulator with weak competition constraints is in place, the issue of regulatory costs, and of the accountability mechanisms that could curb overregulation, is still an open one: see the proposal for a SEC Regulatory Accountability Act (H.R. 1062) adopted by the House of Representatives on 17 May 2013 (enhancing the impact assessment procedure to be followed by the SEC before passing new rules and imposing a review of the regulations in force every five years according to a specific assessment plan).

²⁷⁵ Enriques and Tröger (2008), at 539.

²⁷⁶ Proposals for a new appointment mechanism applicable to all the EU agencies, which would give equal space to Council and Commission appointees within the authorities and which would not ensure Member States representation, have been subsequently abandoned (compare the Commission’s Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies (COM(2005) 59 final), 25 February 2005, at 7, with the 2012 Interinstitutional Joint Statement, at 5).

²⁷⁷ Craig (2012), at 162 and 173; Chamon (2010) at 301-2.

²⁷⁸ ESMA, (ESMA/2011/009), at 11; Wymeersch (2012), at 241-2.

the symmetric approach, since Member States would have no incentives to substitute those who are performing well from a national perspective at the expense of full compliance with Art. 42 Reg. (EU) 1095/2010.²⁷⁹

Similar consequences may be partially avoided if a slight competition between ESMA and the Commission is retained. A potential challenge to ESMA's monopolistic power could in fact be beneficial to the extent that it limits the side effects of having a single regulator in place, such as reduced incentives to reach a higher level of efficiency; after all, the Commission can already reject or amend technical standards "in very restricted and extraordinary circumstances", so that the departure of ESMA's model from the pattern of traditional independent authorities is not very pronounced in this respect.²⁸⁰

A more effective system could be one based on tacit approval – rather than express endorsement – by the Commission, that would retain the ability to veto and/or to modify draft technical standards, and possibly non-binding measures, prepared by ESMA.²⁸¹ In other words, the Commission would enjoy a power comparable to a call option on the final step of the (quasi-regulatory or supervisory) administrative process,²⁸² substantially in line with its current position. At the same time, the process would be streamlined whenever – as the case will ordinarily be – no need for intervention arises, because the option would be exercised only when "in the money", namely when there is room for improving the quality of regulation. The promptness of the review could also take advantage of a system of enhanced monitoring by means of one or more signalling devices ("fire alarms")²⁸³ that could flag regulatory or supervisory measures that may be

²⁷⁹ See Pierre Shammo, *EU Prospectus Law*, Cambridge University Press, 2011, at 39-40. See also Geradin (2005), at 29-30; Shapiro (2011), at 117.

²⁸⁰ In the first period of ESMA's life, the Commission has never refused endorsement of draft technical standards (Moloney (2013), at 75). Moreover, although departure from Level 2 technical advices and/or draft implementing measures is not unknown (*ibid.*, at 76), it remains an exception (Ferran (2012b), at 73-5).

²⁸¹ Commission's approval of technical standards by "non opposition" was originally suggested in the Communication on European Financial Supervision (COM(2009) 252 final), at 9.

²⁸² Ian Ayres, *Optional Law. The Structure of Legal Entitlements* (2005), Chicago University Press. According to another classification, the Commission's option could be a "switcher", i.e. a system adopted to shift the regulatory power from an entity to another (Shammo, *EU Prospectus Law*, Cambridge University Press, 2011, at 41-2).

²⁸³ Matthew McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 *American Journal of Political Science* 165 (1984). See also Spence (1997), at 415; Rose-Ackerman, at 7-10; Rubenstein (2010), at 2209-10; Kirti Datla and Richard Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, Working paper (2012), at 42-3.

problematic, thus facilitating the Commission's role as a "police patrol".²⁸⁴ Within this context, the SMSG might enjoy a special status if it were entrusted with the power to manifest its scepticism about new developments. A similar albeit informal role could also be played by one or more individual members of the Group, with a view to voice opposition by a dissatisfied constituency.²⁸⁵

The mechanism would partially resemble the system envisaged by the Congressional Review Act, which mandates (executive and) independent authorities to submit the rules they have adopted, before they can take effect, to the US Congress²⁸⁶ – in case the relevant provision qualifies as "major rule",²⁸⁷ a sixty-days period is granted before the entry into force.²⁸⁸ The US Congress is then enabled to adopt a disapproval resolution, hence invalidating the said rule, the President on his turn being able to veto the disapproval unless this is passed with a supermajority quorum.²⁸⁹ If compared with the US system, the mechanism we conjecture might reach a higher level of effectiveness, as the veto power granted to the Commission would not face the limitations that affect *ex post* collective controls such as those performed by the US Congress, namely collective action problems²⁹⁰ and filibustering by interested minorities.²⁹¹ For the same reason, the existing European Parliament's and Council's power to revoke the delegated power to adopt regulatory technical standards could not work as a perfect substitute of the Commission's role in counter-weighting an hypothetical monopolistic regulatory power of the ESMA. At the same time, unlike the US system where the President may only step in once the Congress has adopted a disapproval resolution, under the mechanism we suggest the veto power of the Council and the Parliament would not depend on an intervention by the Commission, and the legitimacy of the regulatory procedure *vis-à-vis* the TFEU would thus be preserved. In this context, the regulatory impact assessment under Art. 10(1) and 15(1) of the founding Regulation would enhance accountability towards the Commission, which has the expertise required to evaluate the quality

²⁸⁴ Adoption of *ex post* measures of accountability (see Spence (1997), 415 ss.; Shammo (2011), 1903), as opposed to *ex ante* controls, would provide more flexibility to the system, avoiding Commission enrolment when this would only delay the adoption of normative measures.

²⁸⁵ Rubenstein (fn. ...), at 2209.

²⁸⁶ 5 U.S.C., § 801 (a)(1)(A).

²⁸⁷ A "major rule" is, with some simplifications, a rule that according to the Office of Management and Budget may significantly affect the economy (5 U.S.C. 804(2)).

²⁸⁸ 5 U.S.C., § 801 (a)(3)(A).

²⁸⁹ See The Mysteries of the Congressional Review Act (editorial note), 122 Harvard Law Review 2162 (2009), at 2166.

²⁹⁰ Spence (1997), at 436; see also *supra*, fn. [Arrow].

²⁹¹ See Rubenstein (2010), at 2209.

of the economic justifications submitted by ESMA.²⁹² Once more, this equilibrium may build upon the US experience – where the Office of Information and Regulatory Affairs (OIRA) review the cost-benefit analysis of the federal executive agencies – while partially improving it, since the absence of OIRA review for independent agencies, including the Securities and Exchange Commission, is regarded as a drawback of the US regulatory process.²⁹³

5.2.2.1. *Feasibility according to the Meroni doctrine*

The solution we propose would inevitably push against the boundaries of the *Meroni* limitations, as it might marginalize the Commission – thus widening ESMA’s powers – by allowing the entry into force of technical standards in the absence of an explicit endorsement. However, we believe that granting a veto power to the Commission would still fit the institutional architecture set by the Treaties as interpreted by the CJEU jurisprudence.²⁹⁴

Of course, no problem arises if one adopts the view that the *Meroni* doctrine can now be relaxed because review by the CJEU is ensured of EU bodies as well as for institutions, let alone the subsequent decisions, or because protection of the EU institutional equilibrium shall be more flexibly interpreted.²⁹⁵ However, we have already highlighted that *Meroni* is still widely regarded as good law by the EU institutions, and that the distinction between discretion on economic policy and technical appreciation still represents a guiding criterion for the European jurisprudence when assessing the tasks of EU agencies.²⁹⁶

It is nonetheless true that the new institutional context, together with the presence of the Board of Appeal for the three ESAs,²⁹⁷ lessens some of the concerns that originated *Meroni*²⁹⁸ and therefore allow for a flexible interpretation of its dictum. In particular, it has been convincingly posited that a power to veto the decisions taken by the delegated authority, or to refer the matter to the legislator, would preserve the Commission’s prerogatives under the Treaties, as

²⁹² The Impact Assessment Board may provide useful expertise. See also the EU Commission Communication on Impact Assessment (COM(2002) 276 final).

²⁹³ Robert W. Hahn and Cass R. Sunstein, A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis, 150 University of Pennsylvania Law Review 1489 (2002), 1496 and 1531-2; Geradin (2005), at 44; Datla and Revesz (2012), at 5. For possible relevant developments in the US securities regulation see fn. [nota su US bill].

²⁹⁴ See also Wymeersch (2012), at 238 (the Lisbon instruments, such as revoking the delegation, could also apply to the relationship between the Commission and the financial authorities).

²⁹⁵ See fn. [Chamon 297] and [Chiti] above.

²⁹⁶ See fn. ... supra.

²⁹⁷ On the relevance of internal review mechanisms in the light of *Meroni* see Griller and Orator (2012), at 29.

²⁹⁸ Geradin (2005), at 15; Schneider (2009), 40 and 43; Chiti (2009), at 1422-4; Griller and Orator (2010), at 29; Craig (2012), at 176.

interpreted by the CJEU.²⁹⁹ In the field of securities regulation not only would this equilibrium be a legitimate solution, but, as our previous analysis shows, it might also represent an efficient device with a view to providing ESMA with the adequate incentives.

If what has been argued thus far is correct, possible limitations to our suggestions could rather stem, on a general basis, from the interpretation of Art. 290 and 291 TFEU, which were invoked by the Commission during the preparation of the ESAs Regulations in order to question the delegation of quasi-regulatory powers.³⁰⁰ We point out this relevant critique for the sake of completeness, but our analysis can leave the question unanswered because, however grounded the objection may be,³⁰¹ it would rather question the legitimacy of the actual system, rather than that of the one we are proposing.

5.2.3. EU financial supervision. Fostering integration (while not necessarily uniformity)

A monopolistic exercise of powers may also negatively affect supervisory and non-mandatory normative measures such as guidelines and recommendations.³⁰² While the creation of a single EU securities and exchange commission has long been advocated by some scholars,³⁰³ the risk has also been stressed that an excessive centralization of supervisory powers may have significant adverse consequences,³⁰⁴ such as the loss of expertise which was developed through the years by adaptation to local peculiarities and the increase of systemic risk if the standardised supervisory approach proves flawed.³⁰⁵

Overall, ESMA's role in financial supervision will mostly depend on its ability and willingness to adopt a proactive stance vis-à-vis the national regulators so as to either push towards a higher level of coordination, which would facilitate cross-border activities, or to allow for more flexibility in the practice of supervision, which would ensure some degree of competition and experimentalism. Even

²⁹⁹ Griller and Orator (2010), 27-8. For some critiques see however Chamon (2011), at 292, and Neergaard (2009), at 627 (“a tacit endorsement does not seem sufficient to lead to that the act is adopted by the Commission”).

³⁰⁰ Busuioac (2013), at 117. After the enactment of the three ESAs, the statement is repeatedly reported in many Commission's legislative proposals (ibid.).

³⁰¹ See e.g. Merijn Chamon, EU agencies between Meroni and Romano or the devil and the deep blue sea, 48 Common Market Law Review 1055 (2011), at ...; contra Shammo (2011), at 1884.

³⁰² We address guidelines and recommendations here because they fall outside the purview of Art. 290 and 291 TFEU and because they are important drivers of national supervision.

³⁰³ For a complete review see Wymeersch (2007), at 239-41.

³⁰⁴ A model explaining divergent implementation and justifying a flexible and decentralized approach to harmonized enforcement is developed by Pheon Nicolaides, The Political Economy of Multi-Tiered Regulation in Europe, 42 Journal of Common Market Studies 599 (2004).

³⁰⁵ Moloney (2011b), at 186-8; Shammo (2012), passim. See also, in general, Romano (2013).

though the architecture of the ESFS follows a hub-and-spoke model that centralizes rulemaking but remits supervision to the periphery,³⁰⁶ ESMA's ability to promote a common supervisory culture and to foster shared supervisory practices may bring in the long run to a stricter alignment of the approaches adopted by competent authorities. In this respect, the precision of the opinions provided under Art. 29 and the stringency of peer reviews according to Art. 30 – whose results are however made public only if the relevant national authority so agrees – will be key to set an appropriate level of coordination,³⁰⁷ depending on the concerned matter.³⁰⁸ For instance, anecdotal evidence, which was also found some statistical confirmation in the past,³⁰⁹ shows that prospectus approval can be either a quick formality or a lengthy process, depending on the jurisdiction involved, and that peer reviews have hitherto³¹⁰ been a soft accountability tool.³¹¹

As far as supervision is concerned, the main difference between ESMA and a traditional authority lies in the fact that the intensity of the scrutiny relies on the inclination of the majority of the scrutinized entities,³¹² whose representatives seat in the Board of Supervisors.³¹³ Therefore, the functions of ESMA can be exercised with variable intensity depending on the willingness of national authorities to either enter a game where they can export their supervisory practices,³¹⁴ with the risk of being also forced to import those of the others, or to

³⁰⁶ Commission Communication COM(2009) 252 final (fn. ...), at 9; Wymeersch (2012), at 235-6.

³⁰⁷ On the role of peer review processes see Gràinne De Búrca, Robert O. Keohane, and Charles Sabel, *New Modes of Pluralist Global Governance*, forthcoming 45 *New York University Journal of International Law and Politics* (2013) (in the most advanced forms of transnational governance, peer reviews are not merely a platform for exchanging views among participants. Rather, they are an instrument for learning from diverse experiences and for determining whether solutions adopted by one or more participants are defensible).

³⁰⁸ The scope of review is wide, as it is not limited to supervisory practices but also involves the governance of supervisors (Art. 30) and their independence (Recital 41). See Partsch (2011), at 46.

³⁰⁹ CESR, *Report on the Supervisory Functioning of the Prospectus Directive and Regulation (CESR/07-225)* (2007), at 31.

³¹⁰ A stricter approach might however be adopted in the future: Moloney (2013), at 80.

³¹¹ Moloney (2011b), at 184.

³¹² Although the three ESAs cannot be properly defined as a supervisor of the supervisors (Wymeersch (2012), at 236), their statutory powers inevitably entail a scrutiny of national practices.

³¹³ The ESAs maintain the strong intergovernmental feature of the pre-existing 3L3 committees (Partsch (2011), at 48; in general, Weiß (2009), at 63).

³¹⁴ See Shammo (2012), at 26 (the EFSF is likely to work effectively if national authorities challenge each other when necessary). See also Moloney (2011a), at 71-2 (institutional consensus within ESMA is a fragile one, as authorities may want to break the equilibrium in order to establish their influence in the EU).

maintain a leeway of discretion at national level.³¹⁵ By analogy with the unstable patterns characterising cartellists' conflicting incentives,³¹⁶ national authorities may be willing to endorse anticompetitive agreements while regaining autonomy when possible. In a similar context, a crucial factor in setting an equilibrium between these two extremes is the majority required for the adoption of decisions by the Board of Supervisors,³¹⁷ because the possibility to decide by qualified – e.g. for Level 3 acts³¹⁸ – or even by simple majority, as opposed to the consensus mechanism followed by CESR,³¹⁹ may increase the incidence of the authorities that are more willing to back up ESMA's interventionism. This analytical framework might also work, at least in part, when supervision is centralized, as is the case for CRAs,³²⁰ with regard to delegation of specific tasks to local authorities (Recital 15 and Art. 30 Reg. (EU) No 1060/2009),³²¹ which allows slight decentralisation of direct supervision.

To the extent that the desired legislative outcome is a more integrated European supervision,³²² the most effective lever in the hand of the legislators would seem to be a revision of ESMA governance.³²³ The revision should be aimed at reducing the influence of national regulators in the management, while leaving to the Board of Supervisors a monitoring role over the general conduct of the Authority. Such equilibrium could be reached by shifting the barycentre of the governance to the Management Board,³²⁴ which should also be reshaped as a body comprising independent members, to be appointed by the EU institutions – e.g. by the Council upon non-binding opinion of the Parliament.³²⁵ This would ensure

³¹⁵ See Moloney (2011b), 214-5. Different equilibria may also be reflected in the latitude of delegation of tasks by the competent authorities to ESMA according to Art. 28 of the founding Regulation.

³¹⁶ Keith N. Hylton, *Antitrust Law. Economic Theory & Common Law Evolution* (2003), Cambridge University Press, at 68-71..

³¹⁷ Shammo (book), at 40; Shammo (2012), 12-6.

³¹⁸ Fischer-Appelt (2009), at 24.

³¹⁹ However, the possibility to pass resolutions with the opposition of one or two members and, in case of disagreement, to resort to qualified majorities reduced hold-up problems (Art. 6 Charter of the Committee of European Securities Regulators (CESR/08-375d), September 2008).

³²⁰ See par. For some effects of the *Meroni* doctrine on supervision see text accompanying fn. [sanzioni CRAs].

³²¹ Alcubilla and Ruiz del Pozo (fn. ...), at 56.

³²² Claims for further integration of EU supervision were first voiced at EU level by CESR, *Which supervisory tools for the EU securities markets? Preliminary Progress Report* (CESR/04-333f), October 2004 (“Himalaya Report”), at 10-7.

³²³ See fn. [McNollgast].

³²⁴ This would also enhance the distinction between monitoring and managing functions (see Enriques and Hertig, fn. ..., at 367-8).

³²⁵ Di Noia and Furlò (2012), at 186 (referring to the ECB model).

that the existing conflict of interests in the management of the Authority by national supervisors is partially overcome.

Either in the new governance we propose or as a consequence of the interplay among national authorities within the existing organization, greater interventionism in national supervision is likely to arise³²⁶ at least in specific circumstances, as the case may be in the aftermath of a financial turmoil or a serious default.³²⁷ In comparison with its role in the exercise of regulatory powers, the Commission seems here less at the centre of the stage, so that the relationship between ESMA's independence and accountability resembles more closely that of a traditional supervisor, in spite of the limitations imposed by the EU treaties as interpreted by the CJEU.³²⁸ To be sure, Commission's enforcement under Art. 258 TFEU is more incisive and direct intervention under Art. 17, 18 and 19 is a last resort device,³²⁹ but the mere possibility that ESMA's initiative brings to a formal infringement procedure confers effectiveness its recommendations, not to mention the benefits of the fast track procedure it ensure.³³⁰ Moreover, ESMA enjoys greater autonomy in its coordinating functions under Art. 29 and 30, as well as in some specific areas such as CRAs³³¹ and short selling supervision,³³² where it is free to set the preferred intensity of restrictions to local authorities. Even taking into account the possibility to grant the Commission with the power to raise concerns in front of the European Parliament and the Council in cases where a decision is likely to violate EU law or contradict EU policy objectives,³³³ reliance in a possible Commission's role as an effective counterbalancing force for ESMA's excessive interventionism would hence be misplaced, considering its limited expertise in supervision, as well as its natural tendency to foster Europeanization of local powers.

Bearing this in mind, a possible way to improve the current architecture would be to ensure that ESMA has a duty to evaluate if the supervisory practices it promotes (either by way of guidelines and recommendations or otherwise) should be regarded as the only admissible ones or, on the contrary, whether divergent approaches may reasonably be adopted upon request. When the latter is the case,

³²⁶ Ferran (2012b), at 48-9

³²⁷ Interventionism may represent the biggest problem also at horizontal level (Enriques (2009)), although in similar circumstances a slightly political-oriented body such as the Commission is unlikely to take a restrictive stance.

³²⁸ See par.

³²⁹ Moloney (2011b), 202 and 212.

³³⁰ ESMA, (ESMA/2011/009), at 5.

³³¹ See par.

³³² See text accompanying fn.

³³³ As envisaged by the Roadmap agreed upon by the European institutions as a follow-up to their common approach on EU decentralized agencies (fn. ...).

deviations from the standard behaviour should be allowed under continuous monitoring by ESMA itself, in order to ensure that deviations do not result in any outright failure to fulfil the objectives set forth by Art. 1(5) Regulation 1095/2010.³³⁴ The entity of the minority opposing the adoption of guidelines within the Board of Supervisors and the position adopted by the SMSG or its constituencies might be proxies for the admissibility of deviations, thus fostering a system that would always ensure a more integrated supervision, but a more uniform one only when needed.³³⁵

A similar exercise would admittedly be a difficult one, as it would entail a self-analysis by the competent authorities of the inherent limits of the supervisory tools they usually employ.³³⁶ However, one of the most important lessons from the crisis is the confirmation that supervisors, as well as market participants, face rationality constraints. A wise approach to regulation would be one that acknowledges that the wisdom of financial authorities is limited, as there are causal relationships in financial markets phenomena which still have to be understood in their mechanisms, and are therefore unknown, as well as events which have not even yet been identified as possible future outcomes, thus being unknowable.³³⁷ Moreover, even undisputed causal correlations may turn out to be mistaken when exceptional occurrences, such as fat tails, emerge.³³⁸ This awareness suggests avoiding any boldness when selecting the supervisory strategy to be adopted in certain fields, because major flaws that go unnoticed may magnify the consequences of future financial turmoil to the extent that they are unanimously adopted in all the relevant jurisdictions, thus increasing systemic

³³⁴ For a similar, albeit more articulated, proposal in the field of transnational banking regulation see Romano (2013). Note that experimentalism and diversity can also be beneficial outside prudential regulation, as a consequence of the need to adapt surveillance to the specificity of the local context and of the systemic consequences of financial market supervision (Art. ... Reg. No 1095/2010)

³³⁵ See also Ferran (2012b), at 51-2 (warning against the risk that supervisory judgment by local authorities within the EU may be displaced in the future).

³³⁶ For some suggestions on how to address these new supervisory challenges see Julia Black, *Restructuring Global and EU Financial Regulation: Character, Capacities, and Learning*, in Wymeersch, Hopt and Ferrarini (eds.) (2012), at 43-4. See also Wymeersch (2011), at 449 (guidance and recommendations may prove particularly useful in fields where formal rulemaking would create unpredictable externalities).

³³⁷ Francis X. Diebold, Neil A. Doherty and Richard J. Herring, Introduction, in Francis X. Diebold, Neil A. Doherty and Richard J. Herring (eds.), *The Known, the Unknown, and the Unknowable in Financial Risk Management: Measurement and Theory Advancing Practice*, Princeton University Press (2010), at

³³⁸ Richard J. Herring, *The Known, the Unknown, and the Unknowable in Financial Policy: An Application to the Subprime Crisis*, 26 *Yale Journal on Regulation* 101 (2009), at 102.

risk.³³⁹ On the contrary, a more flexible strategy could allow for monitored experimentalism³⁴⁰ and would ensure that the specificities related to each single market and jurisdiction are taken into account.³⁴¹ A stricter approach³⁴² should on the contrary be adopted in fields where no such epistemological uncertainties exist and the adoption of a single rulebook need consistent implementation across the Union. For instance, once the policy decision is taken by Level 1 legislations that issuer choice where to file an application for prospectus approval is substantially ruled out³⁴³ and maximum harmonization is chosen, there is no reason not to ensure that each national authority strictly complies, when performing supervision, with the applicable rules on the timing and intensity of the process for approval, as well as on the information that issuers may be requested to disclose.

The adoption of a nuanced approach like the one we suggest is only occasionally reflected by the applicable rules.³⁴⁴ For instance, the duty to adopt temporary measures and to reconsider them periodically or upon request of a Member State, according to Art. 9(5) Reg. No 1095/2010, is a step in the direction of experimentalism and shows that the legislators were conscious of the inevitably limited rationality of supervisors.³⁴⁵ However, the regulatory framework for guidelines and recommendations seems to push in the opposite direction. First, it suggests that ESMA should manage supervisory diversity in an adversarial manner, through a mechanism which closely resembles a “name and shame” system, rather than according to a traditional “comply or explain” approach where noncompliance, if exhaustively motivated, does not entail reputational damages and could even be appreciated to the extent that it allows a coherent adaptation of the general principles. Second, although guidelines and recommendations are not

³³⁹ For instance, supervisors may have divergent preferences as regards the viability of risk-based approach (which concentrates supervision on areas where the risk is higher that one or more statutory objectives are not met: see UK Financial Conduct Authority (FCA), *Journey to the FCA*, October 2012, at 42). But even if a risk-based approach were recommended as the only strategy being able to maximize the expected benefits of supervision in a context of limited resources (for the continuing appeal of this technique under the new trend of “intensive supervision” in the UK see Julia Black, *Charting the fortunes of Principles Based Regulation*, in Valerio De Luca; Jean-Paul Fitoussi, Roger McCormick (eds.), *Capitalismo prossimo venturo. Etica, regole, prassi*, Università Bocconi Editore, Milano (2010), 276), different techniques would still be applicable to risk-analysis and, most important, to the translation of the analysis into actual surveillance.

³⁴⁰ On “experimentalist governance” and the role of peer review process see De Búrca et al. (fn. ...).

³⁴¹ See Moloney (2011b), at 203-4; Shammo (2012) 22-3.

³⁴² See Wymeersch (2011), at 454-5.

³⁴³ See Art. 2(1)(m) and 13 Directive 2003/71/EC. See also Enriques and Tröger (2008), at 530-1.

³⁴⁴ For a theoretical framework see Hornstein (2005), at 944-9.

³⁴⁵ See *supra*, text accompanying fn. [Choi-Pritchard].

binding, the provision by Art. 16(4) that the annual reports outline how the Authority intends to ensure compliance by dissenting competent authorities clearly shows that divergent supervisory practices can be *de facto* allowed for limited periods of time only.

A less pretentious approach to supervision, as the one we suggest, would require that the founding regulation be amended. *De lege lata*, a similar result could be achieved by framing guidelines and recommendations so as to explicitly provide for some margins of monitored variance in specific contentious issues and by calibrating supervisory measures in a flexible manner. However, absent a rule whereby ESMA would be requested to consider the feasibility of deviations from its standards and to motivate denials, this would be a second best solution. In the first place, ESMA's evaluation would not easily be subject to judicial accountability in case they are adopted through non-binding measures,³⁴⁶ in spite of their actual effectiveness in limiting discretion by local supervisors. Second, for individually binding measures, judicial review of proportionality and subsidiarity (Art. 5 TEU), which are weakly policed by the EU judiciary,³⁴⁷ would not be likely to effectively prevent excessive intrusion.

³⁴⁶ Alina Kaczorowska, *European Union Law* (2013), Routledge, London and New York, at 417 (only acts with binding legal effects fall under Art. 263 TFEU). However, some openness has been shown by the CJEU to possible review, under Art. 263 and 277 TFEU, for guidelines capable of producing external effects (see Hofmann, Rowe and Türk (2011), at 807-8).

³⁴⁷ Moloney (2011b), at 219. See also, for the ECJ jurisprudence, fn. [smoke flavour].