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**THE EUROPEAN SECURITIES AND MARKETS AUTHORITY:
ACCOUNTABILITY TOWARDS EU INSTITUTIONS AND STAKEHOLDERS**

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ABSTRACT: The creation of the European Securities and Markets Authority (ESMA) has marked a major step towards more integrated rulemaking and supervision in the European financial market sector. ESMA organization and operations are strongly influenced by the position of the new Authority within the EU institutional framework. While ESMA governance still displays some features of a network among national supervisors, its quasi-regulatory functions and supervisory tasks are constrained by limitations directly or indirectly dictated by the Treaties. The paper highlights how the traditional concepts of independence and accountability towards EU Institutions and stakeholders apply to ESMA. ESMA's relationships with national competent authorities, which retain direct supervisory powers with limited exceptions, and the EU Institutions, which are competent for the adoption of legislative and non-legislative regulatory measures, are also considered. The analysis shows that tasks conferred to ESMA fall short to match its relatively high accountability, which is on the contrary aligned with international best practices. The EU Commission announced a possible revision for the European Supervisory Authorities (including ESMA) framework for 2014: we suggest therefore some reform proposals that could help streamline regulatory and supervisory functions at EU level, thus allowing ESMA to better exploit its potential while avoiding the risk of excessive centralization of supervisory powers.

KEYWORDS: European Securities and Markets Authority (ESMA); Securities and Markets Stakeholder Group; financial regulation and supervision; rulemaking; independence; accountability; delegation of powers; Meroni; Romano.

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1. Introduction

This paper addresses the structure, functions, and powers of the European Securities and Markets Authority (ESMA), one of the three supervisory agencies created in 2010 by the European Union in reaction to the financial crisis. ESMA is certainly a more powerful institution than the Committee of European Securities Regulators (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, as well as being an instrument for further Europeanization of supervisory functions. Central features of ESMA are its stronger accountability and, more generally, 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 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 by which the European Supervisory Authorities (ESAs) were created, 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. 2-3).

In light of this theoretical analysis, par. 4.1.1 describes the main features of ESMA organisation. After sketching out the characteristics of the internal governance structure, the paper specifically focuses on the devices the founding Regulation deploys 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 point, a distinctive feature of ESMA internal organisation is the presence, mandated by the founding Regulation, of a stakeholder group which performs relevant advisory tasks and closely interacts with the other bodies of the Authority. In par. 4.1.2, 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. 4.2.1-2 address ESMA governance from a procedural standpoint, and show how the organizational structure dynamically operates when quasi-

regulatory functions are carried out under the post-Lisbon institutional balance. Par. 4.2.3 performs a similar analysis for supervisory powers.

Finally, par. 5 evaluates the efficiency of the current legislative framework in 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 to devise possible solutions to strengthen the European supervisory arrangements, better protect citizens, and to rebuild 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 proposed the creation of a European Systemic Risk Board (ESRB) to deal with macro-stability issues,² 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 framework was confirmed by the ECOFIN Council on 17 November 2010. The new bodies were established as from January 2011.³

In the ESFS, macro-prudential supervision is entrusted to the ESRB⁴, which is responsible for identifying and analysing systemic developments and operates as a

¹ Report by The High-Level Group on Financial Supervision in the EU (*de Larosière Report*), Brussels, 25 February 2009, 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.

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. CRAIG (2012), 143).

⁴ 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,

network among the three ESAs⁵, the European Commission, as well as the European and National Central Banks. National financial supervisors and the Chairperson of the Economic and Financial Committee are also represented at the ESRB without voting rights.⁶ Micro-prudential supervision (*rectius* regulation) is the responsibility of the ESAs, including their Joint Committee, and national supervisors. The legal basis of the ESAs is Art. 114 of the Treaty on the Functioning of the European Union (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 according to 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 The ESAs’ founding Regulations mention this case-law and specify that, in line with ECJ reasoning, the establishment of the Authority facilitates the uniform application and consistent interpretation of EU law, and therefore contributes to financial stability (see e.g. Recital 17 Regulation No 1095/2010).⁹

such acts have a significant political weight (WYMEERSCH (2011), 450). ESMA has committed to address such recommendations on a “comply or explain” basis (ESMA (2011/009), 8).

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 Regulation (EU) No 1092/2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board. The secretariat of ESRB was attributed to the ECB with Council Regulation (EU) No 1096/2010 “conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board”: the Regulation has not been issued under art. 114 TFEU but under art. 127(6) after a proposal from the European Commission, the opinion of the European Parliament and the opinion of the European Central Bank itself. This has paved the way to the establishment of the Single Supervisory Mechanism over banks, which attributes supervisory competences to the ECB using the same tool.

⁷ NEERGAARD (2009), 617 *et seq.*

⁸ See ECJ, Case C-217/04, *United Kingdom v. Parliament and Council* (ENISA ruling), para 44; TRIDIMAS (2012), 66. The ruling is regarded – together with the “smoke flavouring” decision: see ECJ, Case C-66/04, *United Kingdom v. Parliament and Council*, para 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 (2011a), 1906, 1909 *et seq.*), which might challenge, if widely interpreted, the delegation of certain tasks to the ESAs. See however the Advocate General’s opinion in ECJ, Case C-270/12, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union, European Parliament*, which reiterates the validity of Art. 114 as legal basis for the creation of the ESMA (para 34) while deeming it inappropriate for the conferral of powers resulting in a replacement of national decision making (para 52).

⁹ While the Recital offers a formal justification for the establishment of the ESAs, substantial critiques have been raised of 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), 70 *et seq.*).

Within this institutional design, the 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 is appropriately regulated and supervised and that investors are sufficiently protected (Arts. 1(5) and 8).

3. Independence and accountability of financial regulators: an overview

The importance of 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 easily influenced by 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. Agencies may also facilitate the adoption of decisions on controversial and intractable problems where the majority mechanism could not produce efficient results.¹² Furthermore, independent bodies detached from the central government may ease the implementation of public participation, e.g. through open consultations or stakeholder representation, so as to convey more information to the administrative process.¹³ Finally, the creation of agencies in the

¹⁰ The time-inconsistency explanation is typically developed for monetary policy by central banks. It reasons that absent independence from politics, they would be tempted to systematically inflate prices to lower unemployment and increase nominal gross output (see e.g. ROGOFF (1985), 1173 and 1180).

¹¹ ALESINA & TABELLINI (2008), 440 and 444 *et seq.* While this model is widely applied for – monetary policy (fn. 10) and – prudential regulation, information regulation is sometimes regarded as a field which could also be left to the lawmakers (QUINTYN & TAYLOR (2003), 269). However, time inconsistency affecting law-making and supervision in financial markets can also discourage investments.

¹² ARROW (1950); SPENCE (1997), 443.

¹³ On the informative benefits of participation see SPENCE & CROSS (2000), 124 *et seq.*

EU context, besides facilitating the pooling of knowledge, may also help reduce coordination problems among Member States¹⁴ through centralisation of powers, since these latter are more willing to accept delegation to agencies,¹⁵ in whose governing bodies they are typically represented, rather than to the Commission.¹⁶

One might of course disagree that certain decisions, which are inherently political, should be left to bureaucrats who lack democratic legitimacy.¹⁷ 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 institutional tasks by those bodies requires some degree of independence from both politicians and the regulated entities.¹⁸ When a function has been carved out of the State's central 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 substantial control over the agency – in this case, politicians – would not bear responsibility for their choices¹⁹.

¹⁴ MAGNETTE (2005), 7 *et seq.*

¹⁵ Commission Communication COM(2008) 135 final, 2 and 5; TRIDIMAS (2012), 63.

¹⁶ For further analysis see EGEBERG *et al.* (2012), 29 *et seq.*

¹⁷ Strong political implications are typical of central banking (on the optimal allocation of monetary policy decisions between politicians and central banks see EIJFFINGER & HOEBERICHTS (2002), 5) while the same critique is less appealing for other non-majoritarian institutions (especially in the EU: MAJONE (2002), 327), including securities supervisors, although technical decisions in the area of financial markets law may have redistributive effects as well (see SHAPIRO (1997), 280 and 284 *et seq.*). See also OECD, Principles for the Governance of Regulators – Public Consultation Draft (2013), 34 *et seq.*

¹⁸ See MAJONE (2005), 130 *et seq.* See also OECD (2013), 32 *et seq.*

¹⁹ Shifting responsibility in order to avoid the risk of being blamed is another explanation for the delegation of regulatory and supervisory functions (KANE (1990), 756), at least where 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 (FIORINA (1982), 46 *et seq.*). In this respect, it should come as no surprise that the preferences of politicians tilt towards the attribution of responsibility for some sensitive and potentially unpopular choices to an external agency (ALESINA & TABELLINI (2005), 17 *et seq.*), while covertly trying to influence the latter at the same time (for an insightful description see e.g. ALLISON (2013), 21 *et seq.*). 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, 8).

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.²⁰ Supervisors' employees may be driven by career concerns, which can for instance provide incentives to pass window-dressing measures instead of more effective remedies which are less perceivable by the public.²¹ In financial regulation, this is all the more true because the objectives of supervisors are harder to define,²² and therefore to measure,²³ if compared to those of other independent entities such as central banks.²⁴ Statutory duties are inevitably vaguely defined, that vagueness being exacerbated by the long-term nature of the relationship between supervisors and stakeholders. Long-term funding statutes cannot contemplate all possible future states of the world, and thus cannot always effectively constrain regulators' behaviour. On the contrary, the incompleteness of the statutes requires that administrative discretion steps in to fill the gaps.²⁵ Moreover, the presence of multiple direct and indirect stakeholders increases the risk that the agents deviate from their duties towards the principals,²⁶ as any measure which would not satisfy one group of interests might well be justified on the basis that it is aimed at

²⁰ For an example in the field of deposit insurance and bank resolution see KANE (1990), 760.

²¹ See ENRIQUES (2009), 1153 *et seq.*, for further thoughts on the way regulators can also tackle concerns about public opinion by adopting purportedly ineffective measures with a view to showing that some effort is made in a context where taking no action would be more rational.

²² See CRAIG (2012), 161 (precise definition of agency objectives greatly enhances accountability).

²³ For instance, as pointed out by GOODHART (2001), 151, progress toward the statutory objective to reduce financial crime is very difficult to ascertain. Think about prevention of financial fraud: 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 the supervisor uncovers a fraud, it is usually blamed for not having detected it earlier, before any damage occurred. Both cognitive biases skew the perception and the measurement of supervisors' effectiveness and, still worse, may foster overregulation (see text accompanying fn. 295).

²⁴ One can refer to the potentially conflicting objectives of transparency and orderly functioning of financial markets (as illustrated by a recent proposal to broaden the scope for delaying the publication of inside information where doing so would threaten financial stability: Art. 12(4) Proposal for a Regulation of 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 & TAYLOR (2003), 284; ALLISON (2013), 18 *et seq.*), but financial supervision is especially susceptible to the consequences of multiple statutory functions (HÜPKES *et al.* (2005), 1582).

²⁵ See MASCIANDARO *et al.* (2012), 21 and 33.

²⁶ MASCIANDARO *et al.* (2008), 834; CONZELMANN *et al.* (2010), 4.

protecting other principals. Accountability tools are devised to tackle these shortcomings.

According to the traditional view, in democratic systems the power to make discretionary choices can only be conferred upon unelected bodies to the extent that such bodies are legitimized by accountability. 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:²⁷ 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.²⁸ This analytical framework contributes to explaining why the three ESAs, as well as other supervisors across the globe and other EU agencies,²⁹ 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 administrative processes,³⁰ but the early involvement of those affected by the impending rules also makes spontaneous compliance more likely:³¹ in both cases, accountability increases the (actual or perceived) legitimacy of regulatory action.³²

4. ESMA accountability: Governance and procedures

In every jurisdiction, legislators adopt various strategies to constrain regulators' discretion as prescribed by relevant statutes and to ensure that bureaucrats employed by agencies strive to fulfil statutory objectives.³³ For the sake of exposition, we roughly divide these strategies in two sets, with the caveat that this taxonomy inevitably includes some overlapping areas.³⁴

²⁷ MAJONE (1994), 26 (independence and accountability should be regarded as mutually reinforcing rather than mutually exclusive).

²⁸ HÜPKES *et al.* (2005), 1577.

²⁹ VOS (2005), 128 *et seq.*

³⁰ See *infra* fn. 80 and accompanying text.

³¹ HÜPKES *et al.* (2005), 1579 *et seq.* and 1587 *et seq.*

³² Therefore, input-oriented legitimacy contributes to increasing output-oriented legitimacy (see the classification by SCHARPF (1999), 6 *et seq.*).

³³ See BOVENS (2007), 455 *et seq.* In many respects, the strategies adopted in administrative law resemble those enacted to address agency problems in company law. For a taxonomy and an overview see ARMOUR *et al.* (2009), 37 *et seq.*

³⁴ MACEY (1992), 95.

The first set refers to the governance of agencies,³⁵ 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 regulatory action, including the legislator.³⁶ Nonetheless, no matter how effective *ex ante* arrangements can be, they will never ensure that regulators and supervisors always comply with their duties – or, stated more cynically, that they do not break the leash the legislator may be willing to maintain.³⁷ 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 thus comprises mechanisms aimed at ensuring ongoing accountability.

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.³⁸ Although ESMA is formally referred to as a “Union body” (Art. 5), rather than as an agency,³⁹ its status eased the attribution of wider responsibilities and streamlined the interaction with other EU bodies, thus facilitating 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 require that the institutions be informed on – and authorise

³⁵ In this paper, the term “governance” refers to ESMA internal (or corporate) governance (see e.g. QUINTYN (2007), 7).

³⁶ MCCUBBINS *et al.* (1989), 440 *et seq.* See also MACEY (1992), 100 (the ability to structure the initial design of an agency is the most powerful device available to politicians).

³⁷ HORNSTEIN (2005), 931.

³⁸ This ensures that ESMA retains not only a regulatory and supervisory independence, but also an institutional and budgetary one (QUINTYN & TAYLOR (2003), 275 *et seq.*).

³⁹ After the enactment of the ESAs, the three EU institutions have agreed to adopt the term “agency” when establishing new authorities in the future. The common approach should avoid any confusion as for the qualification of these EU bodies (see the Joint Statement of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, 12 June 2012, 3 (hereinafter: 2012 Interinstitutional Joint Statement)).

them to step into – the rulemaking and supervisory processes. We first analyse ESMA accountability from the standpoint of its organisation.

The governance of ESMA is composed of 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),⁴⁰ 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 responsibility for the final adoption of supervisory decisions (Art. 43), including draft regulatory and implementing technical standards under Arts. 10 and 15.

The Board of Supervisors is chaired by the Chairperson (who has no voting right) and is composed of the (voting) “head”⁴¹ of one competent authority for each EU Member State. The Board also comprises four non-voting members from the Commission, the ESRB and the other two ESAs respectively. While attendance by the ESRB’s and ESAs’ representatives fosters coordination among the European constituencies of the ESFS, the presence of a member appointed by the Commission facilitates the maintenance of the unity and integrity of EU policy in the field of financial regulation.⁴² The Executive Director attends the Board meetings, without voting power (Art. 1(6))⁴³. 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

⁴⁰ The two-tier governance system adopted 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, 5). Dualistic (two-tier) governance is allowed, when required by efficiency reasons, by the 2012 Interinstitutional Joint Statement, at 5.

⁴¹ However, the rule is applied in a flexible manner so as to allow high-level representatives other than chairperson to join the Board of Supervisors (e.g., the Danish FSA is represented in the Board of Supervisors, as well as in the Management Board, by one of its Deputy Director General). Furthermore, each competent authority must appoint a high-level alternate, who may replace the acting member in the Board of Supervisors, when the latter cannot attend. In Member States where more than one authority is responsible for supervision according to ESMA Regulation, those authorities shall agree on a common representative; nevertheless, when an item to be discussed by the Board of Supervisors does not fall within the competence of the national authority represented in the Board, a representative from the relevant national authority, who shall be non-voting, may also join the Board.

⁴² See Commission Communication, The operating framework for the European Regulatory Agencies, COM(2002) 718 final, 2.

⁴³ There are no explicit exceptions to the Executive Director’s right and obligation to attend the Board of Supervisors, but attendance should be excluded for meetings convened to decide the possible renewal of the mandate. The same applies to the Chairperson in case of a new mandate.

expenditures for the incoming year fall into the latter category,⁴⁴ but final approval of the budget – one of the main accountability tools in the hands of the institutions⁴⁵ – is remitted to the Council and the Parliament, since it is part of the General Budget of the EU (Art. 63).⁴⁶ ESMA general costs are financed in part (about 40 per cent⁴⁷) by the national authorities, depending on their respective weight in voting power, and in part by the General Budget (Art. 62); however, ESMA may also collect fees from some regulated entities, such as credit rating agencies.⁴⁸

The Chairperson is also a member of the Management Board, where she has voting power as opposed to what happens when she is sitting in the Board of Supervisors. The Management Board comprises also six other members “elected by and from” the heads of national competent authorities for a two-and-a-half year term, renewable once. These members’ mandates 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, a representative of the Commission and the Executive Director attends, without voting power, the meetings of the Management Board. Direct access to information regarding the Board’s discussion should improve coordination when executing the decisions representing the outcome of the Board debate.⁴⁹

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 Management Board, on the other hand, is demonstrated 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 (Arts. 43 and 47). The two programmes are also transmitted for information to the European Parliament, the Council, and the Commission,⁵⁰

⁴⁴ Another example are decisions taken upon recourse against a provisional ban on a financial activity decision (Art. 9(5)); see para 4.2.3.1.

⁴⁵ See e.g. SHAPIRO (1997), 288; RUBENSTEIN (2010), 2207 (harnessing the purse strings is crucial, as “an unfunded agency is a powerless one”).

⁴⁶ See also Regulation (EU) No 1268/2012 enacting Art. 208 Regulation (EU, Euratom) No 966/2012.

⁴⁷ WYMEERSCH (2012), 311.

⁴⁸ Direct collection of funds enhances agency independence, in light of the risks embedded in budget approval by political bodies (SELIGMAN (2004)).

⁴⁹ See also BUSUIOC & GROENLEER (2012), 141 *et seq.*

⁵⁰ According to the 2012 Interinstitutional Joint Statement, at 9, the Commission should issue a formal advice on the annual and multi-annual work programmes.

and are made available to the general public. Therefore, besides being an internal governance tool in the hands of the two Boards,⁵¹ the work programmes also enhance ESMA 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 (Arts. 1(5) and 8),⁵² as institutional tasks alone may hardly operate as an effective benchmarks against which performance can be measured.⁵³ Second, the ESMA agenda allows all 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 participate in the administrative process.⁵⁴ Third, the work programmes facilitate measuring ESMA performances *ex post*, with respect to the targets that the Authority itself has deemed appropriate for its management.⁵⁵

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”⁵⁶) is appointed by the Board of Supervisors, but the European Parliament, which also hears the selected candidate, has one month to object the designation.⁵⁷ An even stronger role for the EU Parliament is foreseen for the nomination of the Executive Director, as the appointment of the latter by the Board of Supervisors⁵⁸ requires the preliminary confirmation by the Parliament (Art. 51).

⁵¹ 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 allows the Board of Supervisors to internally control employee performance in light of the devised programme.

⁵² The dissemination of a business plan makes it easier to identify flawed analysis of market developments and misguided regulatory responses (see ENRIQUES & HERTIG (2011), 375; see also OECD (2013), 51).

⁵³ FERRAN (2003), 296 *et seq.*

⁵⁴ ESMA (2011/11), 2.

⁵⁵ All the more so since the ESMA annual report (see below) sheds light on the performance of supervision (ENRIQUES & HERTIG (2011), 375; 2012 Interinstitutional Joint Statement, 11). Key performance indicators may also facilitate *ex post* evaluation (see *ibid.*, 9; OECD (2013), 63 *et seq.*).

⁵⁶ As opposed to what happened for CESR’s selection procedure, the Chairperson is not appointed among the representatives of national competent authorities (ESMA (2011/009), 9).

⁵⁷ European Parliament, Green light from Parliament for financial watchdog chiefs, press release 3 March 2011.

⁵⁸ “On the basis of merit” and “following an open selection procedure” as is the case for the Chairperson. See also the 2012 Interinstitutional Joint Statement, at 6.

At the end of the five-year term, the Chairperson undergoes an evaluation performed by the Board of Supervisors, which assesses the results achieved during the Chairperson's tenure and compares 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)).⁵⁹ Moreover, the Chairperson is held accountable during the tenure through a section of the annual report which reports on his performance during the year (Arts. 43(5) and 47(6)).

The annual report is also a key tool for the accountability of ESMA as a whole,⁶⁰ because it provides information ESMA regulatory and supervisory activities, as well as on administrative and financial matters (Art. 53(7)). It is formally proposed by the Management Board for 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 to allow scrutiny by stakeholders that can check the actual performance described in the report against the policy envisioned by the previously issued work programmes.

While the annual report enhances ESMA accountability by shedding light on its regular activity, the founding Regulation provides for a more structural triennial review of ESMA (and ESAs') organization and achievements.⁶¹ According to Art. 81, the Commission shall examine⁶² 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 arrangement⁶³ – or a single regulator.⁶⁴ Finally,

⁵⁹ Although the norm is not crystal-clear, the assessment seems to be required only at the end of the first five years of tenure (Art. 48(4)). However, nothing seems to prevent a similar exercise from being performed at the end of the extended terms of office, possibly in the annual report according to Art. 43(5). Even though this would not be a device as effective as the evaluation of the first term, it would represent a mechanism for the accountability of the Chairperson, if only from a reputational standpoint.

⁶⁰ 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).

⁶¹ See also the 2012 Interinstitutional Joint Statement, at 13 (suggesting overall evaluation every five years). Review under Art. 81 will also present the opportunity 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).

⁶² See EU Commission, Public consultation ESFS review. Background document (2013), 2.

⁶³ See the *DE LAROSIÈRE* Report (2009), 58.

⁶⁴ See DI GIORGIO & DI NOIA (2009), 215; DI NOIA & FURLÒ (2012), 186 *et seq.* (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, WYMEERSCH (2007), 239 *et seq.*

accountability towards the EU institutions is ensured on *ad hoc* basis by the power of the European Parliament and the Council to solicit opinions from ESMA (Art. 34) or to ask the Chairperson to make statements and deliver written reports on specific topics (Art. 50).

The Board of Appeal, comprising six members and six alternates who step in whenever there is suspicion that a member is not acting independently (or if a member resigns), is a joint body of the three ESAs in charge of reviewing decisions taken by ESMA according to its supervisory powers (Art. 60).⁶⁵ 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),⁶⁶ but the requirement that Board of Appeal members must be independent when ruling reduces the risk that the Commission itself may *de facto* second-guess ESMA decisions (Arts. 59(1) and (2)). Independent scrutiny is all the more important since, according to some scholars,⁶⁷ the scope of the review goes beyond questions of legality. For decisions taken by the Board of Appeal or, where conditions set forth by Art 60(1) Reg. 1095/2010 are not met, by ESMA itself, review by the Court of Justice of the European Union (CJEU) under Art. 263 TFEU⁶⁸ ensures also judicial accountability (Art. 61) of administrative action.⁶⁹ In such circumstances, preliminary scrutiny by the Board performs a filtering function against specious appeals.⁷⁰

Besides “vertical” accountability vis-à-vis the Parliament and the Council, and judicial accountability, “horizontal” accountability⁷¹ within the ESFS is also

⁶⁵ See *infra* para 4.2.3. 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). For an overview see BLAIR (2013).

⁶⁶ Although the relevance of supervisory experience may foster like-mindedness thus making controls more indulgent (PARTSCH (2011), 48 *et seq.*), the risk of self-reference is reduced by the Commission’s previous selection of candidates.

⁶⁷ WYMEERSCH (2012), 295.

⁶⁸ Or according to Art. 265 in case of failure to act.

⁶⁹ 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 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).

⁷⁰ GERADIN (2005), 33.

⁷¹ See also SCHILLEMANS (2008), 190 *et seq.* (horizontal accountability involves control by either peers or stakeholders, and better performs its functions if accompanied by vertical accountability).

facilitated by the Joint Committee⁷², 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.⁷³ 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 regulatory capture, such as accounting principles, since deeper confrontation among peers may prevent the passage of misguided decisions 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 extra-EU regulators.⁷⁴ Although Reg. No. 1095/2010 contains no explicit provision, as opposed to peer reviews promoted by ESMA itself among national competent authorities (Art. 30), a similar result can be reached through ESMA membership in international organizations or networks of supervisors.⁷⁵

4.1.2. The Securities and Markets Stakeholder Group

Next to the Joint Committee, the most straightforward form of horizontal accountability in the governance of ESMA is the Securities and Markets Stakeholder Group.⁷⁶ Direct representation of stakeholders within the organisation

⁷² The Joint Committee is composed of Members and Observers. Members are the Chairpersons of EBA, EIOPA and ESMA (who rotate as chairperson of the Joint Committee on a yearly basis, in the following order: EBA, ESMA, and EIOPA), and the Chairperson of each sub-committee (including especially the chairman of the most important one, on financial conglomerates). Observers are the Executive Directors of EBA, EIOPA and ESMA, a representative of the European Commission and a representative of the European Systemic Risk Board.

⁷³ Arts. 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 generally, 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).

⁷⁴ Peer review is increasingly adopted 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 (DIMITROPOULOS, (2012), 12 *et seq*).

⁷⁵ E.g. ESMA is an 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).

⁷⁶ Following SCHILLEMANS (2008), 179, we consider accountability towards stakeholders as horizontal accountability (other possible classifications being downward, citizen, or societal accountability).

of regulators has gained momentum during the last decade as an accountability tool and a device to render rulemaking more effective.⁷⁷ Many European regulators have set up boards representing consumers and the regulated industry to improve the effectiveness of their regulations and strengthen the grounds of their legitimacy.⁷⁸ From the standpoint of accountability, engagement of multiple stakeholders in the agency governance 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 groups that will be affected by new regulation increases the likelihood of spontaneous compliance, thus enhancing the effectiveness of resulting rules by providing incentives which go beyond the traditional command-and-control approach based on the deterrence of sanctions.⁷⁹ Finally, from the point of view of effective rulemaking, stakeholder engagement embeds wider expertise in the regulatory process,⁸⁰ thus increasing the quality of 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 stake.⁸¹ Concerns for legitimacy, accountability, and effectiveness explain why authorities often ensure stakeholder participation on a self-regulatory basis, in the absence of a provision mandating their creation. This was the case before the creation of ESMA, with CESR's Market Participants Consultative Panel, which along with other topic-specific expert groups set up on specific topics assisted CESR in the performance of its tasks.⁸² 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 they are not sufficient.⁸³ Early involvement of the private sector is pivotal to properly approaching a matter from the outset,⁸⁴ while gathering information only

⁷⁷ FERRAN (2004), 96.

⁷⁸ HÜPKES *et al.* (2005), 1600 *et seq.*

⁷⁹ See the compliance pyramid outlined by AYRES & BRAITHWAITE (1992), 35. See also HORNSTEIN (2005), 959; IGLESIAS RODRIGUEZ (2011), 4 and 15 (also highlighting the risk of capture); OECD (2013), 56.

⁸⁰ Past experience in EU financial regulation shows that involvement of private actors has often helped define appropriate policy responses (FERRAN (2004), 59 *et seq.* and 82 *et seq.*).

⁸¹ Labelling a subject matter as "technical" may shield the debate on the relevant draft measures from the public at large (DORN (2011), 6 *et seq.*).

⁸² MENDES (2011), 285 *et seq.*; IGLESIAS RODRIGUEZ (2011), 7.

⁸³ For a different view see CHITI (2009), 1402.

after an initial opinion is already crystallised in a draft position exposes the regulatory process to confirmation biases and framing effects.⁸⁵ 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 that have become obsolete over time.⁸⁶

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.⁸⁷ Moreover, as in any other delegation of tasks, an agency problem arises between stakeholder representatives and the represented stakeholders themselves. Some devices deployed to foster accountability of the regulator may therefore be replicated, at a lower level, for stakeholder panels, to ensure that the latter are responsible towards both the delegating authority and the represented constituencies; the same applies where 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 larger 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.⁸⁸ CESR's Market Participants Consultative Panel mainly comprised industry representatives, but its composition was flexible,

⁸⁴ In the US system, confrontation with interested stakeholders prior to the initiation of the notice-and-comment procedure is provided by the Negotiated Rulemaking Act (5 USC § 561 ff.), which codifies a pre-existing informal practice (ZARING (2005), 579).

⁸⁵ See CHOI & PRITCHARD (2003), 27 *et seq.* (“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”).

⁸⁶ *Ibid.*, 30 and 45.

⁸⁷ Any reform involves redistribution of wealth, so that stakeholder participation is likely to drift into rent-seeking (HERTIG (2011), 329; FERRAN (2004), 104 *et seq.*). 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 (BAXTER (2011), 175).

⁸⁸ 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, the 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), 46). See also EU COMMISSION, Transparency/Relations with stakeholders (Analytical fiche No 30; 2010), 4 (board representation of stakeholders may reach excessive size).

due to the absence of a mandating statutory provision. The Panel was grounded on the CESR Charter, which referred to “market participants, consumers and other end users of financial services”, and thus did not make the engagement of academics mandatory.

Nowadays, the ESMA founding Regulation⁸⁹ ensures representation to investors, the industry, and academia within the Securities and Markets Stakeholder Group (SMSG) (Art. 37).⁹⁰ 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,⁹¹ although recourse to a stakeholder panel does not of course shift the governance of the Authority into a pure collaborative model.⁹² In order to make representation more effective, the Regulation sets numerical and qualitative limits for membership of the SMSG, either directly or indirectly through binding guidelines to the ESMA Board of Supervisors. The SMSG comprises 30 members representing in “balanced”⁹³ proportions financial market participants operating in the Union (at least ten members), their employees’ representatives, consumers, users of financial services, and representatives of SMEs. At least five of its members shall be independent top-ranking academics.⁹⁴

The appointment procedure must 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 enhance its representativeness. It starts with a public call for applications and ends, after a two-step selection by ESMA

⁸⁹ 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).

⁹⁰ 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 authorities are represented.

⁹¹ 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: AYRES & BRAITHWAITE (1991), 435.

⁹² Collaborative governance entails direct engagement of participants in the decision making process, rather than mere consultation (ANSELL & GASH (2007), 544 *et seq.*).

⁹³ ESMA seems to have applied “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.

⁹⁴ 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 Securities and Markets Stakeholder Group (CESR/10-1466), 26 November 2010, 1).

staff and the Management Board, with a decision by the Board of Supervisors. Both the Management Board and the Board of Supervisors are informed on all the candidacies, and are not bound by previous selections.⁹⁵ The clarification of the selection procedure and 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 undefined requisites.⁹⁶

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 could be selected if a panel member had to be replaced. The candidates were asked to classify themselves into different – while sometimes overlapping – categories, depending on the interests they represented.⁹⁷ For some categories, ESMA also required the candidates to have at least either four years of experience in the financial service field or, for those representing financial institutions, four years of professional experience. ESMA then appointed the first SMSG members (and alternates):⁹⁸ 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) represent the academia. Members of the SMSG serve for two and a half years. After their term, a new selection process takes place,⁹⁹ but existing panellists may apply for a second term (Art. 37(4)). The SMSG Rules of Procedure foster individual accountability of members by providing that records of attendance and participation should be considered when deciding whether to extend the first tenure (Art. 11(4)).

The appointment procedure limits ESMA discretion in the selection of its counterparties in the regulatory dialogue and has the advantage of having already been tested, as it closely resembles the procedure adopted by the European

⁹⁵ ESMA (2013/703), 8.

⁹⁶ See MENDES (2011), 285 *et seq.*

⁹⁷ 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 (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.

⁹⁸ See ESMA decision No. 123 of 12 April 2011.

⁹⁹ ESMA (2013/703).

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.¹⁰⁰

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)).¹⁰¹ In October 2011, the SMSG approved its own rules of procedure¹⁰² (RoP), which further specify its governance. For example, the RoP provide for a chairperson, to be elected by consensus or by majority voting when this proves impossible, and a vice-chairperson (or two in case of a tie at the moment of the election) (Art. 2). While the RoP encourage decision-making by consensus, a quorum of two-thirds of the members – which can also be reached by a written procedure (Art. 8) – is in any case required both for convening the Group and passing decisions, including the adoption and amendments to the RoP; dissenting opinions supported by at least three members may also be included in the final statement (Arts. 3(3) and 7).¹⁰³ Early circulation of information among members ensures that there is sufficient time to assess 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 (Arts. 4(2) and 5(2)). Furthermore, information sharing is also facilitated by direct contacts, as the SMSG regularly meets, at least twice a year, with the Board of Supervisors (Art. 40(2) Reg. 1095/2010), and the ESMA Chairperson,¹⁰⁴ as well as a representative of the Commission, are invited to attend all the SMSG's meetings (Art. 11 RoP).

In addition to 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).¹⁰⁵ Its ability to set part of its own agenda and its direct accountability to the public at large, as well as to the Authority, increases the SMSG's independence

¹⁰⁰ A list of relevant documents was available on the ESME webpage in the Internal Market Directorate website which has been cancelled recently.

¹⁰¹ 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. The first SMSG has however recommended continuity (SMSG (2013/013), 12).

¹⁰² See SMSG (2011/SMSG/1 final).

¹⁰³ Supermajority quorums and disclosure of dissenting opinions ensure that representatives of the financial industry are not in substantial control of the SMSG (IGLESIAS RODRIGUEZ (2011), 12-3).

¹⁰⁴ ESMA Chairperson can ask the Vice-Chairperson and/or members of the Authority's Management Board and/or the Chairpersons of the relevant Standing Committees and working groups of the Authority and/or members of the Authority's staff to join specific meetings. In practice, the Chairperson and the Executive Director attend all meetings.

¹⁰⁵ Actually, up to 2013 the SMSG report has not been enclosed in the ESMA report, which only mentioned it.

from the Authority itself. A further analogy with the ESMA Regulation lies in the fact that, just as the Authority may revert to the SMSG for advice on a technical issue, the SMSG can 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) RoP). Working groups are interim committees set up to deal with specific issues and dissolved once their mandate is performed. The operating rules of working groups closely mirror those of the SMSG, as does their composition, which should where possible ensure representation of the same stakeholders as the SMSG. The Regulation and RoP does not provide for delegation of SMSG functions to working groups, so the latter operate only 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 chaired by an independent *rapporteur* – have been established on various issues.¹⁰⁶

The founding Regulation requires ESMA to provide adequate secretarial support to the SMSG. Furthermore, “adequate compensation” is granted to members representing non-profit organizations or 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 members other than academics and representatives of non-profit organizations.¹⁰⁷ These 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 stakeholders irrespective of their available financial resources,¹⁰⁸ and reflects historical underrepresentation of retail investors – usually represented by non-profit institutions – in the EU regulatory process.¹⁰⁹ Nonetheless, excluding any reimbursement of travel expenses for industry representatives may strengthen their influence and lead to capture, because as long as industry is bearing the costs of participation, it is more likely to expect specific results from members’

¹⁰⁶ SMSG (ESMA/2012/SMSG/53), 9.

¹⁰⁷ ESMA (2013/702 Rev 1), 3.

¹⁰⁸ 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-funded 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.

¹⁰⁹ FERRAN (2004), 105.

participation in the SMSG work.

This raises the issue of potential conflicts of interest of the 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 members 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 constituency¹¹⁰, and there is therefore no certainty that all the members are supported by 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 stakeholder 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 idea¹¹¹ 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 – both for the Authority and the stakeholders – to 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 can they be substituted by the organisations they belong to. Any evaluation of the opportunity to promote a proposal which may affect an organisation is therefore left to its representative members. Neither the relevant constituency nor the ESMA may object to the member’s decision.

Finally – and, once more, as with the ESMA itself – accountability of the SMSG is also ensured 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).¹¹² Although the primary function of these interactions is to ensure coordination with similar committees set either within or outside other ESAs, direct confrontation among

¹¹⁰ See the Application Form attached to ESMA (2013/702 Rev 1).

¹¹¹ See fn. 120 and accompanying text.

¹¹² Although the groups may share one or more members, multiple applications by candidates are not recommended (ESMA (2013/703), 7).

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 theoretically clear, and the legislative framework relies upon it, too.¹¹³ While regulation refers to the drafting of rules (i.e. normative acts), supervision concerns application of those rules in individual cases,¹¹⁴ which encompasses administrative monitoring and enforcement. In practice, distinguishing the two may not be easy,¹¹⁵ for instance because supervisory acts concerning multiple market participants may not always be distinguished from rules having general effects towards an identified set of addressees.

The blurred boundaries between regulation and supervision have fundamental implications under the Treaties and the CJEU case-law. While the former can only be delegated to the Commission – or exceptionally, for implementing measures only, to the Council (Art. 291 TFEU) – the latter may be entrusted to other EU bodies, although the Commission and Member States maintain the primary responsibility for the application of EU law. 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, where the measure substantially confers on the Authority the power to pass non-legislative acts having “force of law” (i.e.: a normative nature).¹¹⁶

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. 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

¹¹³ See WYMEERSCH (2011), 446.

¹¹⁴ E.g. WYMEERSCH (2005), 988.

¹¹⁵ SCHNEIDER (2009), 30 (rulemaking can no longer be strictly separated from administrative action concerning individual and concrete cases); WYMEERSCH (2007), 242 (supervision often implies regulation and vice-versa). See also FERRAN (2012a), 140 (increasingly detailed regulatory measures reduce the room for subsequent discretion in supervision).

¹¹⁶ See also *infra*, para 5.1.

that, besides lacking immediate consequences for individuals, usually entail some degree of administrative discretion.¹¹⁷ 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 before 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).¹¹⁸ 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,¹¹⁹ while full review is possible for the final standards as endorsed by the Commission.

In the following sections, 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,¹²⁰ the dynamic interaction among those engaged in the regulatory and supervisory process helps elucidate the determinants of the administrative acts which are eventually adopted. From this standpoint, the effects produced by the direct or indirect participation of the relevant actors to the process enrich the traditional – and rather static – concept of accountability.

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.¹²¹ However,

¹¹⁷ TÜRK (2013), 126 and 136.

¹¹⁸ See ECJ Case C-25/62, *Plaumann & Co. v. Commission of the European Economic Community*, 15 July 1963; HOFMANN *et al.* (2011), 826 *et seq.* According to TRIDIMAS (2012), 81, the Board of Appeal is not bound by the ECJ interpretation of the standing to sue and can therefore adopt a more expansive interpretation.

¹¹⁹ ECJ, Case C-60/81, *International Business Machine Corporation (IBM) v. Commission*, 11 November 1981, para 10.

¹²⁰ BLACK (2002), 261 *et seq.*

¹²¹ 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

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, reinforcing the legal status of the Level 3 committees and strengthening the Level 3 coordination, with a view to achieve further integration in the internal market for financial services.¹²²

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.¹²³ 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 seeks to ensure a consistent application of the European rules and to upgrade the quality of national – and, increasingly, cross-border – regulation and supervision, taking advantage of a European single rule-book applicable to all financial market participants in the internal market.¹²⁴

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, but also by a subset of Level 3¹²⁵ measures referred to as “technical standards”.¹²⁶ 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

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).

¹²² EU Commission, Review of the Lamfalussy Process. Strengthening Supervisory Convergence, 2007, (COM(2007) 727).

¹²³ 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 (CHITI (2013), 99).

¹²⁴ Recital 5, Regulation (EU) No 1095/2010.

¹²⁵ Categorisation of technical standards as Level 3 measures, albeit not unanimous, is followed by the majority of commentators (see e.g. WYMEERSCH (2012), 251; LAMANDINI (2012), 219; RAPTIS (2012), 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 would classify the said measures, based on their quasi-regulatory nature, within the Level 2 (FSA (2011), 27) or a new “Level 2+” layer (WEBER-REY (2011), 22).

¹²⁶ MOLONEY (2011a), 66.

implementing acts,¹²⁷ and are therefore remitted to the Commission for formal adoption, while others still retain their soft-regulatory nature, albeit tightened by virtue of a newly-framed “comply or explain” principle,¹²⁸ and fall into ESMA competence. But Level 2 measures, which have hitherto represented the bulk of delegated non-legislative acts, are still part of the architecture,¹²⁹ and are adopted according to the specific process set by the delegating rule under Art. 290 TFEU for delegated acts¹³⁰ or under the new comitology procedure under Regulation (EU) No 182/2011 for implementing acts to be adopted under Art. 291 TFEU.¹³¹

Non-legislative acts can therefore take a variable form, depending on their layer (Level 2 or 3)¹³² 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 the latter shall be respected.¹³³ After the enactment of the new architecture, Directive 2010/78/EU (Omnibus Directive) revised the existing Level 1 instruments in

¹²⁷ See fn. 125 for the classification of these measures under Level 3.

¹²⁸ See text accompanying fn. 183 below.

¹²⁹ Level 2 measures are likely to maintain their dominant position in the future (MOLONEY (2013), 71).

¹³⁰ 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.*, 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.

¹³¹ The comitology procedure only applies under Art. 291 TFEU, as implementing measures should in principle be left to Member States; therefore, only in this case does 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. 120). 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 and Recital 6 Regulation (EU) No 182/2011 implicitly allow for the granting of implementing power without the need to follow the comitology procedure.

¹³² 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 (2011), 28; KERJEAN (2011), 10. But see MOLONEY (2011a), 75 (the European Securities Committee is involved in the adoption of implementing technical standard by way of a “comitology-style oversight”).

¹³³ See Recital 13 Directive 2010/78/EU.

order to reshape the coordination among the legislative and regulatory measures.¹³⁴ In some areas, the new Level 3 instruments have been simply added to Level 2 acts previously in force,¹³⁵ while the intermediate regulatory layer is no longer foreseen in other fields.¹³⁶

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.¹³⁷ 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).

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),¹³⁸ 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.

Neither technical standards nor recommendations (or guidelines) may exceed the purview of the matters set by the legislative acts specifically referred to by Art. 1(2) of the founding Regulation.¹³⁹ The list of the EU directives set forth by

¹³⁴ For a review of the affected rules see FISCHER-APPELT (2009), 22 *et seq.*

¹³⁵ 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).

¹³⁶ See e.g. Art. 4(3) Directive 2003/71/EC (on specification of exemptions from the duty to publish a prospectus).

¹³⁷ 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), 71.

¹³⁸ MOLONEY (2011a), 65.

¹³⁹ 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”.

Art. 1(2) therefore circumscribes the ESMA 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.¹⁴⁰ Moreover, one of the merits of the provision also lies in its status as a single source of information which fosters the accountability of the Authority, as it makes it easier for all the interested stakeholders to know which fields of regulation and supervision ESMA is responsible for.¹⁴¹

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.¹⁴² 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).¹⁴³ While this expansion of authority is applicable, *mutatis mutandis*, to the other ESAs, ESMA is also granted exclusive competence to take “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,¹⁴⁴ enhanced coordination is needed among the three Authorities to

¹⁴⁰ 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, para 138 *et seq.*). Third, ESMA may adopt guidelines and recommendations at the outcome of peer reviews of national competent authorities (Art. 30(3)).

¹⁴¹ The EU legislator has seemingly taken on the task of keeping the provision up to date: see Dir. 2011/61/EU (amending Art. 1(2) Regulation (EU) No 1095/2010 in order to replace, within the list of relevant sources of ESMA powers, the previous generic mention of future legislation on alternative investment fund managers with a specific reference to the relevant directive).

¹⁴² For a critique of this limitation of the purview of technical standards see DI NOIA & FURLÒ (2012), 185.

¹⁴³ Reference to corporate governance is meaningful if one considers the US debate over the SEC indirect regulatory powers in this field in the presence of a State competence on company law (see ROE (2009), 12).

¹⁴⁴ WYMEERSCH (2012), 248.

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 scope of activity to include entities not addressed by specific Level 1 or Level 2¹⁴⁵ instruments (as is the case, e.g., for proxy agents¹⁴⁶).

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 to elaborate two kinds of technical standards – in the form of either regulation or decision¹⁴⁷ – to be submitted to the Commission for endorsement: regulatory technical standards (Art. 10), representing “delegated” non-legislative acts 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.¹⁴⁸

The reference to either regulatory or implementing technical standards affects the scope of ESMA and Commission 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 elements¹⁴⁹ of the legislative act, in order to ensure consistent harmonisation in

¹⁴⁵ *Ibid.*

¹⁴⁶ ESMA (2013/84). See also MOLONEY (2013), 73 *et seq.*

¹⁴⁷ Technical standards in form of decision may fit the adoption of waivers from general obligations (see WYMEERSCH (2012), 252).

¹⁴⁸ 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).

¹⁴⁹ 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-

the regulated matters.¹⁵⁰ On the contrary, when reference is made to implementing technical standards, only measures strictly implementing the Level 1 legislation are allowed (Art. 291 TFEU).¹⁵¹

Characterising the ontological differences between regulatory or implementing technical standards is, however, far from easy.¹⁵² 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)).¹⁵³ Moreover, if a measure amending the Level 1 act can be 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 adds some further prescriptions to the enacted provision,¹⁵⁴ thereby slightly changing the framework of a legislative basic act the rules of which do not provide, in that respect, full and comprehensive regulation.¹⁵⁵ 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 acts 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

matter envisaged” and “which are intended to give concrete shape to the fundamental guidelines of Community policy”).

¹⁵⁰ 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 authorisation to perform investment services on a professional basis (art. 7(4) Directive 2004/39/EC).

¹⁵¹ 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).

¹⁵² FISCHER-APPELT (2009), 25.

¹⁵³ 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 (MOLONEY (2011a), 68); once again, distinguishing between the two may therefore prove difficult, while institutional control by the European Parliament and the Council of 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. 164). See also fn. 275.

¹⁵⁴ CRAIG (2011), 673. See also the Advocate General’s opinion in case C-270/12, paras 78 and 80.

¹⁵⁵ 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 COM(2009) 673 final, 4).

provision setting out a standard communication format.¹⁵⁶ However, such a provision may also be regarded as a way to add other obligations,¹⁵⁷ 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.¹⁵⁸ 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,¹⁵⁹ while this is not the case when implementing technical standards are at stake. The ability to prevent the entry into force of the technical standards is noteworthy from the perspective of (increased) accountability by ESMA, but may raise some question about the possibly reduced independence of the quasi-regulatory procedure as a whole.¹⁶⁰ 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.¹⁶¹ 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,¹⁶² but rather to assess whether such standards involve, as a matter of fact, policy issues.¹⁶³

Along these lines, ESMA (and the Commission) are held accountable for their technical mandate more strictly when drafting regulatory technical standards than

¹⁵⁶ 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.

¹⁵⁷ *I.e.* using a specified format or a particular means of communication.

¹⁵⁸ See in general HOFMANN *et al.* (2011), 238 and 532 *et seq.*

¹⁵⁹ 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, 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).

¹⁶⁰ Independence of ESMA from the Commission is an even more sensitive issue: see below.

¹⁶¹ 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), 436).

¹⁶² Commission Communication COM(2009) 673 final, 9.

¹⁶³ DORN (2011), 12 *et seq.*

when developing implementing technical standards, as these latter quasi-regulatory measures are not subject to a formal veto.¹⁶⁴ 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 it 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.¹⁶⁵ Within such procedures, an array of devices ensures accountability to the institutions and the interested stakeholders. 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)).¹⁶⁶

The European Parliament and the Council are also constantly 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 ESMA submits them for endorsement. As the responsibility for adopting final 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”¹⁶⁷ be endorsed in part, with amendments, or not be endorsed at all; however, in no case may the Commission 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.¹⁶⁸ Whenever the

¹⁶⁴ Judicial accountability, mainly under the form of legality review triggered by Member States (Art. 263 TFEU), may in any case provide a rigorous scrutiny for implementing technical standards too.

¹⁶⁵ RAPTIS (2012), 66.

¹⁶⁶ 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 concerning consultation of the Stakeholder Group and interested parties (Art. 10(3) and 15(3)).

¹⁶⁷ See also Recital 23 of the founding Regulation, stating that “draft regulatory technical standards would be subject to amendment if they were incompatible with EU 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 HOFMANN & MORINI (2012), 430 (these limitations will guide the Court in interpretation of the Commission’s capacity to amend the draft standards). See also fn. 172 below.

¹⁶⁸ FERRAN (2012a), 143. Limitations on the possibility to have a say in the preparation of draft regulatory measures are all the more important because the Commission loses its power to adopt

Commission does not endorse a draft regulatory technical standard, it shall immediately inform the Parliament and the Council (Art. 14(1)).¹⁶⁹ 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).¹⁷⁰

Restrictions in the Commission's ability to reject the draft standards reflect, at the normative level, the underlying and substantial equilibrium in which ESMA drafts enjoy an inherent strength as a consequence of both the specialized skills of its staff and the legitimacy bestowed by stakeholder engagement.¹⁷¹ This is 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 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."¹⁷² In case of disagreement, both the statements strongly shift the burden of proof to 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,¹⁷³ but this wish is slightly in tension with the fact that the Commission has historically not restrained from amending CESR's Level 2 technical advices when it deemed it appropriate.¹⁷⁴ Indeed, notwithstanding these limitations, the Commission has hitherto interpreted its powers quite broadly. To date, endorsement has been

quasi-regulatory measures when the Level 1 delegations confers the initiative upon ESMA (see BUSUIOC (2013), 115).

¹⁶⁹ 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. 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 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)).

¹⁷⁰ 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. 189).

¹⁷¹ See SCHREFLER (2010), 315 (scientific knowledge may also serve the purpose of increasing the agencies' standing in the political arena).

¹⁷² This equilibrium underpins the theoretical framework that highlights how formal and informal elements affect the interaction among the actors in the process.

¹⁷³ ESMA (2011/009), 4 *et seq.*

¹⁷⁴ See FERRAN (2004), 88.

refused in three instances, where Commission's criticism focused either on the technical standards' compatibility with EU legislation¹⁷⁵ or on the fact that the proposed measures could imply policy choices or strategic decisions.¹⁷⁶

When the Parliament and the Council are engaged in communication concerning ESMA draft measures, 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 and ESMA mandate. Furthermore, if a disagreement exists between the Commission and ESMA, the Parliament and the Council may also back one of the two against the other. In a similar scenario, ESMA has been regarded as more likely to receive support,¹⁷⁷ as the Commission has the upper hand in any instance by virtue of its ability to block the draft technical standards on an autonomous basis.¹⁷⁸ 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,

¹⁷⁵ The first case where endorsement was refused regarded the participation of national competent authorities to colleges set up for the authorisation of central counterparties (Art. 18 Reg. (EU) No 648/2012 (EMIR); ESMA (2013/661), 4). The second case was connected to the possibility to exclude from the category of open-ended alternative investment funds those schemes which redeem shares or units less frequently than on a yearly basis (Art. 4(4), 16(1) and 19(3) Dir. 2011/61/EU (AIFMD); see EU Commission, Letter to ESMA, 4 July 2013). In this latter circumstance, ESMA disagreed with the Commission's statement and recalled the exceptional nature of the refusal to endorse draft standards. However, it aligned with the Commission position to ensure timely implementation of EU legislation (ESMA (2013/1119)).

¹⁷⁶ In the third relevant case, the Commission refused to endorse ESMA's draft implementing technical standards amending Regulation (EU) No 1247/2012, which contains measures implementing the EMIR Regulation, including reporting duties on exchange traded derivatives. ESMA proposed to delay the entry into force of the new technical standards so as to be able to issue guidelines and recommendations on certain technical aspects before the interested firms were required to comply. However, according to the Commission, the regulatory framework was not uncertain even in the absence of such guidelines, and "postponing the starting date of the reporting obligation for exchange traded derivatives would [have hindered] the achievement of a key objective of EMIR, that is, the identification, monitoring, assessment and mitigation of systemic risk arising from derivative contracts by almost one year" (Commission Communication, 7 November 2013). See fn. 151 and accompanying text.

¹⁷⁷ MOLONEY (2011a), 77.

¹⁷⁸ According to a commentator, should the Commission be willing to retain as far as possible its regulatory capacity, it could decide to make broad use of its powers to refuse full endorsement of technical standards (BUSUIOC (2013), 122 *et seq.*).

on the other hand.¹⁷⁹ All the more so, of course, when either the Council or the Parliament may act as vetoing institutions.¹⁸⁰

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 documents:¹⁸¹ guidelines and recommendations.¹⁸² The entry into force of guidelines and recommendations does not require *ex post* endorsement by the Commission, nor do the Parliament and the Council enjoy any formal power to step into the drafting process. Once again, ESMA position has been strengthened if compared to that of CESR.¹⁸³ First, ESMA is entitled to receive information by 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 must outline how ESMA intends to ensure that its guidelines or recommendations are complied with in the future (Art. 16(4)), which makes the regulatory model less flexible than a pure “comply or explain” system. At the same time, accountability has also been reinforced,¹⁸⁴ in order to ensure that the whole architecture is balanced, as ESMA is required to perform open consultations and the Securities and Markets Stakeholder Group must release its opinion or advice before guidelines and recommendations are adopted, where ESMA deems it appropriate.¹⁸⁵

¹⁷⁹ See also para 4.1.2.

¹⁸⁰ In assessing the reciprocal interactions among the constituents of the process, potential regulatory capacity is almost as important as the actual involvement (BLACK (2002), 264).

¹⁸¹ Non-binding instruments will supposedly maintain a central role in the European financial regulation whenever regulators are not able to reliably assess the possible effects of a proposed measure (WYMEERSCH (2011), 449).

¹⁸² 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, standards now fall into the scope of the measures adopted under Art. 290 or 291 TFEU.

¹⁸³ 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, para 18).

¹⁸⁴ However, judicial accountability is still limited: see fn. 370.

¹⁸⁵ ESMA therefore retains a significant discretion on the procedure to be followed when issuing soft regulatory measures, as opposed to draft technical standards, since consultation and

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 order to solve regulatory uncertainties in specific matters.¹⁸⁶ 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.¹⁸⁷ Another example are public statements representing the views of working groups, often gathering representatives of national competent authorities, operating within ESMA.¹⁸⁸

4.2.1.3. 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, the SMSG carries out both compulsory and optional activities. While the 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.

The SMSG is consulted on initiatives concerning the adoption of technical standards, guidelines and recommendations. The opinion of the SMSG is always compulsory before draft technical standards can be adopted. The SMSG significantly retains its power and duty to deliver an opinion even in the exceptional circumstances where public consultation by ESMA does not take place, because it would be disproportionate in light of the scope and impact of the draft technical standards. Of course, this is not the case when public consultation is avoided because actions by ESMA must be taken urgently; in such circumstances, the SMSG must be informed as soon as possible instead. The SMSG must 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)).¹⁸⁹

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 about 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), 105 *et seq.*).

¹⁸⁶ See e.g. ESMA (2013/594); *Id.*, (2013/1527).

¹⁸⁷ ESMA (2013/84), 27 (on proxy advisors). This approach fosters cooperation by market participants to the preparation of soft-law measures (IGLESIAS RODRIGUEZ (2011), 6).

¹⁸⁸ See e.g. ESMA (2013/1642).

¹⁸⁹ See fn. 166 and 170.

ESMA would seem to have wider discretion concerning guidelines and recommendations, as it will request SMSG's opinion or advice only "where appropriate" (Art. 16(2)). However, Art. 37 states that the SMSG "shall" be consulted on actions taken in accordance with Art. 16, to the extent that these do not concern individual financial market participants; it would seem therefore that ESMA should in any case receive the SMSG's advice irrespective of the legal measure to be adopted.¹⁹⁰ Similarly, 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 and the communication of individual news among other stakeholders, who might possibly be 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 the SMSG has an obligation to answer to public consultations. Although replying to public consultations is an option,¹⁹¹ 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 to have a dialogue with ESMA before a consultation document is issued. While performing this task, the Group should be aided by access to "all the necessary information", if not covered by professional secrecy, at ESMA disposal (Art. 37(4)). The SMSG may thus step in at a very early stage (before the document is discussed by the Board) or afterwards, by delivering an opinion on a draft consultation document before it is finally approved,¹⁹²

This is also made clear by Recital 48 of the founding Regulation, which requires that the SMSG be involved in the impact assessment that must support the technical standards; contextual development of the proposals and their respective cost-benefit analyses represents a best practice.¹⁹³ Impact assessment

¹⁹⁰ As we show below, rules applicable to technical standards also stress the importance of the SMSG's opinions, as these may be required even where consultations are not performed because disproportionate.

¹⁹¹ See e.g. ESMA (2013/720), Annex I.

¹⁹² 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).

¹⁹³ ALEMANN & MEUWESE (2013), 85.

exercises are among the most effective accountability tools,¹⁹⁴ and delegated and implementing measures are no exception.¹⁹⁵ The SMSG can play a key role in making these mechanisms 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 the final decision, because minor variations in the initial conditions of the regulatory work may significantly affect the outcomes.¹⁹⁶

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 (the 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 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 build upon the different experiences it gathers, because of the freedom to analyse relevant topics in advance of ESMA 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 the SMSG on its own initiative is the power to point out possible violations of EU law by national competent authorities so that ESMA may decide to launch a procedure under Art. 17.¹⁹⁷ This function allows the SMSG to enhance vertical accountability of national competent authorities vis-à-vis the European Union, and may also possibly help monitor compliance by Member States themselves. Indeed, although the power of ESMA (and therefore of the SMSG) does not directly refer to non-compliance by Member States, insofar as national supervisors are violating EU law because they are properly performing their duties under national provisions, enforcement against competent authorities may put violation by national jurisdictions in the spotlight.¹⁹⁸

In delivering its positions, the SMSG may submit “opinions” or “advice”: the former relate to specific topics already at the ESMA agenda, while the latter

¹⁹⁴ 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 (2008); ROSE-ACKERMAN (2007), 12.

¹⁹⁵ See ALEMANN & MEUWESE (2013), 86 *et seq.* on the relationship between legislative and non-legislative impact assessments.

¹⁹⁶ HORNSTEIN (2005), 926.

¹⁹⁷ See text accompanying fn. 203.

¹⁹⁸ WYMEERSCH (2011), 458 *et seq.*

permits the SMSG to also provide reasoned positions on more general matters. The 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 (Arts. 10-6) 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. This may also confirm the opportunity for ESMA to consult the SMSG on its own initiative before adopting any position relating to these matters, including acts which are formally drafted as public statements,¹⁹⁹ let alone the fact that before the administrative procedure is over, it might not be clear which final legal instrument will be chosen.

However, the width of the formula also seems to allow the SMSG to comment on procedural aspects, such as Level 1 measures setting the timing for the adoption of quasi-regulatory acts, in case the proposed timing is inadequate for ESMA to properly perform its quasi-regulatory functions, or to intervene more generally, such as on ESMA organization; for instance, the SMSG has expressed its position on the ESA’s review in an autonomous reply to the consultation performed by the EU Commission under Art. 81 Regulation 1095/2010²⁰⁰.

4.2.3. The supervisory powers of ESMA

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, in line with previous CERS’ experience as a network of supervisors,²⁰¹ ESMA is entrusted with the task of coordinating national competent authorities, so that its supervisory role 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

¹⁹⁹ One of the improvements achieved by the new regulatory framework for EU financial supervision is that involvement of stakeholders representatives is no longer subject to discretionary decisions by the Authority: see IGLESIAS RODRIGUEZ (2011), 9.

²⁰⁰ See SMSG (SMSG/2013/013).

²⁰¹ See in general MAJONE (2002), 336; WEIB (2009), 47 *et seq.* and 59 *et seq.*; SHAPIRO (2011), 119. See also text accompanying fn. 41 and 338.

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 permitting it to address financial market 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 within the general limits set forth by Art. 1(2) and (3) of the founding Regulation, though sometimes an express enabling provision is needed. ESMA 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 of powers to EU bodies within the Treaties.²⁰² We describe the relevant provisions below with a focus on the role performed by the EU institutions. The analysis will show how accountability towards those institutions easily turns into direct participation by the latter to the administrative process.

The most relevant power of ESMA towards national competent authorities and market participants relates to the breach of EU law, including the regulatory and implementing technical standards (Art. 17). In particular, ESMA has the power to investigate, after giving notice, whether a competent authority²⁰³ has failed to apply the relevant EU acts (referred to in Article 1(2)²⁰⁴), or has applied them in a way which appears to ESMA as breaching EU 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 by one or more national competent authorities, the European Parliament, the Council, the Commission or, notably, the Securities and Markets Stakeholder Group. In all instances, ESMA has no strict duty to perform an inquiry, so any evaluation of the plausibility of the accusation is up to the Authority itself, in keeping with the well-known principle of independence with accountability, even though the willingness to conduct thorough inquiries may be curbed by the governance of the Authority.²⁰⁵ According to its internal procedure, ESMA will first perform a

²⁰² SHAMMO (2011b), 238.

²⁰³ The authority under investigation must provide ESMA with all the required information (Art. 17(2)(2)).

²⁰⁴ No reference is made to Art. 1(3). This limited reference curtails ESMA ability to enforce EU law, such as takeover law, which is referred to only in Art. 1(3), so that enforcement should be left to the Commission under Art. 258 TFEU (see Art. 1(4)). The same seems to apply for ESMA decision which, although necessary to ensure the effective and consistent application of directives mentioned by Art. 1(2), are not expressly envisaged by the same directives (see Art. 1(3)).

²⁰⁵ See *infra* text accompanying fn. 337.

preliminary evaluation of the admissibility and, if it takes a positive decision, will then carry out a second assessment to establish whether the request deserves further investigation (both steps are delegated to the Chairperson and her deputy).²⁰⁶

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 the SMSG, and the independence of its members, can shield the constituency that initiated the request from being identified as an antagonist of the local authority. Submissions by individuals or private entities are not explicitly contemplated but also are not ruled out,²⁰⁷ and can therefore be taken into account.²⁰⁸

Investigation may have different outcomes, depending on the ground of allegations, the reaction by the national competent authority, and 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 possible only when the lighter touch of the previous intervention has proven insufficient, in conformity with the principle of proportionality. As a first step, if the inquiry has demonstrated to the satisfaction of ESMA that a violation has occurred,²⁰⁹ ESMA itself may address a recommendation to the competent authority, setting out the action necessary to comply with EU law.²¹⁰ However, if the (alleged) non-compliance persists, enforcement is passed to the Commission, which within one month (and, in any case, no later than 3 months after adoption of the ESMA recommendation) may issue a formal opinion requiring the competent authority to align with EU law (Art. 17(4)).²¹¹

²⁰⁶ See ESMA (2012/BS/87), Art. 2 and 3.

²⁰⁷ ESMA (2012/BS/87), Art. 2(2); WYMEERSCH (2011), 458.

²⁰⁸ See the case addressed by the first Board of Appeal's decision (*SV Capital OÜ v. EBA*, 24 June 2013). The decision also shows that Art. 17 may represent an instrument for ESMA second-guessing of interpretation of EU law by national competent authorities.

²⁰⁹ In order to avoid permanent investigations, the inquiry cannot last for more than two months (Art. 17(3)).

²¹⁰ 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 EU law.

²¹¹ 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.

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 get going by threatening a possible recourse to the mechanisms provided for by Art. 258 TFEU.²¹² Indeed, the Commission maintains wide discretion in many respects. First, it deliver a 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.²¹³ Second, 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 concerning the action required from the competent authority because it can depart from ESMA recommendations,²¹⁴ which only have to be taken into account.²¹⁵

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 control. If the national competent authority does not comply with the formal opinion of the Commission, and the necessity arises to remedy “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 individual decision directly addressed to a financial market participant, thereby requiring the necessary action to comply with EU law (Art. 17(6)).²¹⁶

Of course, ESMA does not have exclusive control of the enforcement mechanisms; since under the TFEU the primary function of detecting and prosecuting breaches of EU law lies with the Commission, the latter retains the power to bring the matter before the CJEU (Art. 258 TFEU). The boundaries of ESMA powers therefore determine to what extent the action of the Authority and

²¹² 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. 198.

²¹³ A similar enforcement by the Commission is more likely to concern major and crystal clear infringements (WYMEERSCH (2011), 455).

²¹⁴ For a different opinion see TRIDIMAS (2012), 73 (the Commission is in principle bound by ESMA recommendation).

²¹⁵ A different wording is remarkably used, as shown below, regarding the content of the third act of the enforcement process, namely the ESMA decision directly addressing a financial market participant, which “shall be in conformity with the formal opinion issued by the Commission” (Art. 17(6)(2)).

²¹⁶ The injunction may also require the cessation of one or more specific practices (see *infra* fn. 236 and accompanying text).

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 cover only EU law instruments which do not require implementation in national jurisdictions, namely Regulations (Art. 288 TFEU), but it is sometimes mentioned by the CJEU case-law to describe measures having direct effects.²¹⁷ An interpretation aligned with Art. 288 TFEU would provide safer legal basis for ESMA action²¹⁸ and is therefore preferable.²¹⁹ That conclusion is also confirmed by Recital 29 of Regulation 1095/2010, but it would also curb supervisory powers when the relevant piece of EU legislation is a Directive having direct (vertical) effects.²²⁰ In such instances, enforcement would be entrusted to 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).²²¹

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). 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 competent authorities (if more than a supervisor is involved, ESMA must 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, if the 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.

²¹⁷ See LENAERTS & VAN NUFFEL (2011), 812 *et seq.* and 895.

²¹⁸ 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, para 26 *et seq.*; LENAERTS & VAN NUFFEL (2011), 895; CRAIG & DE BÚRCA (2011), 190). In those 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.

²¹⁹ TRIDIMAS (2012), 73.

²²⁰ See ECJ Case 41/74, *Van Duyn v. Home Office*, 4 December 1974, para 12 *et seq.*; Case 148/78, *Pubblico Ministero (Public Prosecutor) v. Tullio Ratti*, 5 April 1979, para 21 *et seq.* Also covered by Art. 17 are EU primary law provision with direct effects (WYMEERSCH (2012), 257; ECJ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 5 February 1963).

²²¹ FERRAN (2012a), 147.

18(2-4)). As is the case for enforcement of EU law, ESMA market participants may be addressed only 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 for ESMA to be enabled to directly intervene, which is obviously incompatible with the timing of emergency situations seriously affecting one or more key market participants.

The third situation in which 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,²²² where a Level 1 provision so provides²²³ (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 discretion,²²⁴ and divergent views will often reveal a breach of EU 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 EU law, including the cessation of any practice (Article 19(4); the usual limitation to directly applicable rules applies).

ESMA is required to ensure that its decisions in emergency situation or settlement of disagreements do not impinge fiscal responsibilities of member states (Art. 38)²²⁵. This limitation to ESMA powers draws an important boundary between national and supranational competences, as it shows that the final responsibility for supervision rests with the Member States in any case where a decision could have an impact on state budgets.²²⁶ Where a Member State

²²² On the contrary, the joint committee may settle disagreements between competent authorities across sectors (banks, securities and insurance): Art. 20; ESMA (2011/009), 6.

²²³ 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).

²²⁴ SHAMMO (2011b), 235 *et seq.*

²²⁵ This limitation was added following pressure by the Council (CONZELMANN *et al.* (2010), 12).

²²⁶ See EU Commission Communication, European financial supervision (COM(2009) 252 final), 27 May 2009, 9. Fiscal responsibility is the most important driver for decisions concerning where to allocate supervisory powers on EU financial markets, so that Member States maintain

considers that an action taken under Art. 18 and 19 impinges on its fiscal responsibilities, it may notify ESMA and the Commission²²⁷ that such decision will not be implemented. The decision is then suspended, and it is up to ESMA to decide on further actions: when the decision 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).²²⁸ This is particularly true for supervision of 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.²²⁹ ESMA must ensure the streamlined functioning of every college as well as a consistent supervisory approach by different colleges,²³⁰

their powers whenever they would bear the costs of a possible insolvency of market participants. On the contrary, conferral and subsidiarity (Art. 5 TEU) are not that crucial (SHAMMO (2012), 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 (LAMANDINI (2009), 201).

²²⁷ Notification shall be performed, for urgent matters or for settlements of disagreements respectively, within three days or two weeks after notification of ESMA decision to the national competent authority.

²²⁸ See also Art. 4(3) TEU and Art. 6 and 197 TFEU.

²²⁹ After the transfer of supervision on credit rating agencies to ESMA (see para 4.2.3.2 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 (in case of qualified majorities rebutting the request for authorisation, a referral to ESMA is possible under Art. 19 Regulation 1095/2010).

²³⁰ In order to achieve these aims, ESMA may perform its mediating functions according to Art. 19.

to reduce the risks of inconsistent actions that will inevitably arise until this baroque mechanism²³¹ is superseded by full centralization.²³² With a view to exploiting all the potential of cross-border coordinated supervision, the founding Regulation also defines a set of tasks ESMA may 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. 23²³³ 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.²³⁴ Some of the relevant tasks are drafted in general terms (Art. 9(1)). In particular, the Authority is to 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 will 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).²³⁵

Other more detailed powers enable ESMA direct intervention in the market. For example, the Authority may temporarily prohibit or restrict certain financial activities (apparently including the selling or the acquisition of financial products²³⁶) 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”,

²³¹ See critically LAMANDINI (2009), 202.

²³² AVGOULEAS (2012), 320 *et seq.*

²³³ 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.

²³⁴ These tasks were not inserted in the original Commission proposal and were added by the European Parliament.

²³⁵ See para 2.

²³⁶ 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), 76 *et seq.*). See also, implicitly, WYMEERSCH (2012), 274.

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*.²³⁷ since the effects of short selling restrictions are highly controversial,²³⁸ 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.²³⁹ 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; if adopted, ESMA measures replace any national measure possibly in force.²⁴⁰

The opportunity to resort to measures adopted under Art. 9(5) will crucially depend, in the future, on the possibility to ground such measures on Art. 114 TFEU. Should this legal basis be regarded as insufficient insofar as the delegate powers allow a substitution – rather than a harmonisation – of national administrative measures, recourse to Art. 352 would be necessary, as made clear by the Advocate General’s opinion in case C-270/12.²⁴¹ However, reaching unanimity among Member States would often be unachievable, and further centralisation of supervisory functions at the EU level would thus become extremely difficult. Absent an enabling rule such as Art. 28 Reg. (EU) 236/2012, 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 so adopted do not face time constraints and can be drafted as normative acts, in contrast to the limits imposed on *ad hoc* measures (Art. 9(5)).²⁴²

²³⁷ See CHOI & PRITCHARD (2003), 43. Periodical review of regulations in place is recommended by OECD (2013), 21, and represents a best practice in supranational financial regulation (ZARING (2005), 578).

²³⁸ See fn. 279.

²³⁹ JUURIKALA (2012), 322 and 334 *et seq.*

²⁴⁰ See Advocate General’s opinion C-270/12, para 24. For further comment on Art. 28 and its relevance under the *Meroni* doctrine see para 5.1.

²⁴¹ *Ibid.*, para 54 *et seq.*

²⁴² On the relevance of the scope of this power and the discretion it entails see *infra*, text accompanying fn. 260.

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

It is however in the field of credit rating agencies (CRAs) that ESMA supervisory powers are closer to those of a truly independent pan-European watchdog, as in this area supervision, including enforcement,²⁴³ requires no intermediation by national competent authorities.²⁴⁴ The direct day-to-day supervision is currently confined to areas where the cross-border implications of 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).²⁴⁵ Therefore, although the Commission proposal was more ambitious – as it tried to centralize supervision on entities with Europe-wide reach, including clearing houses²⁴⁶ – ESMA has been granted direct supervision over a small set of market participants.²⁴⁷ 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 ratings²⁴⁸ – 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).²⁴⁹ 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 measures²⁵⁰ adopted under CRA Regulation, including fines and periodic payments (Art. 36a and 36b) imposed for violations of the applicable rules (Art. 21(6)).²⁵¹

²⁴³ In other matters, direct enforcement outside the circumstances analysed in para 4.2.3.1 is allowed only upon delegation by national competent authorities (Art. 28(3)).

²⁴⁴ Among the three ESAs, only ESMA has been granted with direct and exclusive supervisory powers.

²⁴⁵ See fn. 228 above. See also MOLONEY (2011b), 211.

²⁴⁶ Commission Communication COM(2009) 252 final, 11.

²⁴⁷ 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 transactions (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).

²⁴⁸ MOLONEY (2011c), 528.

²⁴⁹ 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.

²⁵⁰ Supervisory measures for 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).

²⁵¹ See ESMA (2013/308). A thematic work plan is also prepared (ESMA (2013/87)).

In analysing of ESMA 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 if 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 order to comply with the restrictions imposed by the *Meroni* doctrine,²⁵² the Regulation provides a complete list of the possible infringements (Annex III) and the criteria to be followed to select the supervisory measure and to set the Level of the pecuniary sanction (including a catalogue of aggravating and mitigating factors – Annex IV).²⁵³ 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: some reform proposals

5.1. In the shadow – or in the light? – of Meroni and Romano. The institutional tensions framing the powers of ESMA

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.²⁵⁴ Overall, the emerging picture is 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.²⁵⁵

²⁵² See para 5.1 below.

²⁵³ See ALCUBILLA & DEL POZO (2012), 111 *et seq.* and 119 *et seq.*

²⁵⁴ 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 MASCIANDARO *et al* (2011), 210 (“the score for accountability [...] seems excessively high given the modest level of the Authority’s independence”).

²⁵⁵ For a similar assessment of EU agencies in general see SCOTT (2005), 79.

The CJEU jurisprudence has indeed played a crucial role in shaping the relationship between ESMA and the Commission. The *Meroni* decision²⁵⁶ has *inter alia*²⁵⁷ established that powers may be delegated from the Commission to 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.²⁵⁸ Furthermore, according to the ECJ decision rendered in *Romano*,²⁵⁹ these bodies may not be empowered to adopt acts "having the force of law".²⁶⁰ Both decisions, and *Meroni* in particular, are still considered "good law" by the majority of scholars and, most important, by the Commission²⁶¹ and the other EU institutions.

When weighing 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 explicitly²⁶² envisaged for acts passed by bodies other than the EU institutions, so that any substantial transfer of powers would have deprived

²⁵⁶ ECJ, C-9/56, *Meroni & Co.*, 13.6.1958, 152.

²⁵⁷ Other important principles set by the decision are that "a delegation of power cannot be presumed" (*Meroni* decision, 151), but 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.*, 149 *et seq.*).

²⁵⁸ TRIDIMAS (2012), 61.

²⁵⁹ ECJ, Case 98/80, *Giuseppe Romano v Institut national d'assurance maladie-invalidité*, 14 May 1981, para 20.

²⁶⁰ In other languages, the decision rather refers to acts having a normative nature (SHAMMO (2011a), 1892 *et seq.*; CHAMON (2011), 1064). As opposed to *Meroni*, *Romano* involved delegation of powers by the Council and the European Parliament. For the continuing relevance of *Romano* Advocate General's opinion in case C-270/12, para 84.

²⁶¹ CHITI (2009), 1421 *et seq.*; TRIDIMAS (2012), 63. See also e.g. the Impact Assessment accompanying the proposal for Regulation (EU) No 513/2011 (SEC(2010) 678), 2 June 2010, 13 and 30.

²⁶² Judicial review of administrative acts adopted by non-institutional bodies was deemed admissible under the case-law of the CJEU (Case T-411/06, *Sogelma v. European Agency for Reconstruction (EAR)*, 8 October 2008, para 36 *et seq.*), but the Lisbon Treaty has removed residual doubts (HOFMANN *et al.* (2011), 801; COUTRON (2012), 181 *et seq.*).

the persons concerned of the standing to sue with regard to delegated acts.²⁶³ However, new Art. 263 and 267 TFEU 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 it reflects the perspective that agencies are executive or (quasi-)regulatory bodies detached from the Commission, the central EU administrative body, and that delegated policymaking faces the limitations set by the Treaties, as made clear by Art. 290 and 291 TFEU.²⁶⁴ This perspective hinges upon the nature of EU institutions as entities entrusted with powers assigned by Member States under the Treaties,²⁶⁵ 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,²⁶⁶ 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.²⁶⁷ Notwithstanding this line of reasoning, the rationale of the decision is still generally deemed applicable on a basis we deem convincing, as according to the Treaties the said powers would be in principle granted to one of the EU institutions,²⁶⁸ and only in a subsequent logical – albeit not chronological – moment, can they be conferred on the agencies.²⁶⁹ On the contrary, conferral of executive powers entailing wide discretion on bodies other than the EU institutions – or, one might even argue,

²⁶³ See *Meroni* decision, 152. On the importance of judicial review as a rationale of *Meroni* see CHAMON (2010), 297.

²⁶⁴ See CRAIG (2012), 154 *et seq.*; HOFMANN & MORINI (2012), 442.

²⁶⁵ See also, for a more flexible stance, MAJONE (2002), 328.

²⁶⁶ See e.g. GERADIN (2005), 10; for a review SHAMMO (2011a), 1893. The point is also raised by the Advocate General's opinion in C-270/12 (para 6 and 90-1), which however concludes that *Meroni* still applies, with a view to protecting the EU institutional equilibrium (see text accompanying fn. 319).

²⁶⁷ See e.g. CHITI (2009), 1422.

²⁶⁸ The greater flexibility that the ECJ has adopted when assessing the EU institutional balance (see CHITI (2009), 1423 *et seq.*; for further references see also SHAMMO (2011a), 1894), although well-grounded in the lack of a sharp separation of powers within the EU (MAJONE (2002), 323 *et seq.*), 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).

²⁶⁹ Convincingly, SCHNEIDER (2009), 37 *et seq.*; SHAMMO (2011a), 1894.

other than the Commission²⁷⁰ – would surreptitiously amend the Treaties by way of secondary legislation.²⁷¹

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;²⁷² 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.²⁷³ However, although the evolution of 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 discretion with regard to economic policy, as no balance of rival interests is performed by the EU agency²⁷⁴, at least formally, or is explicitly or implicitly allowed by the CJEU decisions.²⁷⁵

The continuing relevance of the traditional CJEU case-law²⁷⁶, not only for executive agencies,²⁷⁷ is at stake in the action brought on June 2012 by the United Kingdom against the EU Parliament and the Council questioning the legality of Art. 28 Reg. (EU) No 236/2012 on short selling, which allows ESMA to take *ad*

²⁷⁰ In line with the principle of the unity and integrity of the executive functions: see fn. 42. For a convincing critique see CHITI (2009), 1441.

²⁷¹ See also NEERGAARD (2009), 609 *et seq.*

²⁷² CHAMON (2010), 293; CURTIN & DEHOUSSE (2012), 198 *et seq.*

²⁷³ CHAMON (2010), 294, and CHAMON (2011), 1059, 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 *et al.* (2011), 244.

²⁷⁴ For a different opinion see TRIDIMAS (2012), 65 (ESMA arbitrates between conflicting public interests because it arbitrates conflicting interests of national supervisory authorities).

²⁷⁵ The *Schröder* decision was rendered in a case involving the refusal by the Community Plant Variety Office (CPVO) to acknowledge the existence of a new plant variety for which a right was sought; although the evaluation performed by the CPVO on similar applications may result in wide technical appreciation, it does not amount to any sort of policy discretion. For a similar distinction see SHAMMO (2011b), 33 *et seq.*; CRAIG (2012), 174. On conflicting objectives in regulators’ activity see OECD (2013), 25.

²⁷⁶ See CHITI (2009), 1421; GRILLER & ORATOR (2010), 20; CRAIG (2012), 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*.

²⁷⁷ See Art. 6(1) Council Regulation (EC) No 58/2003. Executive agencies are entrusted with tasks relating to the mere implementation of EU programs, with the exclusion of discretionary powers. These latter may instead be conferred upon regulatory (or decentralised) agencies, to which the ESAs belong. While “executive agencies are directly dependent on the Commission, and exclusively accountable to it”, regulatory agencies “operate under a management or supervisory board composed by Member States’ representatives and some representatives of the Commission” (Advocate General’s opinion C-270/12, para 21).

hoc measures limiting short selling and other equivalent practices when required by the need to safeguard the financial stability of the Union.²⁷⁸ The UK's plea is mainly grounded on alleged violation of the *Meroni* and *Romano* decisions. As for the former, it argues that ESMA enjoys excessive discretion with respect to the evaluation of the triggering events,²⁷⁹ the selection of the measures to adopt, and the scope of application. As for *Romano*, the UK challenges the nature of the measures arguing that the conditions set by ESMA to limit the acquisition of net short positions may have the force of law to the extent that they are addressed to a wide set of market participants and concern an equally wide array of financial instruments.

5.2.1. Evaluation of efficiency. Rulemaking

As the previous analysis shows, the ESAs are, within the plethora of EU agencies, among those which have been granted the most extensive powers. However, commentators tend to consider that the existing architecture, while improving the previous system, is far from perfect.²⁸⁰ According to this view, European authorities should enjoy wider independence in their rulemaking activity²⁸¹ and greater discretion in the application of penalties.²⁸² A similar evolution would indeed render ESMA more similar to the traditional model followed by national independent authorities,²⁸³ and it appears that the

²⁷⁸ Case C-270/12. See also text accompanying fn. 240 above.

²⁷⁹ See however the Level 2 measures further detailing the circumstances where a threat is posed 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 technical discretion is undoubtedly wide, the objective of the measures to be adopted is only the safeguarding of the financial stability, so ESMA's decisions do not seem to entail any policymaking (in general, WEIB (2009), 58; see also the Advocate General's opinion, para 94 *et seq.*). The discretion amounts only to deciding whether short selling bans may or may not, in specific market conditions, have net positive outcomes, in light of the highly debatable global effects of such measures on liquidity and volatility (see e.g. CLIFTON & SNAPE (2008); BEBER & PAGANO (2013); AVGOULEAS (2010)).

²⁸⁰ According to WYMEERSCH (2012), 238, the current system is "untenable" in the long run.

²⁸¹ See in general MAJONE (2002), 332; GERADIN (2005), 16. For a more positive view with reference to the ESAs see DI NOIA & FURLÒ (2012), 184.

²⁸² E.g. FERRAN (2012a), 142; MOLONEY (2011a), 78; MOLONEY (2011b), 222, who however also cautions against the risks of an excessive centralisation of financial supervision.

²⁸³ All the European agencies cannot be equated to national independent authorities because they lack independence from the Commission (CHITI (2009), 1399). As opposed to what CHITI stresses (*ibid.*, 1400 *et seq.*), 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, 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. 28).

accountability mechanisms in place under Reg. 1095/2010 are adequate to support an increased level of autonomy.²⁸⁴ We evaluate in this par. whether the ESFS should be improved in its rulemaking functions and suggest in par. 5.2.2 some reform proposals, which in our opinion could fit EU primary law as interpreted by the ECJ (par. 5.2.3). Parr. 5.3.1-2 provide a similar analysis for supervisory powers.

Opinions supporting increased discretionary powers for ESMA and the other ESAs in their rulemaking functions have merits. Enhanced autonomy would avoid duplication of work and, therefore, would facilitate concentration of the available skilled resources within a single entity.²⁸⁵ In contrast, the existing division of roles between ESMA and the Commission in the adoption of technical standards prevents any direct judicial accountability for ESMA, which formally only finalises a preparatory act,²⁸⁶ and focuses judicial review only on the Commission, That is problematic given that the Commission might simply rubber-stamp draft technical standards whose substance has been determined by ESMA, 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, thus calling into question the basis for outsourcing some administrative functions to external entities.²⁸⁷ 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 complex procedure established by Art. 17(4) Reg. 1095/2010 and the regulation of quasi-regulatory functions well illustrate these points. In both cases there is a duplication of tasks for ESMA, which is directly involved with the interested parties and, when applicable, with the stakeholders (let alone the issue of expertise), and for the Commission, which in order to substantially fulfil its role must repeat, at least in part, the evaluations already made by ESMA. The transition towards a new supervisory architecture therefore still looks incomplete. The current framework is indeed increasingly vertically centralized, as a consequence of transfers of powers from Member States to ESMA, but

²⁸⁴ See fn. 254.

²⁸⁵ See text accompanying fn. 12 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.

²⁸⁶ As a consequence, draft technical standards may be appealed neither under Art. 263 TFEU nor under Art. 60(1) Reg. 1095/2010 (fn. 119).

²⁸⁷ CHAMON (2010), 292.

horizontally decentralised at its highest level, as a result of the significant powers retained by the EU institutions. This amplifies the costs of the administrative machinery and reduces the advantages of regulatory autonomy. As long as these arrangements are maintained, some of the benefits arising from the long-term credibility of independent authorities are lost, since the Commission, which is more prone to political pressure²⁸⁸ and, reportedly, to lobbying activity,²⁸⁹ may be exposed to problems of time inconsistency.²⁹⁰

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 competition is no panacea,²⁹¹ an agency having monopolistic access to quasi-normative instruments may pursue self-interested policies,²⁹² disregard innovation,²⁹³ or indulge in excessive regulation,²⁹⁴ either by 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.²⁹⁵ Moreover, the disappearance of any regulatory competition among national authorities – and between these latter and ESMA – as a consequence of the single EU-wide rulebook would further exacerbate this risk.²⁹⁶ Most important, ESMA

²⁸⁸ Especially in the wake of financial crises, independent authorities may also suffer, although to a lesser extent, from impulsive reactions that can break previous supervisory or regulatory patterns (ENRIQUES (2009)).

²⁸⁹ See FERRAN (2004), 104.

²⁹⁰ Although particularly dangerous for monetary policy (see fn. 10 supra), sudden variations in regulatory policy are also unwelcome by investors. For an example, compare MCCREEVY (2009) (policymakers should not swing the pendulum of re-regulation too far, nor should they fall prey to populist tendencies; the Commission will not adopt regulation that may encourage risk aversion) with BARNIER (2010) (“no market, no financial player, no product, no territory should be able to escape anymore relevant regulation”). See also FERRAN (2012b), 81.

²⁹¹ CHITI (2009), 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 regulatees”).

²⁹² FERRAN (2004), 91.

²⁹³ MACEY (1994), 934.

²⁹⁴ Excessive regulation may also serve 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 (GIL (2007), 47 *et seq.*). See also fn. 23.

²⁹⁵ See e.g. CHOI & PRITCHARD (2003), 45; ENRIQUES & TRÖGER (2008), 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).

²⁹⁶ ENRIQUES & TRÖGER (2008), 539.

possibly perverse incentives would not be counterbalanced, at the EU level, by the most straightforward accountability mechanism, namely the designation (and renewal) of office holders in top-level positions within the Authority.²⁹⁷ That is because the Commission has no say in the appointment of the members of the Board of Supervisors, which in this respect remain accountable to their national governments.²⁹⁸ Although the head of a local regulator could not be deemed responsible at Member State level for having pursued the ESMA institutional objectives to the detriment of national interests,²⁹⁹ she would encounter no risk of being removed – or not being renewed – should she choose to satisfy local demands, 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) 1095/2010.³⁰⁰

5.2.2. Reform proposals for rulemaking functions: centralization vs. monopolization

The side effects of having a single regulator in place may be partially avoided by retaining slight competition between ESMA and the Commission. A potential challenge to ESMA 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 the departure of ESMA model from the pattern of traditional independent authorities is not very pronounced in this respect.³⁰¹

A more effective system could be one based on tacit approval – rather than express endorsement – by the Commission, which would retain the ability to veto and/or modify draft technical standards, and possibly non-binding measures,

²⁹⁷ 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).

²⁹⁸ CRAIG (2012), 162 and 173; CHAMON (2010), 301 *et seq.*

²⁹⁹ ESMA (2011/009), 11; WYMEERSCH (2012), 241 *et seq.*

³⁰⁰ See SHAMMO, (2011b), 39 *et seq.* See also GERADIN (2005), 29 *et seq.*; SHAPIRO (2011), 117.

³⁰¹ During ESMA existence so far, the Commission has refused to endorse draft technical standards in two circumstances (see fn. 172). Moreover, although departure from Level 2 technical advices and/or draft implementing measures is not unknown (*ibid.*, 76), it remains an exception (FERRAN (2012b), 73 *et seq.*).

prepared by ESMA.³⁰² 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,³⁰³ 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”)³⁰⁴ that could flag regulatory or supervisory measures that may be problematic, thus facilitating the Commission’s role as a “police patrol”.³⁰⁵ Within this context, the SMSG might enjoy a special status if it were entrusted with the power to manifest its scepticism about new developments. One or more individual members of the Group can also play a similar albeit informal role, with a view to voice opposition by a dissatisfied constituency.³⁰⁶

The mechanism would partially³⁰⁷ 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 Congress.³⁰⁸ Where the relevant provision qualifies as “major rule”,³⁰⁹ a sixty-day period is granted before the entry into force.³¹⁰ The US Congress is then enabled to adopt a disapproval resolution, invalidating the said rule, the President in turn being able to veto the disapproval unless it is passed with a supermajority

³⁰² Commission’s approval of technical standards by “non-opposition” was originally suggested in the Communication on European Financial Supervision (COM(2009) 252 final), 9.

³⁰³ For a general theory see AYRES (2005), 2 *et seq.* 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 (2011b), 41 *et seq.*).

³⁰⁴ MCCUBBINS & SCHWARTZ (1984). See also SPENCE (1997), 415; ROSE-ACKERMAN (2007), 7 *et seq.*; RUBENSTEIN (2010), 2209 *et seq.*; DATLA & REVESZ (2012), 42 *et seq.*

³⁰⁵ Adoption of *ex post* measures of accountability (see SPENCE (1997), 415 *et seq.*; SHAMMO (2011a), 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.

³⁰⁶ RUBENSTEIN (2010), 2209.

³⁰⁷ While the Congress power increases the democratic legitimacy of the administrative act, a similar role conferred upon the EU Commission would ensure legitimacy of ESMA acts under the institutional equilibrium envisaged by the Treaties.

³⁰⁸ 5 U.S.C., § 801 (a)(1)(A). Before the enactment of the Congressional Review Act, review of individual acts by the Congress had been judged unconstitutional in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (see Editorial note (2009), 2164-5).

³⁰⁹ 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)).

³¹⁰ 5 U.S.C., § 801 (a)(3)(A).

quorum.³¹¹ 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 problems³¹² and filibustering by interested minorities.³¹³ 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 a hypothetical monopolistic regulatory power of the ESMA. At the same time, unlike the US system where the President may step in only 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 skills required to evaluate the quality of the economic justifications submitted by ESMA.³¹⁴ Once more, this equilibrium may build upon the US experience – in which the Office of Information and Regulatory affairs (OIRA) reviews the cost-benefit analysis of the federal executive agencies – while partially improving on 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.³¹⁵

5.2.3. Feasibility according to the *Meroni* doctrine

The solution we propose in par. 5.2.2 would inevitably push against the boundaries of the *Meroni* limitations, as it might marginalize the Commission – thus widening ESMA powers – by allowing the entry into force of technical standards in the absence of an explicit endorsement. However, we believe that

³¹¹ See Editorial note (2009), 2166.

³¹² SPENCE (1997), 436; see also *supra*, fn. 12.

³¹³ See RUBENSTEIN (2010), 2209.

³¹⁴ The Impact Assessment Board may provide useful expertise. See also the EU Commission Communication on Impact Assessment (COM(2002) 276 final).

³¹⁵ HAHN & SUNSTEIN (2002), 1496 and 1531 *et seq.*; GERADIN (2005), 44; DATLA & REVESZ (2012), 5. For possible relevant developments in the US securities regulation see fn. 295.

granting a veto power to the Commission would still fit the institutional architecture set by the Treaties as interpreted by the CJEU jurisprudence.³¹⁶

No problem arises if one adopts the view that the *Meroni* doctrine can now be relaxed because review by the CJEU is ensured for acts adopted by EU bodies as well as institutions, or because protection of the EU institutional equilibrium should be more flexibly interpreted.³¹⁷ However, as we have already highlighted, *Meroni* is still widely regarded as good law by the EU institutions, and the distinction between discretion in economic policy and technical appreciation still represents a guiding criterion for European jurisprudence when assessing the tasks of EU agencies.³¹⁸ According to the ECJ Advocate General, new Art. 290 and 291 TFEU, while allowing direct attribution of powers by the legislature to an agency, do not remove the need to preserve the institutional balance within the EU. Therefore, the delegated power must be sufficiently specific and must not include policy decisions or value judgements.³¹⁹

It is nonetheless true that the new institutional context, together with the presence of the Board of Appeal for the three ESAs,³²⁰ lessens some of the concerns that were addressed in *Meroni*,³²¹ and therefore permits 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 interpreted by the CJEU.³²² 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 for providing ESMA with appropriate 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 the Commission invoked during the preparation of the

³¹⁶ See also WYMEERSCH (2012), 238 (the Lisbon instruments, such as revoking the delegation, could also apply to the relationship between the Commission and the financial authorities).

³¹⁷ See fn. 263 and 267 above.

³¹⁸ See fn. 261 *supra*.

³¹⁹ Advocate General's opinion C-250/12, paras 88 and 92 *et seq.*

³²⁰ On the relevance of internal review mechanisms in light of *Meroni* see GRILLER & ORATOR (2010), 29.

³²¹ GERADIN (2005), 15; SCHNEIDER (2009), 40 and 43; CHITI (2009), 1422 *et seq.*; GRILLER & ORATOR (2010), 29; CRAIG (2012), 176. See also the Advocate General's opinion C-250/12, para 72.

³²² GRILLER & ORATOR (2010), 27 *et seq.* See also fn. 302. For some critiques see however CHAMON (2010), 292.

ESAs Regulations to question the delegation of quasi-regulatory powers.³²³ One might in fact justifiably consider that mere “non-opposition” could bring sub-delegation too far, as it would deprive the Commission of the powers conferred by the Treaties³²⁴. However, a much larger tension with the EU constitutional framework descends from the constraints that the ESAs Regulations set for the Commission’s intervention in the non-legislative rulemaking process. The bargaining mechanism set by Art. 10 and 15 in case full endorsement is refused and, more important, the possibility to question the draft measures only in exceptional circumstances and for limited reasons³²⁵ substantially reduce the Commission’s prerogatives. Therefore, however grounded this objection to a veto power mechanism may be,³²⁶ it should in the first place deal with the legitimacy of the current system, rather than with the one we propose.

5.3.1. Evaluation of efficiency. Supervision

A monopolistic exercise of powers may also negatively affect supervisory and non-mandatory normative measures such as guidelines and recommendations.³²⁷ While some scholars have long advocated the creation of a single EU securities and exchange commission,³²⁸ the risk has also been stressed that an excessive centralization of supervisory powers may have significant adverse consequences,³²⁹ such as the loss of expertise developed through the years by adaptation to local peculiarities and the increase of systemic risk if the standardised supervisory approach proves flawed.³³⁰

³²³ BUSUIOC (2013), 117. After the enactment of the three ESAs, the statement is repeatedly reported in many Commission’s legislative proposals (*ibid.*).

³²⁴ See e.g. NEERGAARD (2009), 627 (“a tacit endorsement does not seem sufficient to lead to that the act is adopted by the Commission”).

³²⁵ Namely, incompatibility with EU law, breach of the proportionality principle and of the fundamental principles of the internal market (see fn. 167). This equilibrium between the Commission and the ESAs reflects the tension between the constitutional architecture and the institutional practice, which may sometime enlarge the powers conferred to the EU agency (HOFMANN & MORINI (2012), 420 and 426).

³²⁶ See e.g. CHAMON (2011), 1067 *et seq.*; contra SHAMMO (2011a), 1884.

³²⁷ 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.

³²⁸ For a complete review see WYMEERSCH (2007), 239 *et seq.*

³²⁹ A model explaining divergent implementation and justifying a flexible and decentralized approach to harmonized enforcement is developed by NICOLAIDES (2004).

³³⁰ MOLONEY (2011b), 186 *et seq.*; SHAMMO (2012), *passim*. See also, in general, ROMANO (2012).

Overall, ESMA 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 though the architecture of the ESFS follows a hub-and-spoke model that centralizes rulemaking but remits supervision and implementation to the periphery,³³¹ ESMA ability to promote a common supervisory culture and to foster shared supervisory practices may bring in the long run 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,³³² depending on the concerned matter.³³³ For instance, anecdotal and statistical³³⁴ evidence shows that prospectus approval can be either a quick formality or a lengthy process, depending on the jurisdiction involved. Peer review, being a soft accountability tool,³³⁵ has therefore been hitherto unable to curb divergences in some sensitive matters where the general approach to supervision is at stake.³³⁶

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,³³⁷ whose representatives sit on the Board of Supervisors.³³⁸ Therefore, the functions of ESMA can be exercised with variable intensity depending on the willingness of national

³³¹ Commission Communication COM(2009) 252 final, 9; WYMEERSCH (2012), 235 *et seq.*

³³² On the role of peer review processes see BÚRCA *et al.* (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).

³³³ 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), 46.

³³⁴ CESR, Report on the Supervisory Functioning of the Prospectus Directive and Regulation (CESR/07-225) (2007), 31.

³³⁵ A stricter approach might however be adopted in the future: MOLONEY (2013), 80.

³³⁶ MOLONEY (2011b), 184.

³³⁷ Although the three ESAs cannot be properly defined as a supervisor of the supervisors (WYMEERSCH (2012), 236), their statutory powers inevitably entail a scrutiny of national practices.

³³⁸ The ESAs maintain the strong intergovernmental feature of the pre-existing 3L3 committees (PARTSCH (2011), 48; in general, WEIB (2009), 63).

authorities to either enter a game where they can export their supervisory practices,³³⁹ with the risk of being also forced to import those of the others, or to maintain a leeway of discretion at national level.³⁴⁰ By analogy with the unstable patterns characterising cartellists' conflicting incentives,³⁴¹ 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,³⁴² because the possibility to decide by qualified majority – e.g. for Level 3 acts³⁴³ – or even by simple majority, as opposed to the consensus mechanism followed by CESR,³⁴⁴ may increase the incidence of the authorities that are more willing to back up ESMA interventionism. This analytical framework might also work, at least in part, when supervision is centralized, as is the case for CRAs,³⁴⁵ with regard to delegation of specific tasks to local authorities (Recital 15 and Art. 30 Reg. (EU) No 1060/2009),³⁴⁶ which allows slight decentralisation of direct supervision.

In comparison with its role in the exercise of regulatory powers, here the Commission seems less at the centre of the stage, so that the relationship between ESMA independence and its accountability resembles more closely that of a traditional supervisor, in spite of the limitations imposed by the EU treaties as interpreted by the CJEU.³⁴⁷ To be sure, the Commission's enforcement under Art. 258 TFEU is more incisive, and direct intervention under Art. 17, 18 and 19 is a last resort device,³⁴⁸ but the mere possibility that ESMA initiative may result in a

³³⁹ See SHAMMO (2012), 26 (the ESFS is likely to work effectively if national authorities challenge each other when necessary). See also MOLONEY (2011a), 71 *et seq.* (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).

³⁴⁰ See MOLONEY (2011b), 214 *et seq.* 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.

³⁴¹ HYLTON (2003), 68 *et seq.*

³⁴² SHAMMO (2011b), 40; SHAMMO (2012), 12 *et seq.*

³⁴³ FISCHER-APPELT (2009), 24.

³⁴⁴ 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).

³⁴⁵ See para 4.2.3.2. For some effects of the *Meroni* doctrine on supervision see text accompanying fn. 253.

³⁴⁶ ALCUBILLA & DEL POZO (2012), 56.

³⁴⁷ See para 5.1.

³⁴⁸ MOLONEY (2011b), 202 and 212.

formal infringement procedure confers effectiveness to its recommendations.³⁴⁹ At the same time, efficiency may take advantage of the fast track procedure ensured by ESMA procedures. Moreover, ESMA enjoys greater autonomy in its coordinating functions under Art. 29 and 30, as well as in some specific areas such as CRAs and short selling supervision,³⁵⁰ where it is free to set the preferred intensity of restrictions to local authorities. Even taking into account the possibility of granting the Commission the power to raise concerns before the European Parliament and the Council if a decision is likely to violate EU law or contradict EU policy objectives,³⁵¹ reliance on the Commission as an effective counterbalancing force for ESMA excessive interventionism would be misplaced, considering the Commission's limited expertise in supervision and its natural tendency to foster Europeanization of local powers.

5.3.2. Reform proposals for supervisory functions: integration vs. uniformity

To the extent that the desired legislative outcome is a more integrated European supervision,³⁵² the most effective lever in the hand of the legislators would seem to be a revision of ESMA governance.³⁵³ 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 Authority's general conduct. Such equilibrium could be reached by shifting the barycentre of the governance to the Management Board,³⁵⁴ which should also be reshaped as a body comprising independent members appointed by the EU institutions – e.g. by the Council upon non-binding opinion of the Parliament.³⁵⁵ This would partly overcome the existing conflict of interests in the management of the Authority by national supervisors.

Either in the new governance we propose or as a consequence of the interplay among national authorities within the existing organization, greater

³⁴⁹ ESMA (2011/009), 5.

³⁵⁰ See text accompanying fn. 278.

³⁵¹ As envisaged by the Roadmap agreed upon by the European institutions as a follow-up to their common approach on EU decentralized agencies (2012 Interinstitutional Joint Statement).

³⁵² Claims for further integration of EU supervision were first voiced at EU level by CESR (04-333f) ("Himalaya Report"), 10 *et seq.*

³⁵³ See fn. 36.

³⁵⁴ This would also enhance the distinction between monitoring and managing functions (see ENRIQUES & HERTIG (2011), 367 *et seq.*).

³⁵⁵ LAMANDINI (2012), 221; DI NOIA & FURLÒ (2012), 186 (both referring to the ECB model). For further examples see HOFMANN & MORINI (2012), 437.

interventionism in national supervision is likely to arise³⁵⁶ at least in specific circumstances, such as in the aftermath of a financial turmoil or a serious default,³⁵⁷ while the Commission is not likely to curb this tendency. Bearing this in mind, a possible way to improve the current architecture would be to ensure that ESMA has a duty to evaluate whether 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, 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 1095/2010.³⁵⁸ 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.³⁵⁹

This outcome would admittedly not be easy to reach, as it would entail a self-analysis by the competent authorities of the inherent limits of the supervisory tools they usually employ.³⁶⁰ However, one of the most important lessons from the current financial 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, because there are causal relationships in financial markets phenomena whose mechanisms are not yet understood, and are therefore unknown, as well as events which have not yet even been identified as possible future outcomes, thus being unknowable.³⁶¹ Moreover, even undisputed causal correlations may turn out to be

³⁵⁶ FERRAN (2012b), 48 *et seq.*

³⁵⁷ 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.

³⁵⁸ For a similar, albeit more articulated, proposal in the field of transnational banking regulation see ROMANO (2012). 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 (Arts. 21(2)(b) and 22-4 Reg. No 1095/2010).

³⁵⁹ See also FERRAN (2012b), 51 *et seq.* (warning against the risk that supervisory judgment by local authorities within the EU may be displaced in the future).

³⁶⁰ For some suggestions on how to address these new supervisory challenges see BLACK (2012), 43 *et seq.* See also WYMEERSCH (2011), 449 (guidance and recommendations may prove particularly useful in fields where formal rulemaking would create unpredictable externalities).

³⁶¹ DIEBOLD *et al.* (2010), 1 *et seq.*

mistaken when exceptional occurrences, such as fat tails, emerge.³⁶² 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 risk.³⁶³ On the contrary, a more flexible strategy could allow for monitored experimentalism³⁶⁴ and would ensure that the specificities related to each single market and jurisdiction are taken into account.³⁶⁵ A stricter approach³⁶⁶ should on the contrary be adopted in fields where no such epistemological uncertainties exist and the adoption of a single rulebook requires consistent implementation across the Union. For instance, once a policy decision is taken by Level 1 legislation substantially ruling out issuer choice on where to file an application for prospectus approval³⁶⁷ and choosing maximum harmonization, 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.³⁶⁸ 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.³⁶⁹ However, the regulatory framework for guidelines and recommendations seems to push in the opposite direction. First, it

³⁶² HERRING (2009), 102.

³⁶³ For instance, supervisors may have divergent preferences as regards the viability of a 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, 42). But even if a risk-based approach were recommended as the only strategy 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 BLACK (2010), 276), different techniques would still be applicable to risk-analysis and, most important, to the translation of the analysis into actual surveillance.

³⁶⁴ On “experimentalist governance” and the role of peer review process see DE BÚRCA *et al.* (2013).

³⁶⁵ See MOLONEY (2011b), 203 *et seq.*; SHAMMO (2012) 22 *et seq.*

³⁶⁶ See WYMEERSCH (2011), 454 *et seq.*

³⁶⁷ See Art. 2(1)(m) and 13 Directive 2003/71/EC. See also ENRIQUES & TRÖGER (2008), 530 *et seq.*

³⁶⁸ For a theoretical framework see HORNSTEIN (2005), 944 *et seq.*

³⁶⁹ See *supra*, text accompanying fn. 85.

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 damage and could even be appreciated to the extent that it allows a coherent adaptation of general principles. Second, although guidelines and recommendations are not binding, the provision in Art. 16(4) that the annual reports should 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 evaluations would not easily be subject to judicial scrutiny where they are adopted through non-binding measures,³⁷⁰ in spite of their actual effectiveness in limiting discretion by local supervisors.³⁷¹ Second, for individually binding measures, judicial review of proportionality and subsidiarity (Art. 5 TEU), which are weakly policed by the EU judiciary,³⁷² would not be likely to effectively prevent excessive intrusion.

³⁷⁰ KACZOROWSKA (2013), 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 *et al.* (2011), 807 *et seq.*).

³⁷¹ TRIDIMAS (2012), 71.

³⁷² MOLONEY (2011b), 219. See also, for the ECJ jurisprudence, fn. 8.

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