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EU Agencification and the Rise of ESMA:  
Are its Governance Arrangements Fit for Purpose?

## 1 Introduction

Agencies are a familiar feature in the EU. They have proliferated in policy sectors from border control to medicine with recent additions including an enhanced European Border and Coast Guard Agency ('Frontex'), and the creation of a European Data Protection Board. There are ever more powerful agencies emerging, whose mandate can extend to quasi-regulatory and direct supervisory competences. Recent Commission Proposals advocate further expansions to the financial European Supervisory Authorities ('ESAs') mandate; bodies with legal personality but agencies in all but name.<sup>1</sup> These authorities, are a major new phase in the European project, and demonstrate concrete, if incremental, steps being taken towards centralised and single financial supervision.<sup>2</sup>

Although agencies serve a number of valuable roles within the EU framework, they are unelected entities. Moreover, the ESAs, particularly the European Securities and Markets Authority ('ESMA'), have been granted increasingly broad powers, yet their governance frameworks have weaknesses, and may not be fit for purpose. In such situations, justifications put forward for their competency based on agency autonomy and expertise can risk being insufficient to guarantee their continued legitimacy.<sup>3</sup> That being so, effective internal governance arrangements and robust external accountability mechanisms are necessary to ensure there is no lacuna.<sup>4</sup> This generates a related challenge: an agency's mandate requires technical expertise and autonomy for it to be effective; but at the same time, non-majoritarian agencies must have effective oversight mechanisms to ensure their enduring legitimacy.<sup>5</sup> The significance of this has by no means gone unnoticed in the scholarship, but its constitutional salience becomes ever more pressing given ESMA's powers, and the likely future additions to its remit.<sup>6</sup>

This paper examines ESMA's governance arrangements, and whether these can ensure its autonomy and legitimacy; however, the analysis is salient beyond the financial zone. The process of reorganisation and growth occurring raises issues that may influence administrative developments elsewhere as a model for comparison and inspiration.<sup>7</sup> In this

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<sup>1</sup> Commission, *ESAs' Review: Proposal COM(2017) 536 Final* (2017); Commission, *Proposal for a Regulation as Regards CCPs and Requirements for the Recognition of Third-Country CCPs COM(2017) 331* (2017).

<sup>2</sup> Commission, *Reinforcing Integrated Supervision to Strengthen CMU and Financial Integration in a Changing Environment COM(2017) 542* (2017) 13.

<sup>3</sup> Martin Shapiro, 'The Problems of Independent Agencies in the United States and the European Union' (1997) 4 *Journal of European Public Policy* 276.

<sup>4</sup> Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP 2015) 541-2; Giandomenico Majone, 'Delegation of Regulatory Powers in a Mixed Polity' (2002) 8 *ELJ* 319.

<sup>5</sup> Niamh Moloney, *The Age of ESMA* (Hart Publishing 2018), chapter 2.

<sup>6</sup> See further e.g. Marta Simoncini, *Administrative Regulation Beyond the Non-Delegation Doctrine* (Hart 2018).

<sup>7</sup> Edoardo Chiti, 'In the Aftermath of the Crisis – the EU Administrative System between Impediments and Momentum' (2015) 17 *CYELS* 311, 332.

regard, ESMA is especially ripe for analysis as it is proving to be the most ambitious of the ESAs. Rooting the discussion within the EU agency scholarship, and through examining the governance reforms in the Commission's Proposal, the paper advocates refinements to better balance the competing supranational and national interests within ESMA. Moreover, it recommends paring back of the Commission's presence in ESMA's governance framework to avoid stifling its autonomy. Further, through exploring the EU Banking Union's Single Supervisory Mechanism ('SSM') arrangements (whilst remaining mindful of its specific drivers), it speculates that the argument for the European Parliament (the 'Parliament') to have greater input in ESMA's accountability framework grows more compelling. ESMA is politically accountable to the Parliament, and regular, nuanced assessments of ESMA's activities by this directly elected institution could be a valuable addition to the accountability arrangements. Although the Parliament may not be a perfect repository of democratic legitimacy at the European level, it is engaging with new agencies and finding ways to keep them under the spotlight.<sup>8</sup> It can be seen to be evolving into the pivotal institution when it comes to agency accountability and practices.

This paper's structure is as follows: section 2 examines the emergence and rationale for agencies; section 3 considers agency design within the EU's constitutional framework. Section 4 examines ESMA, with particular reference to its current governance structures. Section 5 considers the Banking Union's SSM. Section 6 examines the Commission's ESA Proposals. Section 7 advocates normative proposals. Section 8 concludes.

## 2 Agencies in EU Administrative Law

### 2.1 Evolution and Rationale

Although agencies are a familiar phenomenon in national law, in the EU, policy matters were traditionally the mandate of either the Member States, or the EU institutions. Despite this, over the years, in line with trends observable within domestic regimes, matters have increasingly become decentralised. This 'agencification' process commenced in the 1970s and agencies have been introduced in a wide range of sectors that directly impact the lives of citizens. Agencies are often created to tackle distinctive issues arising from a particular event or policy sector; accordingly they are often incremental developments meaning caution should be exercised with respect to generalisations.<sup>9</sup> At the same time a variety of rationales are articulated in the legal and political science literature concerning for their emergence and proliferation, which help provide explanatory power with respect to the creation of most EU agencies to date.<sup>10</sup>

The principal-agent model (developed in the US literature) involves the principal (a political official) using their authority to establish non-majoritarian agencies through a public act of

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<sup>8</sup> D Curtin and R Dehousse, 'European Union Agencies: Tipping the Balance?' in M Busuioc, M Groenleer and J Trondal (eds), *The Agency Phenomenon in the European Union* (Manchester University Press 2012) 201.

<sup>9</sup> Deirdre Curtin, 'Holding (Quasi) Autonomous EU Administrative Actors to Public Account' (2007) 13 *ELJ* 523; Commission, *European Agencies - the Way Forward COM(2008) 135 Final* (2008).

<sup>10</sup> Renaud Dehousse, 'Regulation by Networks in the European Community: The Role of European Agencies' (1997) 4 *Journal of European Public Policy* 246.

delegation. The principal then relies on the agent to act on the principal's behalf. Delegation is functional for the principal as the benefits of delegation outweigh the costs of delegation; agents can (for instance) help principals overcome informational asymmetries in technical areas of governance; enhance the efficiency of the rule-making process; and help principals avoid taking the blame for unpopular policies.<sup>11</sup> At the same time, principals can only realise the benefits of delegation via granting discretion to the agent, and the agent can have incentives to pursue its own interests. Accordingly, agency discretion will be restricted by the principal (both *ex ante* and *ex post*) to avoid the risk of generating outcomes that may conflict with those of the principal.<sup>12</sup> This principal-agent model has some relevance with respect to the emergence of agencies at the EU level. In particular the need to bring technical expertise to sectoral regulation, plus pressures on Commission resources has led to specific and complex tasks being delegated to EU agencies.<sup>13</sup> At the same time, the principal-agent rationale does not fully account for the idiosyncrasies of the EU model, not least that there is not one clearly articulated principal given that the EU institutional architecture is specifically defined to avoid the risk of concentrations of power.<sup>14</sup>

Given this, the development of agencies in EU law can also be understood as a product of political compromise between the EU institutions and Member States. Specifically, as the single market project expanded, the Commission identified a need and an opportunity to expand the EU's regulatory capacity but also recognised that there would be resistance from the Member States in the Council to additional transfers of power to the Commission. Given this, the Commission sought to expand the EU's regulatory capacity via the creation of specialist agencies, which the Member States supported, subject to controls being in place, including through agency control via national appointees.<sup>15</sup>

In conjunction with this, agencies can also be appealing political solutions to crises: for example, mad cow disease led to the creation of the Food Safety Authority; the financial crisis produced the ESAs; and the refugee crisis transformed an existing agency into Frontex. Such responses are connected to particular issues having high political salience and the need for institutions to be seen to be responding in their aftermath. It can also be an attempt to rationalise the policy area, and to adopt technical approaches to decision making.<sup>16</sup> Finally, while all such rationales help provide much explanatory power, in practice, the decision to create new agencies, especially since the 1990s reflects the trends within administrative

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<sup>11</sup> Mark Thatcher and Alec Stone Sweet, 'Theory and Practice of Delegation to Non-Majoritarian Institutions' (2002) 25 *West European Politics* 1.

<sup>12</sup> Niamh Moloney chapter 2; Mark Thatcher and Alec Stone Sweet (n 11) 5.

<sup>13</sup> Giandomenico Majone, 'The Rise of the Regulatory State in Europe' (1994) 17 *West European Politics* 77; Ellen Vos, *EU Agencies on the Move: Challenges Ahead* (Swedish Institute for European Policy Studies 2018)

<sup>14</sup> Renaud Dehousse, 'Delegation of Powers in the European Union: The Need for a Multi-Principals Model' (2008) 31 *West European Politics* 789.

<sup>15</sup> D. Keleman, 'The Politics of 'Eurocratic' Structure and the New European Agencies' (2002) 25 *West European Politics* 93; Ellen Vos (n 13).

<sup>16</sup> Ellen Vos (n 13); Morten Egeberg and Jarle Trondal, *Agencification of the European Union Administration: Connecting the Dots* (2016); Deirdre Curtin (n 9).

policy and public management. In this regard EU institutions were influenced by the spread of so-called new public management norms in the Member States.<sup>17</sup>

### 3 Agency Design: The EU Constitutional Framework

#### 3.1 Legal Basis

The rise and proliferation of agencies in EU law is remarkable, not least because there is no explicit legal basis for their creation in the Treaties.<sup>18</sup> This has been the subject of debate for some time, and although there were earlier attempts to include a legal basis in the Treaties, this question has still not been tackled head on. Despite this the Lisbon Treaty does formally introduce EU agencies, providing that the Court of Justice ('CJEU') can judicially review the legality of their acts, which helps constitutionalise their operation and decision-making.<sup>19</sup> In terms of the legal basis used in practice, most early agencies were based on article 352 TFEU; the residual basis to attain a Treaty objective where no other provision gives the institutions the power. This has since been modified, the Commission's view being that agencies are instruments of implementation of a specific policy. Accordingly they are based on Treaty provisions that provide the specific legal basis for that policy (such as with respect to transport) and, more generally, the internal market basis.<sup>20</sup>

Nonetheless, using the internal market basis, article 114 TFEU has not been straightforward. The UK unsuccessfully challenged the legality of establishing agencies on this basis in the case of the European Network and Information Security Agency. At the same time, this was arguably less due to fundamental objections as to its creation and more due to article 114 using the qualified majority voting ('QMV') procedure, meaning the UK could be outvoted in the Council.<sup>21</sup> More recently, the view that agencies could be adopted on the internal market basis was endorsed by the CJEU in 2014. As discussed further below, the UK challenged ESMA's emergency powers with respect to short selling (the '*Short Selling*' ruling) on a number of grounds including the use of article 114, but the CJEU affirmed that this was the correct basis.<sup>22</sup>

#### 3.2 Delegation of Powers: *Meroni*

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<sup>17</sup> Martijn Groenleer, 'Regulatory Governance in the European Union: The Political Struggle over Committees, Agencies and Networks' in David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Elgar 2011).

<sup>18</sup> Madalina Busuioc, *European Agencies: Law and Practices of Accountability* (OUP 2013), chapter 2.

<sup>19</sup> Treaty of Lisbon (2007/C 306/01), art 263 TFEU.

<sup>20</sup> Commission, *The Operating Framework for the European Regulatory Agencies COM(2002) 718 Final* (2002); Paul Craig, *EU Administrative Law* (2nd edn, OUP 2012) chapter 6.

<sup>21</sup> Martijn Groenleer, *The Autonomy of European Union Agencies: A Comparative Study of Institutional Development* (2009); Ellen Vos (n 13).

<sup>22</sup> Case C-270/12 *UK v Council and Parliament* ECLI:EU:C:2014:18. This placed the Banking Union's Single Resolution Mechanism on more secure foundations. See section 5 below.

In relation to which powers can be delegated to agencies, the starting point is the seminal *Meroni* judgement.<sup>23</sup> This is an important limitation with respect to agencies and it arose from a challenge brought against the High Authority of the Coal and Steel Community relating to a delegation of power to a body established by private law. In *Meroni* the CJEU stated that the High Authority was entitled to delegate its powers to such a body, subject to restrictions imposed by the Coal and Steel Community Treaty. Such powers could only relate to clearly defined executive powers, the use of which, had to be subject in their entirety, to review by the High Authority.<sup>24</sup> The CJEU drew its famous distinction between clearly defined executive powers, the exercise of which could be subject to strict review in the light of objective criteria determined by the delegating authority, and discretionary powers implying a wide measure of discretion, which may make possible the execution of economic policy.<sup>25</sup> The former could be delegated but the latter could not. The CJEU concluded that the delegation of powers implied a wide measure of discretion that could not be considered compatible with the Treaty requirements.<sup>26</sup> Accordingly, following *Meroni*, and until the *Short Selling* ruling, *Meroni* was the legal limit to delegation; where the CJEU upheld delegations of power, this was by reference to *Meroni* reasoning.<sup>27</sup> *Meroni* also shaped the Commission's approach to agencies and the limits to delegation.

More recently, however, as Craig argues, political imperatives led to institutional developments, which placed the traditional legal interpretation under strain.<sup>28</sup> The most notable case being the aftermath of the financial crisis, which led to the creation of the ESAs: ESMA, the European Banking Authority ('EBA'), and the European Insurance and Occupational Pension Authority ('EIOPA'). The ESAs stemmed from the de Larosière report; this recognised that the strength of EU regulation and supervision was found wanting during the crisis and proposed the establishment of a European System of Financial Supervision, which included the ESAs.<sup>29</sup> In this regard, the ESAs have been constituted as independent bodies with legal personality, although they have been heavily influenced by the restrictions shaping agency design.<sup>30</sup>

With respect to ESMA, these institutional transformations have included it being granted quasi-rule making powers, as well as supervisory competences, some of which are a notable

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<sup>23</sup> Case 9/56 *Meroni v High Authority* [1957 and 1958] ECR 133.

<sup>24</sup> *Ibid* 152.

<sup>25</sup> *Ibid* 152.

<sup>26</sup> *Ibid* 154.

<sup>27</sup> Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* chapter 4; e.g. Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* ECLI:EU:C:2005:449, para 90.

<sup>28</sup> Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* chapter 4, 535.

<sup>29</sup> Jacques de Larosière, *The High-Level Group on Financial Supervision in the EU: Report* (2009); Eilis Ferran, 'Understanding the New Institutional Architecture of EU Financial Market Supervision' in E Wymeersch, K Hopt and G Ferrarini (eds), *Financial Regulation and Supervision: A Post-Crisis Analysis* (OUP 2012).

<sup>30</sup> Niamh Moloney, 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market – a Tale of Two Competences: Part (1) Rule Making' (2011) 12 *EBOR* 41; Niamh Moloney, *EU Securities and Financial Markets Regulation* (3rd edn, Oxford University Press, 2014) chapter X.5.2.2.

change from those conferred on earlier agencies, and some of which also go beyond those conferred on the other ESAs. In addition to its more orthodox 'soft' powers (including information exchange between authorities), its mandate has extended to encompass direct supervisory powers over particular market participants (including credit rating agencies), emergency direct powers of intervention, and limited enforcement powers.<sup>31</sup> In essence, ESMA heralds a new dawn for EU agencies. Its powers are in clear contrast to those delegated to traditional agencies, whose role was largely rooted in the implementation of legislation.

Accordingly, it is pertinent to reflect on ESMA's mandate as both a quasi-rule maker and as a supervisory authority, and how this connects to the Treaty framework and *Meroni*, particularly in light of the UK's challenges in its *Short Selling* application. This then sets the scene for the related questions that then arise with respect to ESMA's governance and its accountability.

### 3.2.1 ESMA as a Quasi-Rule Maker – Undermining the TFEU?

As an institutional matter, although the political institutions are responsible for adopting 'level 1' EU legislation, ESMA, and the other ESAs, have significant quasi-rule making powers. This is not the only instance of agencies having the ability to contribute to such procedures; the European Chemicals Agency ('ECA') provides recommendations to the Commission to assist it in taking decisions on the inclusion of substances subject to authorisation under the relevant legislation.<sup>32</sup> Similarly, the European Aviation Safety Agency enjoys an element of quasi-regulatory autonomy to take individual decisions where these do not entail significant discretionary powers.<sup>33</sup>

Yet ESMA (and the other ESAs) are a step change from this, however. In addition to issuing soft law measures, ESMA has appreciable quasi-rule making powers through which it can directly advance the EU's single rulebook. ESMA can prepare technical standards to be submitted to the Commission for endorsement into law.<sup>34</sup> Depending on the mandate, ESMA can either develop draft regulatory technical standards, or implementing technical standards; in both cases these are not to imply policy choices, or strategic decisions.<sup>35</sup> At the same time, and as discussed in section 3.2.2 below, questions of policy may often be deeply enmeshed in technical issues, begging the question if it is possible to separate them.

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<sup>31</sup> Regulation (EU) No 1095/2010 Establishing ESMA [2010] OJ L331/84, e.g. arts 17-19; arts 21 and 29; see also e.g. Regulation (EU) No 513/2011 on Credit Rating Agencies OJ L145/30 (part of a suite of regulations, and which transfers day-to-day supervisory responsibilities to ESMA).

<sup>32</sup> ECA, *Recommendation for the Inclusion of Substances to REACH* (February 2018); Edoardo Chiti, 'European Agencies' Rulemaking: Powers, Procedures and Assessment' (2013) 19 EUJ 93.

<sup>33</sup> Regulation (EC) No 216/2008 Establishing an European Aviation Safety Agency [2008] OJ L79, art 17(2)(b); Dehousse, 'Delegation of Powers in the European Union: The Need for a Multi-Principals Model' (n 10); Edoardo Chiti, 'European Agencies' Rulemaking: Powers, Procedures and Assessment' (n 32).

<sup>34</sup> Regulation 1095/2010, arts 10-15.

<sup>35</sup> *Ibid* art 10; art 15.

Regulatory technical standards are of a quasi-legal nature capable of amending or supplementing non-essential elements of a level 1 act. ESMA's powers represent a delegation of law-making powers from the institutions, which remain in charge of overseeing its exercise. The Commission may reject the draft standards, and they are subject to a veto by the Council or Parliament, but if endorsed they become binding delegated acts under article 290 TFEU. ESMA can also adopt draft implementing technical standards. These connect to the article 291 TFEU powers and procedure, and facilitate binding implementing acts being adopted by the Commission where uniform conditions for implementing legally binding acts are needed.<sup>36</sup> Granted, the distinction between the two types of standard is by no means always obvious; at the same time, 'the existence of borderline cases does not imply the absence of clear positive or negative ones'.<sup>37</sup>

As an institutional matter, all of the ESAs being given these quasi-rule making powers is based around their high degree of professional expertise, and it has been suggested that there are strong legal and political assumptions that such rules will be accepted by the Commission.<sup>38</sup> Yet the reality demonstrates there are real limitations on the ESAs' reach.<sup>39</sup> Focusing on ESMA, the Commission on occasion rejects or revises the proposals (which sometimes meets with resistance) but the Commission generally places its own final stamp on the provisions, reiterating its position as 'top dog' in this norm-crafting process.<sup>40</sup>

Connecting this institutional framework to the Treaty, the TFEU is enigmatic on agencies in relation to articles 290 and 291, and this formed a part of the UK's challenge in its *Short Selling* application. Although the case stemmed from ESMA's direct powers of intervention under the Short Selling Regulation (the 'SSR') rather than its quasi-rule making capacity, one of the UK's pleas suggested that the delegation of powers to ESMA empowered it to adopt administrative rules of general application in breach of articles 290 and 291.<sup>41</sup>

### 3.2.1.1 CJEU: Articles 290 and 291

The Advocate General considered that articles 290 and 291 had been fully respected but took the view that these powers had been conferred directly by the legislature rather than being delegated. In the event the powers had been delegated, however, he opined that agencies could not act directly under article 290 (as this could change the normative content of legislative acts), but that agencies could be vested with article 291 implementing powers.<sup>42</sup>

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<sup>36</sup> Heikki Marjosola, 'Regulating Financial Markets under Uncertainty: The EU Approach' (2014) 39 ELR 338.

<sup>37</sup> Case C-270/12 *UK v Council and Parliament* Opinion of AG, ECLI:EU:C:2013:562 at para 78.

<sup>38</sup> Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (n 4) chapter 4.

<sup>39</sup> Niamh Moloney, 'International Financial Governance, the EU, and Brexit: The 'Agencification' of EU Financial Governance and the Implications' (2016) 17 EBOR 451; Niamh Moloney, 'Institutional Governance and Capital Markets Union: Incrementalism or a "Big Bang"?' (2016) 13 ECFR 376.

<sup>40</sup> ESAs, *Opinion on the Commission's Amendments of the Regulatory Technical Standards on Risk Mitigation Techniques for OTC Derivatives Not Cleared by a Central Counterparty* (8 September 2016); Commission, *Explanatory Memorandum C(2016) 6329 Final* (4 October 2016).

<sup>41</sup> *UK v Council and Parliament* (n 15) pleas in law and main arguments.

<sup>42</sup> *UK v Council and Parliament* (n 37) para 6; paras 85-86.



The CJEU dismissed the UK's plea although it did not address the conferral versus delegation issue. Rather, it took a pragmatic stance, asking whether articles 290 and 291 amounted to a single framework under which certain powers could be attributed solely to the Commission, or whether other systems may be contemplated, and it affirmed the latter.<sup>43</sup> It acknowledged that the Treaties did not contain any provisions to the effect that powers could be delegated to an agency, but that there were provisions that presupposed such a possibility, particularly article 263 TFEU that provided for agencies' acts to be subject to judicial review.<sup>44</sup> Moreover the CJEU held that ESMA's powers did not correspond to any of the situations defined in articles 290 and 291, but when read as a part of comprehensive framework enabling national and supranational bodies to work closely together with a high level of expertise, this could not be regarded as undermining articles 290 and 291.<sup>45</sup>

Consequently, the CJEU read ESMA's powers not in isolation but as part of a series of rules designed to ensure financial stability in the Union.<sup>46</sup> In this regard, the CJEU's practical approach helped to bridge the awkward 'constitutional gap' that had been emerging with respect to EU executive rulemaking. It recognised a constitutional mandate to grant such powers to agencies despite the neglect in the TFEU, representing a further step forward in restructuring EU executive law-making after the Lisbon Treaty.<sup>47</sup>

### 3.2.1.2 CJEU and Romano

Connected with its article 290 and 291 plea, the UK also suggested that the powers in question authorised ESMA to adopt quasi-legislative measures of general application having the force of law, contrary to the principles established by the CJEU ruling in *Romano*. The Advocate General disagreed, taking the view that the evolution of EU constitutional law under the Lisbon Treaty had accommodated the pivotal concerns in *Romano*, particularly with respect to the provision of effective judicial safeguards.<sup>48</sup>

The CJEU also rejected the plea; it considered that ESMA did adopt measures of general application but that this had been envisaged by the TFEU and was not at odds with *Romano* (as long as the *Meroni* conditions were met). In particular, the TFEU, articles 263 and 277, extended the CJEU's jurisdiction to review legal acts adopted by agencies, and expressly permitted Union bodies, offices and agencies to adopt acts of general application.<sup>49</sup> Accordingly, the CJEU's flexible approach, when viewed in conjunction with its approach to articles 290 and article 291 (as well as with respect to *Meroni* discussed in section 3.2.2 below), created the potential for a future wide operating arena for EU agencies.<sup>50</sup>

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<sup>43</sup> *UK v Council and Parliament* para 78.

<sup>44</sup> *Ibid* paras 79-81.

<sup>45</sup> *Ibid* paras 85-86.

<sup>46</sup> *Ibid* para 85.

<sup>47</sup> Heikki Marjosola, 'Bridging the Constitutional Gap in EU Executive Rulemaking' (2015) 10 *European Constitutional Law Review* 500; Ellen Vos (n 13) section 3.2.

<sup>48</sup> *UK v Council and Parliament* (n 37) paras 72-74.

<sup>49</sup> *UK v Council and Parliament* (n 43) paras 64-66.

<sup>50</sup> Michelle Everson and Ellen Vos, *European Agencies: What About the Institutional Balance?* (Maastricht Faculty of Law Working Paper 2014/4, 2014); Niamh Moloney (n 6).

### 3.2.2 ESMA's Supervisory Powers and *Meroni*

In addition to ESMA's quasi-regulatory mandate, it also has a suite of supervisory competences. As observed above, some of these are a notable advancement on those accorded to earlier agencies, such as the ability of all the ESAs' to exercise binding decisions over national authorities.<sup>51</sup> Some of ESMA's tasks also go beyond those of the other ESAs, such as ESMA's direct day-to-day supervisory powers over particular market participants, and its emergency market intervention powers in relation to short selling.<sup>52</sup>

With respect to the *Meroni* constraints, the CJEU was asked to assess whether the conferral of ESMA's powers to intervene and ban short selling in exceptional circumstances (under article 28 SSR) was compatible with *Meroni*. The UK argued that article 28 SSR was unlawful because the criteria as to when ESMA was required to take action entailed much discretion. Further, ESMA was given a wide range of choices as to what measures to impose and these had economic policy implications. Further, even if article 28 did not involve ESMA making macro-economic policy choices, it had a broad discretion as regards the application of policy, as in *Meroni* itself.<sup>53</sup>

The CJEU again dismissed this plea but it did not reject *Meroni* outright. Rather, it considered the *Meroni* principle to be satisfied as the powers were precisely delineated and amenable to judicial review, and that ESMA's exercise of them was limited by various conditions limiting its discretion.<sup>54</sup> It held that *Meroni* was still good law, but there was some mellowing to be compatible with the 'new reality of agency power'.<sup>55</sup>

In light of the ruling, when ESMA's quasi-rule making and supervisory powers are taken together, it is evident that it has been cut from different cloth to earlier agencies and comes closest to having proper autonomy.<sup>56</sup> In this regard the CJEU's flexible view helped place it (and its sibling ESAs) on a firmer constitutional footing.<sup>57</sup> As Ferran argues, the CJEU was likely also mindful of the broader canvas, specifically the clarification of the emerging European Banking Union's framework.<sup>58</sup> At the same time, the CJEU did not take the more drastic option of repealing, or revising *Meroni* in the light of this changing landscape. It also

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<sup>51</sup> See e.g. Regulation 1095/2010, arts 17-19.

<sup>52</sup> See e.g. Regulation (EU) No 236/2012 on Short Selling and Certain Aspects of Credit Default Swaps [2012] OJ L86/1, art 28.

<sup>53</sup> *UK v Council and Parliament* (n 22) paras 41-54.

<sup>54</sup> *Ibid.*

<sup>55</sup> Jacques Pelkmans and Marta Simoncini, 'Mellowing *Meroni*: How ESMA Can Help Build the Single Market' (CEPS Commentary, 18 February 2014); Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (n 27).

<sup>56</sup> Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (n 27).

<sup>57</sup> Heikki Marjosola, 'Bridging the Constitutional Gap in EU Executive Rulemaking', 518; Ellen Vos (n 13).

<sup>58</sup> Eilis Ferran, 'European Banking Union: Imperfect, but It Can Work' Cambridge Faculty of Law Research Paper No 30/2014 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2426247](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2426247)> accessed 20 July 2018.

chose not to consider whether the powers had been actually conferred rather than being delegated to ESMA.<sup>59</sup> Consequently, the 'spectrum of permitted operational discretion remains somewhat fuzzy'.<sup>60</sup> A narrow reading frames its outcome on the precise questions that were put to the CJEU; a more liberal view suggests that *Meroni* has been mellowed. One way or other, however, the greater according of powers to new EU agencies has been constitutionally sanctioned to an extent, making further grants of power (within these confines) more likely.

It is undoubtedly important that the EU's set-up is capable of developing in light of changing times and the new reality of EU governance.<sup>61</sup> At the same time, given that ESMA can be making decisions (quasi-regulatory or supervisory) that may extend beyond the purely technical, this raises the related issue as to the adequacy of ESMA's governance structures, and whether it is subject to sufficient oversight mechanisms.<sup>62</sup>

## 4 Governance Structures

### 4.1 ESMA: Internal Governance Challenges

EU agencies have traditionally (typically) comprised of a one-tier governance structure with an executive director, an administrative (or management) board, plus the input of a scientific committee.<sup>63</sup> Administrative boards are responsible for ensuring the agency performs the tasks in their founding regulation. There are several variants but they are generally made up of a Commission representative and Member State representatives; and the scientific committees are appointed on the basis of expertise.<sup>64</sup>

Examining ESMA (although the same framework applies to all three ESAs), its governance architecture is based on that of prior agencies to an extent but has some unique features.<sup>65</sup> In contrast to the orthodox framework, ESMA has a two-tier governance system. Its Management Board is charged with organisational issues such as budget and human

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<sup>59</sup> Niamh Moloney, 'European Banking Union: Assessing Its Risks and Resilience' (2014) 51 CMLR 1609; *UK v Council and Parliament* (n 37).

<sup>60</sup> Niamh Moloney, 'European Banking Union: Assessing Its Risks and Resilience' (n 59).

<sup>61</sup> Michelle Everson and Ellen Vos (n 50).

<sup>62</sup> Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (n 27); Ellen Vos (n 13).

<sup>63</sup> Edoardo Chiti, 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies' (2009) 46 CMLR 1395; Commission, *European Agencies - the Way Forward COM(2008) 135 Final* 5.

<sup>64</sup> Michelle Everson, *A Technology of Expertise: EU Financial Services Agencies* (LEQS Paper No 49/2012, June 2012); Edoardo Chiti, 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies' (n 63).

<sup>65</sup> Moloney, *EU Securities and Financial Markets Regulation* (n 30) chapter X.5.2.2; Everson (n 64) 22.

resources, and its Board of Supervisors (the 'Board') is the main rule making and decision making entity.<sup>66</sup>

The Board is comprised of experts (the Member States via the heads of the national competent authorities ('NCAs')). They are the voting members, and operate under a simple majority vote apart from regarding ESMA's quasi-rule making powers, where QMV (a system of weighted votes) applies.<sup>67</sup> The Board also has non-voting members; specifically an independent Chairperson, and supranational representatives including a Commission representative (in line with traditional agency models), plus single member representatives from the other ESAs and the macro-prudential European Systemic Risk Board that oversees the risk to the financial system as a whole. The independent Executive Director of ESMA may also participate in the meetings, again in a non-voting capacity.<sup>68</sup>

The Board's technocratic nature is clear from its mandate; it is responsible for tasks including giving guidance to ESMA's work; adopting decisions, the work plan, annual report and budget.<sup>69</sup> The necessity of expert judgment is also underlined by the presence of the independent Chairperson, and Executive Director. Both are to be appointed following an open selection procedure on the basis of merit, skills, knowledge and financial regulation experience (with the Executive Director also requiring managerial experience), although the Parliament may object to the Chairperson's designation, and must confirm that of the Executive Director.<sup>70</sup> In this regard, it is notable that there were significant inter-institutional tensions over the appointment procedure during the ESAs' legislative process, including with the Parliament suggesting that it should select the candidate from a Commission shortlist.<sup>71</sup> This all played out during the appointment of the ESAs' first Chairpersons. The Commission was in charge of drawing up a short list and it added criteria not contemplated by the Regulations (including age limit and administrative ranking). The Parliament criticised this for a lack of transparency and the ability to select a sufficient number of candidates (for some ESAs, the short list was of one name).<sup>72</sup>

Such wrangling aside, the Board elects six NCA representatives from the Board plus the Chairperson to sit on ESMA's Management Board. There is the right for the Commission and ESMA's Executive Director to also participate in a non-voting capacity, although the Commission has a right to vote on the budget.<sup>73</sup> ESMA has also established a securities and markets stakeholder group (as required by its founding regulation), and this is an important

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<sup>66</sup> Carmine Di Noia and Matteo Gargantini, 'Unleashing the European Securities and Markets Authority: Governance and Accountability after the ECJ Decision on the Short Selling Regulation' (2014) 15 EBOR 1; Commission, *Joint Statement on Decentralised Agencies* (2012) 5.

<sup>67</sup> Regulation 1095/2010, art 44.

<sup>68</sup> *Ibid* art 40.

<sup>69</sup> *Ibid* art 43.

<sup>70</sup> *Ibid* art 48(2) and art 51(2); Everson (n 64).

<sup>71</sup> Eilis Ferran, 'Crisis-Driven Regulatory Reform: Where in the World Is the EU Going?' in *The Regulatory Aftermath of the Global Financial Crisis* (CUP 2012) 76.

<sup>72</sup> Mazars, *Review of the New ESFS: Study for the European Parliament's ECON Committee* (October 2013 (IP/A/ECON/ST/2012-23)), section 2.1.3.

<sup>73</sup> Regulation 1095/2010, art 63.

element of governance designed to facilitate consultation with market participants, consumers, and financial services users and providers.<sup>74</sup>

ESMA's governance model has a strong focus on independence in its founding regulation. This differs from many prior agencies, where there was considerable variation in the way independence was tackled, if referenced at all.<sup>75</sup> Yet independence can be seen to be a relative concept; the notion is not entirely followed through with the structures in place.<sup>76</sup> Specifically there is an inherent tension between ESMA's European mandate versus the national remit of the NCAs that comprise the Board. As identified, ESMA's independent Chairperson has a non-voting status, and the Board's voting members are the heads of the NCAs. Given the Board is adopting measures addressed to the public authorities and financial institutions run by its voting members, this risks bringing national interests into the equation (termed the 'double hat' challenge).<sup>77</sup> Such conflicts of interest are also heightened by the fact that the national authorities are required to make obligatory contributions to ESMA's revenues.

At the same time, the reality is likely more nuanced. It does appear in practice that the major NCAs can heavily influence discussions and decisions, but this is balanced, to an extent, by the QMV influence. Moreover, with respect to the national position, authorities sometimes adopt self-serving stances, but also adopt positions congruent with the European interest (such as that taken by the euro EBA members during the banking crises). All of which points to the question of the national versus the EU interest being fluid.<sup>78</sup>

Accordingly, perhaps more problematic are the competing inter-institutional pressures that ESMA faces, especially from the Commission. The Commission's involvement in appointing the Chairperson and Executive Director has been observed. Its representation on the Board, the Management Board (with its voting capacity on the budget), plus the fact it contributes to ESMA's funding via the EU budget) are also considerable institutional restraints.<sup>79</sup> As Moloney identifies, the Commission representative plays an active role within ESMA and can impact on proceedings, including expressing concerns where actions risk conflicting with EU

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<sup>74</sup> Ibid art 37. Although concerns, such as of consumers being under-represented have led to complaints, European Ombudsman, *Decision Closing His Own-Initiative Inquiry OI/8/2011/JH Concerning the EBA* (27 September 2013).

<sup>75</sup> Regulation 1095/2010 e.g. art 1; art 42; art 46; art 49; and art 59; M Busuioc and M Groenleer, 'The Theory and Practice of EU Agency Autonomy and Accountability' in M. Everson, C. Monda and E. Vos (eds), *European Agencies in between Institutions and Member States* (Kluwer 2014).

<sup>76</sup> Madalina Busuioc, 'Rule-Making by the European Financial Supervisory Authorities: Walking a Tight Rope' (2013) 19 *ELJ* 111, 120.

<sup>77</sup> Commission, *ESAs' Review: Proposal COM(2017) 536 Final*; Madalina Busuioc (n 76) 121; Ellen Vos (n 13).

<sup>78</sup> Mazars (n 72) section 2.1; Niamh Moloney, 'EU Financial Governance after Brexit: The Rise of Technocracy and the Absorption of the UK's Withdrawal' in *Brexit and Financial Services: Law and Policy* (Hart 2018).

<sup>79</sup> Jennifer Payne, 'Institutional Design for the EU Economic and Monetary Union: Financial Supervision and Financial Stability' in F Amttenbrink and C Herrmann (eds), *Oxford Handbook on the EU Law of Economic and Monetary Union* (2017).

measures.<sup>80</sup> Ultimately, the Commission's shadow looms large; this risks stifling ESMA's relative independence, and could impede its performance.<sup>81</sup>

#### 4.2 Independence, Control and Accountability

Control and accountability mechanisms can appear at odds with ESMA's creation given its need to be independent and at arms length from the EU institutions.<sup>82</sup> Indeed, historically, the independence of unelected agencies was an important legitimising function (even if this was not always referenced in their establishing acts). EU agencies have often been established to counter credible commitment failures by the Commission, and jeopardising independence would defeat the purpose for which they were created.<sup>83</sup> Yet as agencies flourished and their powers increased, this generated rising anxiety about them escaping control and led to calls for increased control and accountability. Such concerns can produce a catch 22 situation; control and accountability are difficult to reconcile with independence.<sup>84</sup> Despite this, however, as Busuic and Groenleer argue, and in line with the analysis above, in reality independent EU agencies do not, in fact, exist. Rather, non-majoritarian agencies are granted a degree of autonomy (or 'relative' independence) from their 'parent bodies' but not full freedom, and will be subject to various constraints and restrictions.<sup>85</sup> Hence, there is a balance to be struck between their independence and accountability to ensure their democratic legitimacy and that of the EU's more generally.<sup>86</sup>

The next issue is what is meant by accountability. Despite its central place in the agency debate, there can sometimes be a lack of clarity about the concept. In the agency literature, definitions increasingly used include 'the obligation to explain and justify conduct'; and a 'relationship between an actor and a forum, in which the actor has an obligation to explain and justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences'.<sup>87</sup> These definitions differentiate 'accountability' as ex post systems; versus 'control', which has a wider dimension, and can include ex ante, on-going, and also ex post ways of directing behaviour.<sup>88</sup> These are helpful labels; nonetheless other

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<sup>80</sup> Moloney, *EU Securities and Financial Markets Regulation* (n 30) X.5.2.2; e.g. ESMA, *Board of Supervisors: Summary of Conclusions* (December 2016 (2016/BS/309rev1)) 3.

<sup>81</sup> Moloney, *EU Securities and Financial Markets Regulation* (n 30) chapter X.5.2.2; Mazars (n 72) section 2.1.

<sup>82</sup> Ellen Vos (n 13) chapter 4.

<sup>83</sup> Madalina Busuic, 'Accountability, Control and Independence: The Case of European Agencies' (2009) 15 *European Law Journal* 599, 601.

<sup>84</sup> M Busuic and M Groenleer (n 75).

<sup>85</sup> *Ibid*; Martijn Groenleer, *The Autonomy of European Union Agencies* (2009) chapter 2.

<sup>86</sup> M Busuic and M Groenleer (n 75); cf Miroslava Scholten, 'Accountability vs. Independence: Proving the Negative Correlation' (2014) 21 *Maastricht Journal of European and Comparative Law* 197. See also Simoncini (n 6) chapter 4.

<sup>87</sup> Mark Bovens, *Analysing and Assessing Public Accountability. A Conceptual Framework* (European Governance Papers No C-06-01, 2006) 9; Deirdre Curtin, 'Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability' in D. Gerardin and N. Petit (eds), *Regulation through Agencies in the EU, a New Paradigm of European Governance?* (Routledge 2005); Ellen Vos (n 13).

<sup>88</sup> Busuic (n 18) chapter 3; Paul Craig, *EU Administrative Law* (n 20) chapter 6.

commentators still use the terms in varying ways. Accordingly, this section considers the mechanisms used to control and hold ESMA accountable, whilst bearing in mind that elements can impact at more than one level.<sup>89</sup>

ESMA's ex ante controls include the boundaries in its establishing regulation, such as the ambit of its powers and finances, and political controls in relation to appointments. Particularly with respect to the scope of its activities and objectives, these are widely defined in its founding legislation.<sup>90</sup> Although this can be valuable in conferring ESMA with operational flexibility in practice, as discussed below, it can also generate related challenges with respect to ensuring meaningful ex post review of its performance. On-going control and accountability occurs through various channels, including the national authorities on the Board and Management Board, as well as the Commission's presence.<sup>91</sup> Ex post accountability arrangements embrace a range of avenues. Financial mechanisms include the Commission's say on the budget, plus further arrangements. For instance, ESMA must send budget estimates to the Commission who transmits these to the Parliament and Council, in tandem with the Commission estimating ESMA's subsidy.<sup>92</sup> The Commission also plays a role in oversight with respect to ESMA's staff employment policies, including how such funds are expended.<sup>93</sup> Concerning political accountability, ESMA is vertically politically accountable to the Council and Parliament under its founding regulation,<sup>94</sup> and is subject to considerable duties including reporting requirements (such as transmitting its work programmes for information, plus an annual report on its activities).<sup>95</sup> ESMA also engages more informally with the Parliament, particularly with its Economic and Monetary Affairs Committee. On the reviewability of decisions, a Joint Board of Appeal can decide appeals by affected parties against decisions taken by the ESAs.<sup>96</sup> These can also be appealed to the CJEU under article 263 TFEU.<sup>97</sup> Extra judicial accountability encompasses quasi-judicial fora such as the European Ombudsman.<sup>98</sup> There is also horizontal accountability within the Joint Committee that all three ESAs participate in on topics where their competences overlap and to enable information exchange with the ESRB.<sup>99</sup>

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<sup>89</sup> Paul Craig, *EU Administrative Law* (n 20) chapter 6.

<sup>90</sup> See Regulation 1095/2010, arts 1(2) and (3) (scope of activities); art 1(5) (mandate and objectives); art 8 (tasks and powers).

<sup>91</sup> Ellen Vos (n 13) chapter 4.

<sup>92</sup> Regulation 1095/2010 arts 62-64.

<sup>93</sup> *Ibid* art 68; Moloney, *EU Securities and Financial Markets Regulation* (n 30) chapter X.5.2.

<sup>94</sup> Regulation 1095/2010, art 3.

<sup>95</sup> *Ibid*, art 43(4)-(6).

<sup>96</sup> ESMA, 'Board of Appeal Decisions' (2018) <[https://www.esma.europa.eu/databases-library/esma-library/?f%5B0%5D=im\\_esma\\_sections%3A355&f%5B1%5D=im\\_field\\_document\\_type%3A43](https://www.esma.europa.eu/databases-library/esma-library/?f%5B0%5D=im_esma_sections%3A355&f%5B1%5D=im_field_document_type%3A43)> accessed 10 August 2018.

<sup>97</sup> Regulation 1095/2010, arts 60-61.

<sup>98</sup> European Ombudsman (n 74).

<sup>99</sup> Regulation 1095/2010, arts 54-55; Noia and Gargantini (n 66); Iris Chiu, 'Power and Accountability in the EU Financial Regulatory Architecture: Examining Inter-Agency Relations, Agency Independence and Accountability' (2015) 8 *European Legal Studies* 67; cf Moloney, *EU Securities and Financial Markets Regulation* (n 30) chapter X.5.2.6.

Taken together, intricate and extensive governance, control, and accountability arrangements are in play ranging from the intergovernmental to the inter-institutional. These systems are also intertwined; accountability fora can act as 'fire alarms' for other fora.<sup>100</sup> The resulting set-up is complex and not necessarily conducive to guaranteeing ESMA's autonomy or its effective accountability.<sup>101</sup> Indeed in this regard, the ex ante legislative framing of ESMA's tasks and objectives in somewhat broad and vague terms can be regarded as a particular shortcoming in that it may risk severely limiting its accountability.<sup>102</sup>

Early reviews of the ESA framework, including the IMF's 2013 FSAP assessment, and the Parliament's 2013 Mazars Review, reiterated many of these issues. These reports highlighted that aspects of ESMA's design and operation should be reviewed as existing arrangements could inhibit its operational independence and proper accountability.<sup>103</sup> In this regard, and as explored in section 6 below, the Commission's 2017 Proposal now includes governance changes including transforming the Management Board into an independent Executive Board. Yet the Commission remains enmeshed in ESMA's overall framework, and the accountability system remains largely unchanged. Accordingly, although the Proposal may contain useful initiatives to improve ESMA's governance, these may not go far enough. Moreover, particularly as ESMA is being accorded real and increasing powers, the argument becomes stronger to ensure its architecture is in line with its role, as well as the greater levels of integrated supervision now occurring in today's markets.<sup>104</sup>

## 5 What About the SSM?

### 5.1 Eurozone Supervisory Structure: Banks

At this stage, it is pertinent to contrast ESMA's set-up with the Banking Union's; specifically the SSM's governance and accountability structures. The creation of the Eurozone Banking Union is a 'genuine novelty both at the constitutional and administrative level', and it is the product of very specific drivers.<sup>105</sup> Given this, care must be taken; this zone-specific system is not necessarily capable of being directly transplanted to the pan-EU financial market. At the same time, the Banking Union's SSM is pertinent for examination as it offers important

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<sup>100</sup> M Busuioc and M Groenleer (n 75).

<sup>101</sup> The multitude of channels can raise 'accountability overload' concerns, Mark Bovens, Thomas Schillemans and Paul Hart, 'Does Public Accountability Work? An Assessment Tool' (2008) 86 *Public Administration* 225, 227.

<sup>102</sup> Fabian Amttenbrink and Rosa Lastra, 'Securing Democratic Accountability of Financial Regulatory Agencies – a Theoretical Framework' in R. De Mulder (ed), *Mitigating Risk in the Context of Safety and Security How Relevant Is a Rational Approach?* (Erasmus 2008).

<sup>103</sup> IMF, *FSAP: Technical Note on Issues in Transparency and Accountability Country Report No. 13/65* (March 2013) 10-11; Mazars (n 72) 117-118.

<sup>104</sup> Fabrice Demarigny and Karel Lannoo, *Navigating the Minefield of the ESA Review* (European Capital Markets Institute Commentary, No. 49 / 27 February 2018).

<sup>105</sup> Edoardo Chiti, 'In the Aftermath of the Crisis – the EU Administrative System between Impediments and Momentum' (n 7) 319.



and unprecedented ‘proof of concept’ in terms of the centralisation of supervision.<sup>106</sup> Further, it is valuable to consider this model in order to discern whether guidance could be drawn from it in relation to ESMA, particularly with reference to the heightened role that the Parliament plays in relation to the SSM’s oversight mechanisms.

It was the financial and sovereign debt crises that demonstrated that countries sharing a currency were interdependent, increasing the likelihood of cross-border spillover effects in the event of a bank crisis (the ‘doom loop’ between banks and their sovereigns).<sup>107</sup> The Banking Union was forged in the aftermath to break this link and to avoid taxpayers being first in line to bail out ailing banks.<sup>108</sup> It creates special prudential supervision and bank resolution arrangements for the euro area via two pillars. The first pillar, the SSM, is overseen by an EU institution, the European Central Bank (‘ECB’),<sup>109</sup> and the second, the Single Resolution Mechanisms (‘SRM’), is coordinated by the Single Resolution Board (‘SRB’).<sup>110</sup> The mechanisms are mandatory for Eurozone countries and their banks; other Member States can choose to participate although none have yet done so. Under the SSM, the ECB has direct supervisory responsibility for ‘significant’ credit institutions (currently 119 banking groups), and it oversees the national authorities’ direct supervision of ‘less significant’ banks (currently 2869 groups).<sup>111</sup> Under the SRM, there is a single resolution process that applies to all participating banks; this is coordinated by the SRB and a centralised Single Resolution Fund to support resolution.<sup>112</sup> A European Deposit Insurance Scheme is also envisaged as a further pillar of the Banking Union, but progress has been slow.<sup>113</sup>

## 5.2 The SSM: Governance, Control and Accountability

The ECB’s SSM governance, control and accountability mechanisms are designed to tackle conflicts of interest that can arise with the ECB combining supervisory tasks with its monetary policy functions.<sup>114</sup> The SSM Regulation articulates that monetary policy, and supervisory tasks under the SSM are separate.<sup>115</sup> In terms of governance structures, the SSM comprises of a Supervisory Board with a Chair and Vice Chair, four ECB representatives,

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<sup>106</sup> Niamh Moloney, ‘EU Financial Governance after Brexit: The Rise of Technocracy and the Absorption of the UK’s Withdrawal’ (n 78) 106.

<sup>107</sup> Commission, ‘Banking Union: Restoring Financial Stability in the Eurozone’ (Brussels, 15 April 2014).

<sup>108</sup> Commission, *Communication on Completing the Banking Union COM(2017) 592 Final* (2017).

<sup>109</sup> The SSM’s legal basis is article 127(6) TFEU (ECB competence for prudential supervision). The ECB is not subject to *Meroni*.

<sup>110</sup> In line with section 3, the SRM/SRB’s legal basis is article 114.

<sup>111</sup> ECB, *Annual Report on Supervisory Activities for 2017* (March 2018) 74; Regulation (EU) No 1024/2013 Conferring Specific Tasks on the ECB Concerning Policies Relating to the SSM [2013] OJ L287/63, art 6(4).

<sup>112</sup> Regulation (EU) No 806/2014 Establishing Uniform Rules and Procedure for the Resolution of Credit Institutions in the SRM and SRF [2014] OJ L225/1.

<sup>113</sup> Commission, *Communication on Completing the Banking Union COM(2017) 592 Final*.

<sup>114</sup> Niamh Moloney, ‘European Banking Union: Assessing Its Risks and Resilience’ (n 59).

<sup>115</sup> SSM Regulation, article 25; also article 1.

and one national authority representative from each participating country.<sup>116</sup> The Chair and Vice Chair are subject to ex ante controls; are appointed by the Council and approved by the Parliament on the basis of ECB proposals (the Chair on the basis of open selection; the Vice Chair to be chosen from the members of the ECB's Executive Board).<sup>117</sup> The Chair may be removed by the Council on specified conditions, following an ECB proposal and Parliament's approval.<sup>118</sup> The Parliament or Council may also inform the ECB that they consider that the conditions for removal of the Chair or Vice Chair are fulfilled and the ECB must respond.<sup>119</sup> As Ferran and Babis identify, the increased role of the Parliament in these procedures was a late addition, reflecting the concerns that the Supervisory Board would lack democratic accountability.<sup>120</sup>

The Supervisory Board is responsible for the planning and execution of tasks conferred on the ECB (and largely operates on each member having one vote with the Chair having a casting vote),<sup>121</sup> but due to the Treaty constraints (requiring that the ECB Governing Council be the ultimate decision-maker), the Board is not able to adopt formal decisions.<sup>122</sup> These must be sent to the ECB's Governing Council for adoption (and are deemed adopted unless an objection is raised within a specified period).<sup>123</sup> The ECB's Governing Council is also responsible for monetary policy and its Member State members are Eurozone central bank governors; accordingly this violates the 'ring fence' between monetary and supervisory policy. At the same time, given the Treaty constraints, the structure can be considered a positive and pragmatic solution.<sup>124</sup>

In terms of on-going controls and accountability, the approach builds on the ECB's accountability for monetary policy but introduces more demanding requirements with respect to its supervisory role.<sup>125</sup> The ECB is accountable for its supervisory role to the Council and the Parliament.<sup>126</sup> There are regular reporting and review requirements, which extend to include the Commission and the Euro Group. Further, the Chair may be asked to appear before Parliament committees and the Euro Group, and the ECB must reply to questions put to it by the Euro Group or Parliament.<sup>127</sup> The European Court of Auditors can also take into account the supervisory activities of the ECB when it examines its operational

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<sup>116</sup> Ibid art 26.

<sup>117</sup> Ibid art 26(3).

<sup>118</sup> Ibid art 26(4).

<sup>119</sup> Ibid art 26(4).

<sup>120</sup> Eilís Ferran and Valia Babis, 'The European Single Supervisory Mechanism' (2013) 13 JCLS 255, 269.

<sup>121</sup> SSM Regulation art 26(6).

<sup>122</sup> Art 129(1) TFEU.

<sup>123</sup> SSM Regulation art 26(8).

<sup>124</sup> Eilís Ferran and Valia Babis (n 120) 267; Niamh Moloney, 'European Banking Union: Assessing Its Risks and Resilience' (n 59).

<sup>125</sup> SSM Regulation, see arts 20-21, 24; Eilís Ferran and Valia Babis (n 120); Niamh Moloney, 'European Banking Union: Assessing Its Risks and Resilience' (n 59).

<sup>126</sup> Interinstitutional Agreement between the Parliament and ECB (2013/694/EU) OJ L 320/1; *MoU between the Council and the ECB on the Cooperation on Procedures Related to the SSM* (December 2013).

<sup>127</sup> SSM Regulation, art 20(2)-(5).

efficiency.<sup>128</sup> Further obligations apply with respect to the Parliament, including that the Chair (upon request) hold confidential oral discussions with the Chair and Vice-Chair of the Parliament's competent committees, and to participate in any Parliamentary investigations, subject to the TFEU.<sup>129</sup> As already witnessed, the Parliament's role in appointing and removing the Chair or Vice Chair are additional controls.<sup>130</sup> There are also reporting obligations in relation to the national Parliaments of participating Member States.<sup>131</sup> Further, the ECB is also bound by general due process requirements; there is an Administrative Board of Review that can review the ECB's decisions; and acts can be reviewed by the CJEU under articles 263 TFEU.<sup>132</sup>

### 5.3 Independence and Accountability Risks?

A similar balancing act between independence and accountability pertains to the ECB's supervisory functions, as witnessed above with ESMA. Moreover, from the analysis in section 5.2, the Parliament has ex ante control and ex post accountability mechanisms that extend beyond those currently in place for ESMA. Although these checks and balances can pose a risk to the ECB's independence, in line with section 4's observations, independence can be viewed as a relative rather than absolute concept.<sup>133</sup> In particular, independence can relate to the objectives of given tasks, and different forms of independence for the ECB's supervisory and monetary tasks appear justified.<sup>134</sup>

This affects accountability. As Moloney identifies, it is hard to dismiss that the Parliament's ex ante role in key Supervisory Board appointments and its range of ex post accountability mechanisms may constitute a challenge to the ECB's independence. Yet, although the Parliament plays a bigger role, the more serious challenge may stem from the ECB's Governing Council in endorsing the Supervisory Board's decisions.<sup>135</sup> At the same time, this relationship may again be more nuanced than a simple trade-off between independence and accountability.<sup>136</sup> In particular the two can potentially complement one another, with accountability being capable of strengthening independence.<sup>137</sup> Ultimately, it may come down to trying to find a delicate balance between an agency's independent status versus the institutional decisions made in favour of accountability.<sup>138</sup> In this regard, as Ferran and Babis

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<sup>128</sup> Ibid art 20(7).

<sup>129</sup> Ibid art 20(8)-(9).

<sup>130</sup> Ibid art 20(8); Eilís Ferran and Valia Babis (n 120).

<sup>131</sup> SSM Regulation, art 21.

<sup>132</sup> Ibid recitals 54 and 58; arts 22 and 24.

<sup>133</sup> Ellen Vos (n 13); Niamh Moloney, 'European Banking Union: Assessing Its Risks and Resilience' (n 59).

<sup>134</sup> G Ter Kuile, L Wissink and W Bovenschen, 'Tailor-Made Accountability within the Single Supervisory Mechanism' (2015) 52 CMLR 155, 165; Eilís Ferran and Valia Babis (n 120).

<sup>135</sup> Niamh Moloney, 'European Banking Union: Assessing Its Risks and Resilience' (n 59).

<sup>136</sup> Fabian Amttenbrink and Rosa Lastra (n 102) 121.

<sup>137</sup> G Ter Kuile, L Wissink and W Bovenschen (n 134); see also Marc Quintyn, Silvia Ramirez and Michael W. Taylor, *The Fear of Freedom: Politicians and the Independence and Accountability of Financial Sector Supervisors* (2007) 11.

<sup>138</sup> Fabian Amttenbrink and Rosa Lastra (n 102).

argue, given that the ECB has the power to affect the interests of financial institutions, and the financial system in profound ways, its accountability framework must be commensurate with the nature and extent of its powers.<sup>139</sup>

The ECB/SSM structure may not be perfect, but it is still relatively early days for the Banking Union and the governance and oversight mechanisms appear to be working relatively smoothly. The IMF 2018 FSAP report concluded that although the large membership of the Supervisory Board, and the influence of national interests ran the risk of in-action bias, the Supervisory Board and Governing Council had demonstrated the ability to act expeditiously in emergency situations.<sup>140</sup> Moreover, responding to concerns raised by the Commission, the IMF and Court of Auditors regarding the high volume of decisions being taken, (which also included calls for less dependence on national supervisors), the ECB streamlined its decision-making.<sup>141</sup> This included implementing a delegation framework enabling routine decisions to be adopted by ECB managerial staff.<sup>142</sup>

Reflecting on the Parliament's increased role in monitoring the SSM, during 2017, in addition to presenting the annual report, the Chair participated in three public hearings, had three ad hoc exchanges of views with Members of the European Parliament ('MEPs'), and the ECB published 41 replies to MEPs questions.<sup>143</sup> In this regard, a qualitative study of this Banking Dialogue suggested that, overall, MEPs raised informed questions, although with a 'notable deterioration' of mood when they sensed a failure of the SSM, such as when a bank ran into difficulties.<sup>144</sup> On this note, the SSM/SRM have certainly faced criticism as to their effectiveness, including for not intervening earlier with respect to the failure of two Italian banks in 2017. At the same time, the criticisms have mainly been about operational rather than existential challenges.<sup>145</sup> Certainly, recent Commission Proposals in December 2017 include visions for the ECB to supervise the largest, systemic investment firms under the SSM. This Proposal has clear 'Brexit'-related connotations given that UK investment firms play a key role in this market and may choose to relocate due to Brexit.<sup>146</sup> Although the fate

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<sup>139</sup> Eilís Ferran and Valia Babis (n 120) 271.

<sup>140</sup> IMF, *FSAP Technical Note: Assessment of Observance of Basel Principles for Effective Banking Supervision No.18/233* (July 2018); ECB (n 111).

<sup>141</sup> European Court of Auditors, *SSM – Good Start but Further Improvements Needed* (2016) 134; Commission, *Report on the Single Supervisory Mechanism COM(2017) 591 Final* (October 2017) 6.

<sup>142</sup> *SSM Supervisory Manual* (March 2018); *ECB Annual Report on Supervisory Activities: 2017* (March 2018).

<sup>143</sup> ECB (n 111) section 5.1; Fabian Amttenbrink and Menelaos Markakis, 'Towards a Meaningful Prudential Supervision Dialogue in the Euro Area? A Study of the Interaction between the European Parliament and the European Central Bank in the Single Supervisory Mechanism' (ADEMU Working Paper 2017/081).

<sup>144</sup> Fabian Amttenbrink and Menelaos Markakis (n 143).

<sup>145</sup> 'ECB Supervisor Defends Role in Italian Banking Crisis' *Financial Times* (4 July 2017); cf 'Banco Popular Process Is a Model for Failing Banks' *Financial Times* (8 June 2017); Niamh Moloney, 'EU Financial Governance after Brexit: The Rise of Technocracy and the Absorption of the UK's Withdrawal' (n 78) 82, 96.

<sup>146</sup> Niamh Moloney, 'Brexit and Financial Services: (yet) Another Re-Ordering of Institutional Governance for the EU Financial System?' (2018) 55 CMLR 175, 192-3.

of this initiative is by no means clear, its ambition certainly reinforces rather than calls into question the future of the ECB/SSM.<sup>147</sup>

Taken together the SSM has been designed specifically as a single supervision mechanism for Eurozone banks, providing empirical evidence of integrated supervision.<sup>148</sup> Yet there are numerous difficulties, ranging from the political to the constitutional, in simply extending this mechanism to the EU's capital markets. Moreover, the ECB/SSM is in a more powerful position than ESMA; as a Treaty institution, the ECB has power and authority that flows directly from this status, and so any SSM/ESMA comparisons can only be taken so far.<sup>149</sup> Nonetheless, beneficial insights can still be gleaned from the SSM's architecture, particularly when reflecting on ESMA's future role (not least when bearing in mind that ESMA may have some ambition to eventually frame itself as type of financial market equivalent to the ECB/SSM).<sup>150</sup> In this regard, the Parliament serving as an accountability forum via the Banking Dialogue is noteworthy.<sup>151</sup> As Curtin argues, part of the Parliament's strategy appears to be developing its position as a visible forum for critically debating agency actions; and this role has been expanding in recent years.<sup>152</sup> Accordingly, and as sections 6 and 7 explore, the Parliament could be utilised further as a channel for holding ESMA to account.

## 6 ESMA: Governance Initiatives

### 6.1 The Commission's Proposal

The supervisory structure across the EU is now one of variable geometry. For the banking sector, the Eurozone's supervisory set-up is highly integrated, with major roles for the ECB and the national central bank representatives for Eurozone-bank supervision.<sup>153</sup> In the financial sector, supervision continues to be, mainly, a Member State responsibility, although ESMA's powers and responsibilities are increasing. The Commission's 2017 Proposal sets out a suite of reforms, including to the ESAs' governance and funding arrangements (as discussed below), enhancements to their supervisory convergence powers, as well as, for ESMA, new direct supervisory responsibilities over a range of sectors and actors (including in relation to certain prospectuses, and particular types of EU fund). A connected 2017 Central Clearing Counterparties ('CCPs') Proposal also envisages ESMA having direct supervisory and enforcement competences over third country CCPs, as well as strengthening ESMA's role over EU CCPs.<sup>154</sup>

<sup>147</sup> Ibid; Moloney identifies that the Treaty competence for this is unclear.

<sup>148</sup> Niamh Moloney, 'EU Financial Governance after Brexit: The Rise of Technocracy and the Absorption of the UK's Withdrawal' (n 78) 106.

<sup>149</sup> See further, Niamh Moloney, *The Age of ESMA* (n 5) chapter 6.

<sup>150</sup> Ibid chapter 6; see also Veerle Colaert, 'European Banking, Securities, and Insurance Law: Cutting through Sectoral Lines?' (2015) 52 CML Rev 1579.

<sup>151</sup> Fabian Amttenbrink and Menelaos Markakis (n 143).

<sup>152</sup> Deirdre Curtin, 'Holding (Quasi) Autonomous EU Administrative Actors to Public Account' (n 9) 540.

<sup>153</sup> Fabrice Demarigny and Karel Lannoo (n 104).

<sup>154</sup> Commission, *Proposal for a Regulation as Regards CCPs and Requirements for the Recognition of Third-Country CCPs COM(2017) 331*.

If the Commission's 2017 ESA Proposal is adopted in its current form (which, as is considered below, is by no means clear), it will represent a substantial expansion to ESMA's powers and follow the trend towards ESMA emerging as a distinct supervisory authority. The Proposal would further bolster ESMA's presence within the EU financial markets, extend its influence in particular sectors, and could also send clear signalling effects to NCAs with respect to its strengthened authority.<sup>155</sup> Moreover, in contrast, the other two ESAs are not blazing the same trail; they are on different trajectories.<sup>156</sup> Unlike ESMA they do not have any powers of direct supervision, and can be perceived more as instruments for assisting the Commission with technical rule making, and in achieving supervisory convergence. Accordingly, given ESMA's slow and steady evolution as a type of EU-supervisory authority that is separate to the other ESAs, this raises the question whether there should be a greater recalibration of its governance and oversight framework to reflect this.<sup>157</sup> As ESMA takes on a life of its own, the argument becomes more compelling for it to have its own bespoke arrangements.<sup>158</sup>

## 6.2 Governance and Funding Proposals

The Proposal's headline changes envisage an alteration of ESMA's governance structure to make it more assertive vis-à-vis the national authorities. Linked to this, the Proposal also proposes eliminating the national authority contributions and replacing it with an industry levy.

On the specifics, the Proposal replaces the current Management Board with an independent Executive Board comprising five full-time members (with one acting as Vice-Chair) and ESMA's Chairperson. The current role of Executive Director is eliminated and those responsibilities assumed a full-time member.<sup>159</sup> In contrast to the current model (where the Management Board is elected by the Board of Supervisors and is dominated by national authorities), the selection of the full-time members is to be based on an open call for applicants who are appointed by the Council, subject to Parliament approval.<sup>160</sup> Decisions in the Executive Board are to be by simple majority and each member has one vote, with the Chairperson getting a casting vote (as before, the Commission participates in a non-voting capacity except the right to vote on the budget).<sup>161</sup> There are clarifications to the Chair's appointment procedure. The Chair is to be appointed on the basis of an open call organised by the Commission; the Parliament shall approve the Commission's shortlist, and the Council shall appoint via a QMV decision.<sup>162</sup> On accountability, the Proposal's recitals state that the

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<sup>155</sup> Niamh Moloney, *The Age of ESMA* (n 5) chapter 5.

<sup>156</sup> EIOPA is the smallest of the three, and although its tasks may grow (particularly in relation to pan-EU pension product proposals), this will take time. The EBA's structure is also fundamentally impacted by the SSM's introduction and the ECB's shadow looms large over it Eilís Ferran, 'The Existential Search of the European Banking Authority' (2016) 17 EBOR 285.

<sup>157</sup> Fabrice Demarigny and Karel Lannoo (n 104).

<sup>158</sup> A Sapir, N Véron and G Wolff, *Making a Reality of Europe's Capital Markets Union* (April 2018).

<sup>159</sup> Commission, *ESAs' Review: Proposal COM(2017) 536 Final* art 77a.

<sup>160</sup> *Ibid* art 45.

<sup>161</sup> *Ibid* art 45a (2).

<sup>162</sup> *Ibid* art 48.

Chair and Executive Board are accountable to the Parliament and Council for any decisions taken on the basis of its founding Regulation.<sup>163</sup> Other than this, however, such mechanisms are not tackled further in the Proposal.

The Executive Board's main function is also to be expanded; as well as preparing the Board of Supervisors' work programme and budget, it will prepare decisions to be taken by the Board of Supervisors. This is to facilitate quicker, more streamlined decision-making, and an approach that is more EU-oriented. The Executive Board is also attributed some important decision-making powers in relation to non-regulatory matters. These are geared towards reducing the power of the Board of Supervisors and the risk of influence arising from the national mandate of the NCAs on the Board. Such proposals dilute the power of the Board where there could be conflicts of interest (such as relating to actions being brought against a NCA) and places these decisions with the Executive Board.<sup>164</sup> The Executive Board is also to be in charge of setting out supervisory priorities for NCAs via Strategic Supervisory Plans; these are to check the consistency of national authorities' work programmes with EU priorities and to review their implementation.<sup>165</sup> Under the related expansions to ESMA's supervisory powers under the CCP Proposal, an additional 'Executive Session' is to be introduced to work alongside the Executive Board. This will comprise of permanent newly appointed members, NCAs responsible for CCPs, and with the ECB or other relevant central bank of issue, and the Commission as non-voting members.<sup>166</sup>

At the same time, the Board of Supervisors remains the main body in charge of overall guidance and decision-making (save for those decisions transferred to the Executive Board), and the Commission's presence remains undiminished. The Board's composition is to be amended to include the full time members of the Executive Board although these members will not have voting rights (whether on the quasi-regulatory QMV issues, or on supervisory matters where voting is by simple majority).<sup>167</sup> The Chair also remains non-voting. Nonetheless, there is an element of erosion to the Board's position; in situations where ESMA exercises powers of direct supervision, the Board will only be able to reject a proposal from the Executive Board by a qualified majority.<sup>168</sup>

In light of the proposed changes, the Commission also suggests amendments to ESMA's funding. It proposes retaining the EU funding, but instead of collecting national authority contributions, it advocates combining EU funding with that of industry (while retaining the fees ESMA receives from entities subject to direct supervision, with provisions to avoid double charges).<sup>169</sup> The budgetary demands from ESMA would be subject to the existing accountability and audit mechanisms, as would the annual decision on the EU's balancing contribution to ESMA.<sup>170</sup>

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<sup>163</sup> Ibid recital 23.

<sup>164</sup> Ibid art 47; Moloney (n 146) 193-4.

<sup>165</sup> Commission, *ESAs' Review: Proposal COM(2017) 536 Final* art 29a.

<sup>166</sup> Commission, *Proposal for a Regulation as Regards CCPs and Requirements for the Recognition of Third-Country CCPs COM(2017) 331* 19.

<sup>167</sup> Commission, *ESAs' Review: Proposal COM(2017) 536 Final* art 40.

<sup>168</sup> Ibid art 44.

<sup>169</sup> Ibid arts 62 and 62a.

<sup>170</sup> Ibid art 62.

As observed, the Proposal is testament to ESMA's steady rise. The Commission roots it within wider moves 'towards a Single European Capital Markets Supervisor' (whilst tempering this by the subsidiarity principle and the continued role of the national authorities).<sup>171</sup> At the same time, the Proposal has been contested. The funding and governance initiatives significantly strengthen ESMA's bureaucratic capacity and reduce the decision-making powers of the national authorities within it.<sup>172</sup> Some countries, industries, and firms have taken strong stances against it.<sup>173</sup> Industry concerns include the shift in funding from the public sector to market participants.<sup>174</sup> Further flashpoints concern the composition and process for appointing the full-time members of the Executive Board, which could dilute the influence of the national authorities. Equally, the role of the Executive Board in the Strategic Supervisory Plans also risks limiting the discretion of the national regulators.<sup>175</sup> The connected CCP governance proposals may also face resistance, not least for the increased complexity the Executive Session introduces into the overall framework.<sup>176</sup>

Given these various tensions, it is notable that the 2019 Council Compromise Proposal, which forms the basis of the trilogue negotiations with the Parliament, is more restrained in its ambition. This retains the Management Board (whilst reinforcing its role and powers), and broadly preserves the existing funding structure.<sup>177</sup> At the time of writing, the legislation's ultimate form remains a matter of speculation, yet at the same time, it raises the related normative question: if ESMA is evolving into a type of single supervisor, what should that mean in terms of its governance and accountability mechanisms?

## 7 The Rise of ESMA

### 7.1 ESMA: Mind the Gap Between the Model and the Reality?

The rationale of the financial sector ESAs complements the wider phenomenon in the EU order of agencification.<sup>178</sup> In this space, ESMA's emergence within the ESAs' as an astute

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<sup>171</sup> Commission, *Reinforcing Integrated Supervision to Strengthen CMU and Financial Integration in a Changing Environment COM(2017) 542* 5, 9; Moloney (n 146) 197.

<sup>172</sup> Niamh Moloney, 'EU Financial Governance after Brexit: The Rise of Technocracy and the Absorption of the UK's Withdrawal' (n 78) 111.

<sup>173</sup> Fabrice Demarigny and Karel Lannoo (n 104); House of Commons European Scrutiny Committee, *Fifth Report of Session 2017-19* (December 2017) section 9; LSEG, *Response to the ESA Review* (January 2018).

<sup>174</sup> Asset Management and Investors' Council, *Feedback on ESAs Review* (January 2018).

<sup>175</sup> EFAMA, *Review of the ESFS* (January 2018); Irish Funds, *Position on the Commission's Proposal for Reforming the ESFS* (January 2018).

<sup>176</sup> LSEG, *Commission's CCP Proposals* (2017) 8-9.

<sup>177</sup> ECOFIN, *Presidency Compromise Proposal (5834/19)* (February 2019); see also European Parliament, *Draft Report on ESA Proposals 2017/0230(COD)* (2018) (suggesting amendments including heightened accountability requirements).

<sup>178</sup> I Bajakić and M Božina Beroš, 'Examining Agency Governance in the European Union Financial Sector – a Case-Study of the European Securities and Markets Authority' (2017) 30 *Economic Research* 1743.



and ambitious authority is indicative of the EU's strengthening technocratic capacity. At the same time, it also fleshes out the widening of the gap between the model of EU agencies as originally conceived, and the reality of ESMA's position. This includes, as witnessed above, the ability of ESMA to make quasi-regulatory choices via its rule-making competences, its direct supervisory competency, and its powers to impose decisions binding on third parties.

As Craig argues, this raises important questions with respect to the role of agencies in the EU order. Specifically, even if it is accepted that a mellowing of *Meroni* took place via the *Short Selling* ruling, justifications for transferring powers based on agency independence, expertise and credibility become weaker when EU agencies are being accorded real discretionary powers, which may include policy elements.<sup>179</sup> At the same time, it does not follow from this that recourse to agencies is incorrect, especially when one bears in mind the magnitude of the EU project and the Commission's limited resources. Yet, it becomes all the more vital that such agencies are subject to effective checks and balances to ensure their continued credibility and legitimacy.<sup>180</sup> In this regard, there is the related puzzle for ESMA's governance mechanisms. On the one hand its mandate requires technical expertise and autonomy to operate; at the same time, as an unelected entity it must have robust oversight mechanisms to ensure its enduring legitimacy.<sup>181</sup>

Accordingly, this section speculates that although the governance reforms in the Commission Proposal may have some value, they neither fully tackle the shifts occurring towards greater centralisation, nor adequately respects the position of NCA experts on the current Board of Supervisors. Given this, it advocates further refinements to ESMA's governance framework, including reducing the Commission's presence to avoid stifling its autonomy. In relation to legitimisation concerns, and drawing on the SSM case study, it proposes that there could be a greater role allocated to the Parliament with respect to ESMA's oversight mechanisms. ESMA is politically accountable to the Parliament, and the Parliament currently lacks representation on ESMA's governing bodies. Moreover as a directly elected EU institution, the Parliament is an important institutional contact for ensuring ESMA's democratic accountability.<sup>182</sup> It is also the institution playing an increasingly significant role as a forum for holding unelected agencies to account. In this regard, increased monitoring by the Parliament could better guarantee ESMA's continued legitimacy.

## 7.2 Some Proposed Refinements

As observed in section 6, the Commission Proposal's governance modifications envisage creating an independent Executive Board geared at impartial and EU-oriented decision-making. The locating of certain decisions in the Executive Board is designed to dilute the Board of Supervisor's power where it may be in conflict. The Board remains the main intergovernmental body largely in charge of decision-making, however, and ESMA's executive members do not have voting rights in the Board. There are operational changes

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<sup>179</sup> Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (n 27) 541-2.

<sup>180</sup> Giandomenico Majone, *Regulating Europe* (Jeremy Richardson ed, Routledge 1996) chapter 13; Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (n 27).

<sup>181</sup> Niamh Moloney, *The Age of ESMA* (n 5) chapter 2.

<sup>182</sup> Fabian Amttenbrink and Rosa Lastra (n 102) (making the observation in the national context).

advocated concerning the Chair's appointment and profile; and the funding amendments seek to reduce the risk of national interference through eliminating national contributions.

It is not easy to strike the right balance between the Member States' heterogeneous interests and those of the supranational. The Commission's Proposal draws, to an extent, on the Parliament's Mazars recommendations, and especially from an efficacy perspective, could have some value.<sup>183</sup> At the same time, with respect to the moves observable towards greater centralised supervision, the Proposal could also have gone further, such as granting the full-time Executive Board members a vote in the Board of Supervisors on supervisory matters.<sup>184</sup> Yet, any such ESMA-shaped developments, which push in the direction of bureaucratic centralisation, could then be balanced through further increasing the Board of Supervisors' decision-making and oversight tasks.<sup>185</sup> In line with the analysis in section 4, it is not necessarily the case that the NCAs in the Board always adopt self-serving national positions. Moreover, the NCAs are expert and closest to the risks ESMA has to tackle.<sup>186</sup> Accordingly, and as Moloney argues, additional enhancements to the Board's role could involve the use of expert Board committees to analyse particular decisions prior to their adoption; wider use of QMV to ensure greater Board interaction; plus the introduction of additional oversight mechanisms to challenge both the Executive and the Board where necessary.<sup>187</sup> Although the resulting set-up could run the risk of becoming overly complex, it could help to support the centralised direction of travel of the ESMA project via ensuring the continued input, expertise, and monitoring ability of the NCAs.

At the level of the international arena, taking account of ESMA's presence within international standard setting bodies, additional enhancements to the Chair's profile would seem sensible.<sup>188</sup> Moreover ESMA has considerable influence (which is likely to increase due to Brexit) with respect to third country supervisors.<sup>189</sup> In this regard, as the Chair is set to become a much more powerful player, this needs factored into the level of their administrative ranking and selection procedure. Paring back the Commission's input in this process would also seem prudent, particularly given the debacle witnessed above surrounding the appointment of the ESAs' first Chairpersons.<sup>190</sup> The Parliament could also play a greater *ex ante* role, providing democratic weight to the process, whether via assistance in preparing the short-list, or in co-approving the Council's appointment.

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<sup>183</sup> Mazars (n 72) section 7; Niamh Moloney, *The Age of ESMA* (n 5) chapter 2.

<sup>184</sup> More radically (and less likely), the Executive Board could be given full responsibility for supervisory matters enabling swifter action (which can be necessary in the financial sector) whilst requiring the Executive Board to be accountable to the Board of Supervisor, IMF, *FSAP: Technical Note on Issues in Transparency and Accountability Country Report No. 13/65*.

<sup>185</sup> Niamh Moloney, *The Age of ESMA* (n 5) chapter 2.

<sup>186</sup> Mazars (n 72) section 2; Niamh Moloney, *The Age of ESMA* (n 5) chapter 2.

<sup>187</sup> Niamh Moloney, *The Age of ESMA* (n 5) chapter 2.

<sup>188</sup> Moloney, 'International Financial Governance, the EU, and Brexit: The 'Agencification' of EU Financial Governance and the Implications' (n 39).

<sup>189</sup> Mazars (n 72) 116-7.

<sup>190</sup> Fabrice Demarigny and Karel Lannoo (n 104) 4; Mazars (n 72) 2.1.3.

### 7.3 Ensuring ESMA's Autonomy...?

Considering the Commission's position more generally, its presence in ESMA's governance structure is complex. ESMA is not formally accountable to the Commission, and the two have a close working relationship. Yet the Commission has considerable influence (a type of teacher-pupil dynamic), which can risk impacting on ESMA's operational freedom, and its presence remains unchanged in the ESA Proposal.<sup>191</sup> One option would be for the Commission's influence to be diluted by the addition of Parliament representation within ESMA's governing bodies. In line with the analysis in section 3, and as Craig argues, given that ESMA's quasi-regulatory and supervisory mandate can blur the line between the technical and the policy, it is not readily apparent why the Parliament should be excluded from exercising influence alongside the Commission.<sup>192</sup> Yet at the same time, this could heighten the risk of inter-institutional wrangling within ESMA whilst further reducing its autonomy. Accordingly, an alternative could be to recalibrate the existing Commission/ESMA relationship so it becomes less burdensome for ESMA's independence (such as removing the Commission from ESMA's governance structures in relation to supervisory issues). This could then be balanced via ESMA being held formally accountable for such decisions to the Commission.

### 7.4 ...Subject to Guaranteeing ESMA's Continued Legitimacy?

In a similar vein, any such shifts need to be tempered by implementing appropriate checks and balances to ensure ESMA's legitimacy. Although the 2017 Proposal largely advocates no substantive amendments to ESMA's accountability structures, inspiration could be drawn from the SSM. Any such comparisons have to be made with a firm eye on their distinct environments, yet, the SSM provides a paradigm of integrated supervision, and, although not immune from controversy, is bedding in. As noted above, the SSM is subject to on-going 'police patrol' as well as a range of accountability demands to the Parliament.<sup>193</sup> Accordingly, augmenting ESMA's accountability in this way to Parliament would recognise the Parliament's position as the one directly elected institution, which currently lacks representation in ESMA's governing bodies. Moreover, ESMA is already primarily politically accountable to the Parliament as one of its principals (in conjunction with the Council); and bolstering the Parliament's position would accord with its evolving role as an accountability forum for overseeing EU agencies' performance.<sup>194</sup>

The starting point should be greater ex ante legislative specification of ESMA's scope of its activities and objectives (whilst remaining mindful of the particular dynamics of financial market oversight, and ESMA's location within this), to form a clear yardstick against which ESMA is to be assessed.<sup>195</sup> This should help to protect against concerns as to arbitrary

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<sup>191</sup> I Bajakić and M Božina Beroš (n 178) 1753-4.

<sup>192</sup> Paul Craig, *EU Administrative Law* (n 20) chapter 6; Martin Shapiro, 'The Problems of Independent Agencies in the United States and the European Union' (1987) 4 *Journal of European Public Policy* 276, 287.

<sup>193</sup> Paul Tucker, *Unelected Power* (Princeton University Press 2018).

<sup>194</sup> Fabian Amttenbrink and Menelaos Markakis (n 143); Deirdre Curtin, 'Holding (Quasi) Autonomous EU Administrative Actors to Public Account' (n 9) 536.

<sup>195</sup> Fabian Amttenbrink and Rosa Lastra (n 102); Fabian Amttenbrink and Menelaos Markakis (n 143).

evaluation or the risk of interactions turning into political score settling.<sup>196</sup> Further, in light of ESMA's expanding competencies, more formal, regular appearances before the Parliament should be implemented. A form of Capital Markets Dialogue could be introduced via channels to include more standardised public hearings, workshops, as well as maintaining current practices (such as more ad hoc exchanges of view with MEPs). In line with the analysis in section 4, such fora could require ESMA and the Chair to explain and justify particular conduct or inaction to the Parliament on a regular basis; and facilitate rigorous questioning and informed debate. This Dialogue could also eventually lead to judgment, and for ESMA, where necessary, to face consequences in the case of malperformance.<sup>197</sup> In this regard, developing an enhanced and fruitful ESMA/Parliament relationship should not prove too onerous a challenge given that ESMA has sought to develop a productive relationship with the Parliament since day one of ESMA's creation, and has strengthened its engagement with it over the years.<sup>198</sup>

At the same time, this paper is not promoting a 'SSM for Capital Markets'. Although the general direction of travel may ultimately point that way, this paper has analysed political, legal, and institutional obstacles that stand in the way. These include how far *Meroni* has been mellowed, how much article 114 TFEU can bend before Treaty change is needed, as well as the 'bewildering array' of design choices with respect to how to split supervisory responsibilities between the ESAs, and the ECB in the Banking Union.<sup>199</sup> Rather, given that ESMA is becoming a different type of authority from the other ESAs, the paper advocates embracing bespoke governance and accountability reforms within existing EU constraints to ensure these frameworks are fit for purpose. The paper remains mindful of the more open questions as to whether the Parliament's political priorities and designs are always going to be in line with those of ESMA's and financial market oversight. Yet, it has also demonstrated that a plethora of other inter-institutional and intergovernmental monitoring systems are in place to temper any grand designs by the Parliament. This is true of EU governance more generally; the reality today illustrates a combination of intergovernmental, supranational and regulatory relations are in place, and none of these can be confined to 'neat single-level interactions'.<sup>200</sup>

## 8 Conclusion

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<sup>196</sup> Fabian Amtenbrink and Menelaos Markakis (n 143); Niamh Moloney, *The Age of ESMA* (n 5) chapter 2.

<sup>197</sup> Mark Bovens (n 87). In this regard although the Council would also need to be involved in any decision to revise ESMA's founding legislation, Moloney argues that Parliamentary disapproval can act as a proxy for formal sanctions and that ESMA has shown itself to be sensitive to institutional displeasure, see Niamh Moloney, *The Age of ESMA* (n 5) chapter 2.

<sup>198</sup> Niamh Moloney, *The Age of ESMA* (n 5) chapter 2; ESMA, *ECON Statement* (October 2017) where the ESMA Chair commented on their continuous dialogue and looked forward to their continued cooperation.

<sup>199</sup> Moloney (n 146) 200; Niamh Moloney, 'Brexit and EU Financial Governance: Business as Usual or Institutional Change?' (2017) 42 *ELJ* 112, 121; Moloney, 'Institutional Governance and Capital Markets Union: Incrementalism or a "Big Bang"?' (n 39).

<sup>200</sup> D Curtin and R Dehousse (n 8) 203.

Agencies are integral aspects of the EU's architecture today; they are an established part of how the EU operates.<sup>201</sup> In recent years, agencies have mushroomed, and ESMA now has far-reaching quasi-regulatory and supervisory powers. Such shifts raise fundamental questions with respect to its constitutional standing, the powers that can be delegated to it, and how to wrestle the competing challenges of its autonomy and accountability. This paper has charted the rise of ESMA within the agency literature, and via an examination of its governance and accountability mechanisms, as well as drawing on the SSM's operating systems, makes normative proposals for ESMA's framework. It argues that given the greater levels of integrated capital markets supervision now occurring, ESMA's governance model needs recalibrating to better recognise this new reality, whilst also balancing this with the competing national interests. Strengthening ESMA is not an end in itself, however, and any governance refinements would be implemented with the imposition of additional control and accountability requirements. In particular, the paper proposes a bigger role for the Parliament, and the creation of a regular Capital Markets Dialogue to ensure critical debate and deliberation in relation to ESMA's action or inaction.<sup>202</sup> ESMA is now a central actor in EU financial markets regulation and supervision, and reshaping its governance and accountability mechanisms is vital to guarantee both its autonomy and legitimacy.

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<sup>201</sup> Ellen Vos (n 13).

<sup>202</sup> Deirdre Curtin, 'Holding (Quasi) Autonomous EU Administrative Actors to Public Account' (n 9) 536.