The Regulatory Powers of the European Supervisory Authorities

Constitutional, Political and Functional Considerations

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After four years into the operation of the architectural framework of the European System of Financial Supervisors introduced by the de Larosière Report in 2009, the Commission's report published in 2014 paints a picture of an operational framework, suggesting some areas for improvement. The focus of the present analysis is on the advanced rule-making powers that the European Supervisory Authorities have been equipped with compared to their predecessors. An examination of the European Supervisory Authorities' legal basis, their governance structures and the process via which the authorities exercise their regulatory powers, sheds some light on the distinction between the constitutional limitations, political concerns and functional objectives that shape the regulatory role of the European Supervisory Authorities. The analysis aims to contribute to the discussion on the overall assessment of the European Supervisory Authorities rulemaking powers and gives consideration to the topic of which institutional elements of the authorities may require an overhaul and why.

1 Introduction

The European System of Financial Supervisors (ESFS) comprises of three European Supervisory Authorities (ESAs), the European Banking Authority (EBA)[1], the European Securities and Markets Authority (ESMA)[2] and the European Insurance and Occupation Authority (EIOPA)[3]. To complement these authorities, a European Systemic Risk Board (ESRB), under the responsibility of the European Central Bank was also established.[4] EBA, ESMA and EIOPA are responsible for the micro-prudential supervision, whereas the ESRB is responsible for the macro-prudential supervision of financial institutions and products respectively. The three ESAs were established by legislation in December 2010 and have been fully operational since January 2011. Each ESA

[1] Regulation No 1093/2010 of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, henceforth EBA Regulation.
[2] Regulation No 10935/2010 of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJEC, L.311/84 of 15 December 2010, henceforth ESMA Regulation.
[3] Regulation No 1094/2010 of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, henceforth EIOPA Regulation.
[4] Regulation No 1092/2010 of 24 November 2010 on European macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, henceforth ESRB Regulation.

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is a Union body with legal personality[5] and is accountable to the European Parliament and the Council.[6] The ESAs replaced the Level 3 Committees which were comprised of the Committee of European Banking Supervisors (CEBS), the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) and the Committee of European Securities Regulators (CESR). With respect to Level 1 initiatives, the previous level 3 Committees provided their views on technical aspects of the policies and regulations for consideration by the Commission and with regard to level 2 initiatives the Committees were invited to submit their advice. The ESAs continue to perform the advisory functions of the level 3 Committees and it is mandatory to provide advice in the cases expressly mentioned in the level 1 initiatives.[7] The ESAs have assumed additional key competences, which include: (a) observing a legally binding mediation role to solve disputes between national supervisors, (b) adopting binding supervisory standards, (c) adopting binding technical decisions applicable to individual institutions, and (d) being in charge of the oversight and coordination of colleges of supervisors.[8] The Regulation specifically provides that the ESAs are authorised to, among others[9], devise and propose *technical standards*, which are put to the Commission for endorsement[10], as well as issue *guidelines* for interpretation and conduct peer reviews with which the national supervisory authorities will make every effort to comply in their decision-making.[11]

The present chapter focuses on the advanced rule-making powers that the ESAs have been equipped with compared to their predecessors. The analysis aims to contribute to the discussion on the overall assessment of the ESAs' regulatory role and its possible development. The previous corresponding EU Committees responsible for financial market services had only consultative competences and were equipped with the tasks of issuing guidelines, recommendations and standards for applying European rules in the form of non-binding 'soft-law'. As the Level 3 Committees were not empowered to introduce or issue binding measures or decisions respectively, it was left to the

[5] EBA, ESMA and EIOPA Regulations, Article 5.
[6] EBA, ESMA and EIOPA Regulations, Article 3.
[7] See Wymeersch (2011), p. 456.
[8] De Larosière Report (2009), p. 57.
[9] Additional competences include the capacity to: facilitate and coordinate actions of national supervisory authorities in the event of emergencies (See EBA, ESMA and EIOPA Regulations, Article 18), take binding decisions in the event of disagreements between national supervisory authorities (See EBA, ESMA and EIOPA Regulations Article 19), promote and monitor the functioning of colleges of supervisors (See EBA, ESMA and EIOPA Regulations, Article 21), build a *common supervisory culture* and *consistent supervisory practices* within the European Union (See EBA, ESMA and EIOPA Regulations, Article 29), provide an assessment of market developments and give advice and deliver opinions to the Commission and the European Parliament See EBA, ESMA and EIOPA Regulations, Article 8, Article 32 and Article 34) and give recommendations to national authorities in the event of failure to comply with European obligations and, if these designations are not followed, to issue specific instructions to the relevant financial institutions (See EBA, ESMA and EIOPA Regulations, Article 17).
[10] EBA, ESMA and EIOPA Regulations, Articles 10 and Article 15.
[11] EBA, ESMA and EIOPA Regulations, Article 18.

national supervisory authorities to ensure compliance with the regulations. The ESAs have the power to recommend binding technical standards for uniform application of EU Directives in the field of financial regulation, issue guidelines on supervisory practices and issue standards for national supervisors and firms to adopt on a 'comply or explain' basis. In creating a single EU rule book by developing draft technical standards, the ESAs are nevertheless still dependant on receiving the European Commission's endorsement of the standards submitted.

The transfer of Member States' competence and discretion in regulating national institutions to a European System is central to the discussion of the role of the ESAs as quasi-legislators within the context of EU financial regulation. Moloney finds that the institutional design of the ESAs is flawed, explaining that the Treaty provisions have led to a compromise between Commission control and the authority's independence, resulting in an under ambitious design for the ESAs' quasi-rule-making role.[12] Stuart Popham, Senior Partner at Clifford Chance, stated in the House of Commons Treasury Committee's Opinion on proposals for European financial supervision, that the fact that the ESAs constitute a quasi-regulator *without* the direct power to make rules and *without* the direct power to exercise discretion, makes it difficult to ascertain what they can *actually* do.[13] Fahey with reference to the EBA, highlights the fact that the authority lacks the desired powers to deal with post financial crisis issues which in itself indicates the existence of a gap between 'what is politically and economically desirable and what is constitutionally possible'.[14] The constitutional limitations of transferring regulatory powers to the ESAs remain somewhat unclear. The Treaty on the European Community (EC Treaty) does not provide for the creation of EU agencies. The Treaty of Lisbon implicitly makes reference to the existence of agencies of the Union by making provision for the Court of Justice of the European Union (CJEU) to review the legality of acts of bodies, offices or agencies of the Union.[15] At the same time, despite a distinction having been made between policy making and technical decision making, this distinction is not based on a clear articulation of administrative rule-making and is difficult to respect in regulatory practice.[16]

The new structure of the ESAs, aims, among others, to guarantee independence from the Commission and Member States respectively. The Larosière Report highlighted the need for the ESFS to be independent from possible political and industry influences, from both the EU and Member States,

[12] See Moloney (2011) Part (1), p. 41.
[13]HC 1088 (11 November 2009) House of Commons, Treasury Committee. The Committee's Opinion on proposals for European financial supervision. Sixteenth Report of Session 2008–09, pp. 25-26 quoting Stuart Popham. London: The Stationery Office Limited. Available via UK PARLIAMENT. http://www.publications.parliament.uk/pa/cm200809/cmselect/cmtreasy/1088/1088.pdf. Accessed 05 November 2015.
[14] See Fahey (2011), p. 582.
[15]Article 263 TFEU.
[16] Chiti (2015), p. 3.

by providing supervisors with clear mandates and tasks, as well as sufficient resources and powers.[17] In order to strengthen legitimacy and as a counterpart for independence, the Larosière Report stressed the need to ensure proper accountability to the political authorities at the EU and national levels.[18] Whether however this has in fact been the case, can only be understood by assessing how the architectural framework of the European System of Financial Supervision works in practice. The founding regulations of each of the three ESAs required the Commission to undertake a review and to publish a general report by early 2014 on the experience acquired as a result of the operation of the ESAs and the procedures laid down in the founding regulations. The Commission's report was published on 8.8.2014 and reviews the ESAs' work, outlining major achievements, as well as areas for improvement.[19] Four years into the operation of the architectural framework of the ESFS, the Commission's 2014 Report paints a picture of an operational framework. In terms of the ESAs' overall effectiveness and efficiency the report finds that the ESAs have quickly established well-functioning organisations aimed at contributing to restoring confidence in the financial sector and that the scope of the mandate of the ESAs is sufficiently broad with some room for targeted possible extensions in certain fields.[20] The Commission report finds that the work undertaken by the ESAs on the development of the single rule book has so far contributed significantly towards enhanced regulatory harmonisation and coherence and has improved mutual understanding between supervisors and allowed the EU to equip itself with a significant amount of high quality rules within a relatively short timeframe.[21] Nevertheless, the Report also identifies areas in need of improvement, specifically in relation to the ESAs' regulatory role and governance structures.

The present analysis aims to contribute to the discussion on the assessment of the ESAs' rulemaking powers and gives consideration to the topic of which institutional elements of the authorities may require an overhaul and why. The problems identified are not to be understood as minor imperfections of the ESAs establishing regulations, but rather reflect a more profound problem of institutional design.[22] The claim the Chapter makes is that the role and the objectives of the ESAs need to be further clarified. The proposed reforms aim to guarantee that a better balance is struck between the ESA and the Commission in the exercise of their regulatory powers respectively, as well as help with the creation of an effective accountability mechanism were conflicts to arise. A

[17] The De Larosière Report (2009), p. 47.
[18] The De Larosière Report (2009), p. 47.
[19] COM (2014) 509 final 'Report from the Commission to the European Parliament and the Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)'.
[20] COM (2014) 509 final, p. 4.
[21] COM (2014) 509 final, p. 5.
[22] Chiti (2015), p. 3.

further clarification of the ESAs' legal basis and their role would also help address the tension which exists between driving towards the reinforcement of their discretionary rule-making powers and obstructing the effective exercise of such powers and presenting them as purely technical.[23] The chapter will delve deeper into the constitutional control to which the ESAs' rule-making powers are assumed to be subject to and also consider the political and functional objectives surrounding their powers.

The Chapter is organised as follows. Section 2 addresses the EU Financial Integration Project and the role of the ESAs' therein. Section 3 provides an overview of the legal basis for the creation of the ESAs and section 4 discusses the regulatory powers of the ESAs with reference to the constitutional limitations to which their powers are subject to, the political concerns which surround their rule-making status and the functional objectives which the ESAs may in fact need to meet. Section 5 addresses the process observed by the ESAs' in exercising their quasi-rulemaking powers and their status as independent authorities as outlined in the founding regulations, as well as the balance of powers between different parties involved in the rule-making process. Finally, section 6 concludes and gives consideration to the topic of which institutional elements of the authorities may require an overhaul and why.

2 EU Financial Market Integration Project in context

The financial market integration project is dependent on the efficient and healthy operation of the EU Member States' financial markets. On a theoretical level, capital markets can provide for 'the exchange of information among actors', 'the monitoring of behaviour' and 'the sanctioning of defection from cooperative endeavour'.[24] The integration of financial markets has remained a priority all throughout the entirety of the process of European integration, on the basis that a variety of empirical studies link financial integration to financial development.[25] On a theoretical level, the integration of financial markets can be achieved when securities with identical cash flows command the same price, otherwise known as 'the law of one price'. This implies that the same interest rate will be paid when issuing bonds in different regions and the same capital to be paid when raising equity in different markets.[26] Barriers to such integration include differences in currencies, differences in taxes and subsidies, differences in regulation and enforcement and asymmetric information between potential foreign entrants to the market and domestic incumbents.[27] The creation of the single market in the EU meant therefore that there was a need to, among others,

[23] Chiti (2015, p. 2.
[24] See Hall and Soskice (2001), p. 10.
[25] See Jappelli and Pagano (2008), p. 4.
[26] See Jappelli and Pagano (2008), p. 4.
[27] See Jappelli and Pagano (2008), p. 5.

set in place a plan that would combat 'the differences in regulation and enforcement'.

The regulation and supervision of financial markets had to specifically address the substantive matter of 'what to regulate', as well as the procedural matter of 'by whom' and 'how' the sector would be regulated.[28] The terms 'regulation' and 'supervision' are often used interchangeably. However, as Wymeersch highlights, a distinction between the terms should be made, explaining that regulation refers to 'rulemaking, setting guidelines and normative interventions aimed at ensuring the same regulatory environment', whilst supervision refers to 'the day-to-day action of supervisors-who are also often regulators –aiming to ensure that financial firms apply the rules laid down by the regulators…'.[29] According to Wymeersch the distinction also corresponds to the practical needs of markets and their supervision, as for example the proximity of the supervisor and the knowledge of the local market, which necessitates that the decentralisation of supervision remains the norm of the European supervisory model, whilst regulation remains to a significant extent centralised as European rulemaking pre-empts national rules.[30]

Lorenzo Bini Smaghi identifies the clash between three objectives at EU level, namely a clash between financial integration, financial stability and national supervisory authority, which objectives, as he advocates, cannot be achieved simultaneously.[31] Lord Turner (2009) in his Review also made a distinction between the objectives pursued by stating that:

> Sounder arrangements require either increased national powers, implying a less open single market, or a greater degree of European integration. A mix of both seems appropriate: the extent to which more national powers are required will depend on how effective 'more Europe' options can be.[32]

In many cases retaining a balance between the divergent objectives of national autonomy and European centralisation lends itself to unwanted negative consequences. Notwithstanding the general principle of the supremacy of Union

[28] See Lastra (2003), p. 49.
[29] See Wymeersch (2011), p. 446.
[30] See Wymeersch (2011), p. 448 and see The House of Lords, The future of EU financial regulation and supervision, Chapter 2: Regulation and Supervision in the European Union (Session 2008-09), on the distinction of regulation and supervision. Available via PARLIAMENT. http://www.parliament.the-stationery-office.co.uk/pa/ld200809/ldselect/ldeucom/106/10605.htm. Accessed 05 November 2015.
[31] See Bono Smaghi (2009).
[32] See the Turner Review (March 2009) A regulatory response to the global banking crisis, p.101. Available via FSA. http://www.fsa.gov.uk/pubs/other/turner_review.pdf. Accessed 05 November 2015 and Andenas and Chiu (2013), p. 335 who argue that that legal integration may not adequately address the needs of financial stability and that the aim of ensuring financial stability through this process could in fact facilitate diverging practices on the part of Member States causing tension with the promotion of legal integration in EU financial regulation. The authors specifically critique the Commission's aim to promote regulatory harmonisation as a means to accomplish the creation of a single market leading to financial stability in the EU, see European Commission, European Financial Stability and Integration Report 2011 (April 2012), Executive Summary. Available via EUROPA.http://ec.europa.eu/finance/financial-analysis/docs/efsir/20120426-efsir_en.pdf. Accessed 05 November 2015.

law over national law[33], regulation and supervision remain to a large extent a national matter, which, as Wymeersch points out, only moves to the European level once EU rules have been adopted.[34] The degree of centralisation or decentralisation in the allocation of competencies for financial supervision and regulation in Europe is determined by the requirements of the principle of subsidiarity.[35] The principle of subsidiarity restricts community action only to what is strictly necessary for European needs.[36] According to the principle of subsidiarity the EU does not take action, with the exception of the areas that fall within its exclusive competence, unless it is more effective than action taken at the national level.[37] Conditions of compliance with the subsidiarity principle are obscure however. Subsidiarity, as explained by Craig and De Burca (2008):

> … embraces three separate, albeit related ideas: the Community is to take action only if the objectives of that action cannot be sufficiently achieved by the Member States; the Community can better achieve the action because of the scale of effects; if the Community does take action this should not go beyond what is necessary to achieve the Treaty objectives.[38]

The principle of subsidiarity aims to ensure that decisions are made as closely as possible to the needs of citizens and that checks are made in order to establish whether action at Union level is justified. [39]

The European Union (EU) was prompted, since the 1970s, to develop a programme that harmonises, besides others, the corporate and securities laws of Member States.[40] In the 1990s the introduction of the Financial Services Action Plan (FSAP) sparked a process of intense legislative activity.[41] The FSAP consisted of a set of 42 measures intended to harmonise the financial services markets within the EU. It determined the way in which the laws would be adopted in terms of their mode, e.g. minimum standards or maximum harmonisation, and also determined the content of the laws that would be adopted in terms of the interests the laws would first and foremost serve and protect.

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[33] Costa v Ente Nazionale per L'Energia Elettrica (ENEL), ECJ Case 6/64, [1964] ECR 585, [1964] CMLR 425; Also refer to the Treaty of Lisbon in Declaration No. 17 which states that: '[...] in accordance with well settled case law of the CJEU, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of MS, under the conditions laid down by the said case law.'

[34] See Wymeersch (2011), p. 444.

[35] See Lastra (2003), p. 54.

[36] Article 5(3) TFEU.

[37] See Papadopoulos (2010), pp. 47-59 for an analysis of the permissible limits of harmonisation and issues of subsidiarity.

[38] Craig and De Burca (2008), p.103.

[39] See Lastra (2003), p. 54 who further explains that the principle of subsidiarity also relates to the enforcement of powers which belong to Member States and the principle of proportionality, namely not going beyond what is needed to attain the Union objectives, one of which is the completion of the single market.

[40] Tridimas (2011), p. 792 in Craig and De Burca.

[41] Financial Services - Implementing the Framework for financial markets: Action Plan. Commission Communication of 11.05.1999 COM (1999) 232.

In 2001 the Committee of Wise Men, chaired by Alexander Lamfalussy identified several shortcomings in the legislative process and in order to address these shortcomings introduced a plan for the adoption and implementation of financial services legislation.[42] The Lamfalussy Report distinguished four levels of regulation. 'Level 1' contained framework principles, specific to each Directive and Regulation, decided by normal EU legislative procedures provided for in Article 294 of the Treaty for the Functioning of the European Union (TFEU), i.e. by a proposal by the Commission to the Council of Ministers/European Parliament for co-decision. 'Level 2' rules were rules adopted by a decision of the Commission, in agreement with an EU Securities Committee and an EU Securities Regulators Committee, which assist the Commission in determining how to implement the details of the Level 1 framework. 'Level 3' rules promoted the enhanced cooperation and networking among national EU securities regulators in order to ensure consistent and equivalent transposition of Level 1 and 2 legislation by adopting common non-binding implementing standards. 'Level 4' rules refer to the action by the Commission to enforce Community law, underpinned by enhanced cooperation between the Member States, their regulators, and the private sector on the basis of article 258 of the TFEU.[43] The Level 3 Committees, which comprised of the CEBS, the CEIOPS and the CESR, were equipped with the role of advising the Commission on the rules to be proposed or adopted by it. Level 3 committees specifically aimed at achieving coordinated implementation of EU law, regulatory convergence and supervisory convergence.[44] Level 3 regulation embedded common approaches developed jointly by national regulators into non-binding guidelines, recommendations or standards which were agreed upon in the level 3 committees.[45] The Commission points out in its review of the application of the Lamfalussy Process in 2004 that although Level 3 regulation had the objective of coordinating Member States' implementation efforts, applying that in practice at the time needed to be articulated more clearly.[46]

As Wymeersch identifies, although the above system worked well for several years, the call for more integrated and stronger rulemaking made it eventually increasingly inefficient.[47] The Lamfalussy Report (2004), perhaps in prediction that the system may need further development, made provisions for a full review of the system stipulating in advance that:

[42] The Lamfalussy Report, Final Report of the Committee of wise men on the regulation of European securities markets, Brussels, 15 February 2001. Available via EUROPA. http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf. Accessed 05 November 2015.
[43] See The Lamfalussy Report, 2001, p. 19.
[44] Commission Staff Working Document: The Application of the Lamfalussy Process to EU Securities Markets Legislation, SEC (2004) 1459 (Nov. 15, 2004).
[45] Wymeersch (2011), pp. 448-449.
[46] Commission Staff Working Document, SEC (2004) 1459 (Nov. 15, 2004).
[47]Wymeersch (2011), p. 449.

> …if the full review were to confirm in 2004…that the approach did not have any prospect of success, it might be appropriate to consider a Treaty change, including the creation of a single EU regulatory authority for financial services generally in the Community.[48]

The financial crisis emerging in the autumn of 2008 came as a wakeup call for more coordination between EU Member States, more robust rulemaking and the need for developing further the creation of a level-playing-field in the European Union. The financial crisis made specifically evident that the EU could not advance in its objectives of financial market integration without a robust system of financial regulation and supervision. In October 2008 a Committee of Experts chaired by Jacques de Larosière was given the task of advising on the future of European financial supervision and regulation.[49] The Larosière Report published in February 2009, which provided the Group's assessment of the evidence brought forward by the financial crisis, identified, among others, a series of weaknesses in the former EU system of financial supervision and regulation. Specifically, it identified: (i) the lack of adequate macro-prudential supervision, (ii) ineffective early warning mechanisms, (iii) problems of competences, (iv) failures to challenge practices on a cross-border basis, (v) lack of frankness and cooperation between supervisors, (vi) lack of consistent supervisory powers across Member States, (vii) lack of resources in the level 3 committees, and (viii) no means for supervisors to take common decisions.[50]

In an assessment of the former micro-prudential supervision of the EU financial sector and of the cooperation between the Level 3 Committees of CESR, CEBS and CEIOPS specifically, the Group considered that the *structure* and the *role* bestowed on the existing committees was not sufficient to ensure financial stability in the EU and all its Member States.[51] The Group made proposals to replace the European Union's Level 3 Committees supervisory architecture, with a ESFS comprising of the three ESAs. An integrated network of financial supervisors with a defined number of tasks that could be better preformed at EU level was seen as an effective means of supervising an increasingly integrated and consolidated EU financial market.[52] The ESFS set out to overcome a series of identified deficiencies and to provide a system that is in line with the objective of a stable and single Union financial market for financial services, linking national supervisors within a strong Union network.[53] Preserving financial stability was assumed to be one of the objectives that the

[48] The Lamfalussy Report (2001), p. 41.
[49] High Level Group on Financial Supervision in the EU chaired by Jacques de Larosière, henceforth the De Larosière Report, Brussels, 25 February 2009. Available via EUROPA. http://ec.europa.eu/finance/general-policy/docs/de_larosiere_report_en.pdf. Accessed 05 November 2015.
[50] See the De Larosière Report (2009), pp. 39-42.
[51] See the De Larosière Report (2009), p. 46.
[52] See the De Larosière Report (2009), p. 47.
[53] EBA, ESMA and EIOPA Regulations, Recital 8.

new architectural framework aimed to ensure. It remains open to debate however, whether this objective is complementary to or at odds with the authorities' main objective, which is in principle financial market integration through, among others, regulatory harmonisation.

3 Legal Basis for the creation of the ESAs

The legal basis upon which the ESAs were established is Article 114 of the TFEU.[54] Article 114 of the TFEU is generally used as the main legal basis for internal market harmonisation or approximation of laws. Article 114 paragraph 1 of the TFEU provides (in part) that:

> The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

For the legislator to invoke the application of Article 114 TFEU it is necessary for the harmonisation or approximation to have as a 'genuine' objective the improvement of the conditions of the 'establishment and functioning' of the internal market.[55] According to the Mobile Phone Roaming case, recourse to article 114 TFEU is permitted if the differences between national rules are such that they obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market and also, if there is an aim of preventing the emergence of obstacles to trade resulting from the divergent development of national laws, provided that the emergence of such obstacles is likely and that the measure in question is designed to prevent them.[56] The ENISA decision of the CJEU[57] outlined the scope of Article 114 TFEU as a legal basis for the creation of Community agencies by stating that, 'Article 114 TFEU can be used as a legal basis only where it is actually and objectively apparent from the legal act that its purpose is to improve the conditions for the establishment and functioning of the internal market.'[58] Citing

[54] Referred to as article 114 TFEU (ex Article 95 EC).
[55] Case C-376/98 Germany v Parliament and Council (Tobacco Advertising) [2000] ECR I-8419, para 84 (Tobacco Advertising No 1) and Fahery (2011), p. 587 who explains that the decision remains isolated as an instance of the CJEU striking down legislation rooted in Article TFEU whereby the CJEU held that Article 114 TFEU did not constitute a 'generalised' competence clause by the legislature and held that the Directive did not have as its genuine objective the internal market, but rather public health.
[56] See Case C-58/08 The Queen on the application of Vodafone Ltd & others v Secretary of State for Business, Enterprise and Regulatory Reform & others (Mobile Phone Roaming) [2010] I-ECR 0000, paras 32-33.
[57] Case C-217/04 United Kingdom v Parliament and Council (ENISA) [2006] ECR I-3771, concerning the Regulation establishing the European Network and Information Security Agency (ENISA).
[58] Case C-217/04, para. 42 (citing Case C-66/04 United Kingdom v Parliament and Council [2005] ECR I-0000).

the Case C-66/04 United Kingdom v Parliament and Council, the CJEU in the ENISA decision further highlighted that:

> … by using the expression 'measures for the approximation' in Article 95 EC the authors of the Treaty intended to confer on the Community legislature a discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the method of approximation most appropriate for achieving the desired result, in particular in fields with complex technical features.[59]

The ENISA decision also provides that the tasks conferred on to an EU agency 'must be closely linked to the subject-matter of the acts approximating the laws, regulations and administrative provisions of the Member States.'[60] Fahey explains however that the reasoning of the CJEU in ENISA is not that helpful as it is particularly broad with regard to the threshold to invoke Article 114 TFEU and would authorise many infrastructural designs.[61]

Recital 17 of the founding regulations which expressly refers to the ENISA decision provides that:

> The purpose and tasks of the Authority – assisting competent national supervisory authorities in the consistent interpretation and application of Union rules and contributing to financial stability necessary for financial integration – are closely linked to the objectives of the Union *acquis* concerning the internal market for financial services. The Authority should therefore be established on the basis of Article 114 TFEU.

Recital 8 of the founding regulations establishing the ESAs, provides that the former Committees had reached their limits in terms of providing solutions to a variety of needs that the Union was faced with, one of which was the need to combat the existence of different interpretations given to the same legal text within the Union.[62] One of the aims of the ESAs was therefore to create a more coherent framework on the interpretation of those rules, with the enhanced, compared to their predecessors, regulatory powers that the founding regulations equipped them with. From a reading of the founding regulations of the ESAs however, a tension appears to exist between the role of the ESAs within the financial market integration project and the role that the ESAs have been given as a response to the financial instability stemming from the financial crisis, as future guarantors of financial stability within the Union. The Regulations establishing the ESAs make clear that strengthening the financial integration project is not their sole objective, with their tasks not being limited solely to the

[59] Case C-217/04, para. 43 (citing Case C-66/04 United Kingdom v Parliament and Council [2005] ECR I-0000, para. 54).
[60] Case C-217/04, para. 45.
[61] See Fahey (2011), p. 591.
[62] EBA, ESMA and EIOPA Regulations Recital 8 (v).

creation of the single rulebook[63], but also in maintaining and promoting the orderly functioning and integrity of financial markets and the stability of the whole or part of the financial system in the Union.[64]

The House of Commons has identified this tension, by pointing out that there were potentially fundamental problems with the legal basis of Article 114 TFEU on which the ESRB and the ESAs were founded, considering that there is a divergence between the objectives of financial integration and financial stability.[65] The lack of clarity with reference to the objectives which the ESAs aim to meet is most evident from a comparison of the Recitals of their Founding Regulations, as well as from a comparison of Article 1(5)(a) and (b), and Article 9(5) of the ESAs' Founding Regulations. The former set of articles outline the ESAs' objective of, among others, improving the functioning of the internal market, including in particular a sound, effective and consistent level of regulation and supervision and ensuring the integrity, transparency, efficiency and orderly functioning of financial markets, whilst the latter article empowers the ESAs to intervene in cases where financial activities threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union in certain cases laid down in the legislative acts referred to.

The problematic relationship between financial stability and financial integration has been pointed out recently by the Advocate General (AG) in his Opinion on the case C-270/12 UK v Council and Parliament. Opposed to the UK's claim, the Council and the Commission argued that Article 28 of the Short Selling Regulation constitutes a harmonising measure under EU law and thus Article 114 TFEU constitutes an appropriate legal basis for the authority's powers.[66] In agreement with the particular claim brought forward by the UK, the AG found that Article 114 TFEU is not an appropriate legal basis for the powers granted to ESMA under Article 28 of the Short Selling Regulation, on the basis that they do not amount to a harmonising measure under EU internal market law, but are more reflective of EU level emergency powers, which should be based on Article 352 TFEU that requires unanimity between Member States instead.[67] The legal basis used for the creation of the ESAs should be distinguished from the legal basis used for empowering the ESAs to exercise a particular set of powers. This useful distinction was emphasised by the AG in

[63] EBA, ESMA and EIOPA Regulations Recital 5.
[64] See EBA, ESMA and EIOPA Regulations Recital 12 and Fahey (2011), p. 586.
[65] See House of Commons Treasury-Sixteenth Report Session (2008-09) pp. 15-16, para. 29-31 and Andoura and Timmerman (2008) who question the validity of Article 114 TFEU as a legal basis for the EBA.
[66] Opinion of AG Jääskinen in Case C-270/12 (United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union v Council and Parliament), para. 5, delivered on 12 September 2013. Available via CURIA. http://curia.europa.eu/juris/document/document.jsf?text=&docid=140965&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=127454. Accessed 5 November 2015.
[67] Opinion of AG Jääskinen in Case C-270/12, para. 37.

his Opinion on the case of C-270/12 UK v Council and Parliament.[68] Regarding the powers conferred on the ESMA under Article 28 of the Short Selling Regulation specifically, he argued that, in order to assess whether the conferral of such powers on an agency falls within the scope of Article 114 TFEU, it is necessary to examine whether or not the decisions of the agency concerned either contribute or amount to internal market harmonisation under EU law.[69] The AG finds that the particular powers do not, 'because the conferral of decision making powers under that article on ESMA, in substitution for the assessments of the competent national authorities, cannot be considered to be a measure 'for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market' within the meaning of Article 114 TFEU.'[70] The AG emphasised that:

> …in considering whether Article 114 TFEU is a correct legal basis for a given EU measure, the Court must verify whether the measure whose validity is in issue in fact pursues the genuine objectives of improving the conditions for the establishment and functioning of the internal market as stated by the EU legislature.[71] Moreover, the potential for the emergence of future obstacles to trade resulting from disparities in Member State law is not enough. The emergence of such obstacles must be likely and the measure in question must be designed to prevent them.[72]

Although it is useful to point out that the legal basis upon which the ESAs are established should be distinguished from the legal basis empowering them to exercise a particular set of powers, the ambiguity surrounding the latter remains. The following section will delve deeper into the ESAs' rule making powers by examining the constitutional, political and functional considerations surrounding their regulatory role.

4 The Regulatory Powers of the ESAs

The substantive mandates for the areas in which level 3 rule making or action can be developed are included in the specific Level 1 and Level 2 EU instruments, whilst the legal basis upon which the ESAs are established, as well as the process of secondary rulemaking by the Commission, is outlined in the founding regulations of the ESAs.[73] The Lisbon Treaty introduced a hierarchy among secondary legislation by drawing a distinction between legislative acts,

[68] Opinion of AG Jääskinen in Case C-270/12, para 27.
[69] Opinion of AG Jääskinen in Case C-270/12, para. 36.
[70] Opinion of AG Jääskinen in Case C-270/12, para. 37.
[71] Opinion of AG Jääskinen in Case C-270/12, para. 46 (citing Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419 (*Tobacco Advertising*), par. 85 and case law cited).
[72] Opinion of AG Jääskinen in Case C-270/12, para. 47 (citing Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-8419, (*Tobacco Advertising*) para. 86 and citing Case C-58/08 Vodafone and Others [2010] ECR I-4999, para. 33).
[73] See Wymeersch (2011), pp. 456-457.

delegated acts and implementing acts in Articles 289, 290 and 291 of the TFEU respectively. Moloney refers to these provisions as a pragmatic constitutional fix, which 'attempts to resolve the difficulties created by the Meroni doctrine, while also responding to sensitive institutional interests'.[74]Article 290 TFEU provides that only the Commission has the power to adopt delegated acts, which is subject to the legislator's scrutiny under Article 290(2). The ESAs are empowered to adopt two different types of rules, namely draft technical standards and soft law measures in the form of guidelines and recommendations. Draft technical standards can be distinguished between regulatory technical standards which upon endorsement of the Commission qualify as delegated acts referred to in Article 290 TFEU and implementing technical standards which qualify as implementing acts referred to in Article 291 TFEU. For draft technical standards in the areas within the scope of the powers delegated to the Commission under EU financial services law in accordance with Article 290 TFEU, the ESAs can submit their drafts to the Commission, which may: endorse them as delegated acts, reject them or adopt them with amendments after coordinating with the ESA.[75] In the case of non-endorsement or amendment of draft regulatory technical standards the Commission shall inform the Authority, the European Parliament and the Council, stating its reasons.[76] Draft implementing technical standards are developed in the areas where financial services law provides the Commission with powers to issue uniform conditions for implementation of EU law in accordance with Article 291 TFEU. Both types of draft technical standards shall be technical, shall not imply strategic decisions or policy choices and their content shall be delimited by the legislative acts on which they are based in the case of regulatory technical standards[77] or their content shall be to determine the conditions of application of those acts in the case of implementing technical standards.[78]

The procedure for the adoption of both regulatory technical standards and implementing technical standards is based upon an open public consultation on the draft regulatory technical standards and a request for advice from the relevant stakeholder group, followed by an analysis of the potential related costs and benefits.[79] Soft law measures in the form of guidelines and recommendations are adopted via a similar process of consultation allowing for stakeholder group participation and a cost/benefit analysis. Concerning guidelines and recommendations however it is at the ESA's discretion as to

[74] See Moloney (2010), p. 1347.
[75] EBA, ESMA and EIOPA Regulations, Article 10.
[76] EBA, ESMA and EIOPA Regulations, Article 14(1).
[77] EBA, ESMA and EIOPA Regulations, Article 10(1).
[78] EBA, ESMA and EIOPA Regulations , Article 15(1).
[79] EBA, ESMA and EIOPA Regulations, Article 10(1) and 15(1) respectively.

whether or not it will conduct the consultation and the stakeholder group participation.[80]

The power to exercise discretion and regulatory powers should be distinguished from each other. Chamon argues that the distinction between executive and discretionary powers is simplistic and that reliance should be placed on this distinction, but rather efforts should be made to outline the limits to the possible conferral of powers to agencies.[81] At a first stage the questions that ultimately need to be answered concern the nature of the agencies and their place in the institutional architecture of the Union.[82] At a second stage transparency with a clarified delimitation of powers would help construct the accountability mechanisms both for the Commission and the agencies.[83]

The Commission in its draft institutional agreement on the operating framework for the European regulatory agencies in 2005[84], referring to the Meroni ruling, made clear that the power to adopt general regulatory measures, the power to arbitrate in conflicts between public interests or exercise political discretion are powers conferred on the Commission by the Treaty only and cannot be entrusted to agencies.[85] However, as Chamon identifies, the Commission's proposal for future agencies was at the time outdated considering that the limits of Meroni had already been exceeded by giving the European Aviation Safety Agency (EASA) quasi-regulatory powers.[86] Also, the criterion applied by the Commission to distinguish the powers between them, e.g. between technical and political issues, is not clear and oversimplified.[87]

The following section will start by taking a closer look at the case law to date that address the constitutional limitations on the ESAs' rule-making powers, with an aim of establishing the extent to which the delegation of rule-making powers is available to EU agencies.

4.1 Case Law Overview: Constitutional Limitations

An examination of a series of CJEU cases, with the Meroni decision specifically being often cited as the authority on the limitations imposed, is thought to shed some light on how the non-delegation doctrine has developed to date. The

[80] See Chiti (2013), p. 103.
[81] See Chamon (2010), p. 304.
[82] See Chamon (2010), p. 304.
[83] See Chamon (2010), p. 304.
[84] See Draft Institutional Agreement on the operating framework for the European regulatory agencies, COM (2005) 59 final Available via EUROPARL. http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2005/0059/COM_COM%282005%290059_EN.pdf. Accessed 05 November 2015; Note however that the Commission eventually withdrew its proposal for a draft interinstitutional in agreement in March 2009, see Withdrawal of Obsolete Commission proposals [2009] OJ C 71/17.
[85] See Draft Institutional Agreement on the operating framework for the European regulatory agencies, COM (2005) 59 final, pp. 11-12.
[86] See Chamon (2010), p. 300.
[87] See Chamon (2010), pp. 300-301.

restriction imposed on the authorities' rule-making powers derives from the principle that EU institutions are prohibited from delegating discretionary powers conferred on them by the Treaty to EU agencies.[88] The Meroni principle establishes that a delegating authority cannot confer on the authority receiving the delegation powers different powers from which it has itself received under the Treaty, that the delegation of powers can only involve clearly defined executive powers and not broad discretionary powers and that the delegating authority has to take an express decision transferring those powers. However, it is important to note that, as Chamon explains, the CJEU itself has never applied its ruling of the Meroni case to an agency[89] and that despite wide reference being made to the Meroni doctrine to answer the question of the limits imposed to a possible delegation of powers to agencies, few reflect on the judgment in detail in relation to agencies.[90] It is worth reflecting on the specifics of the Meroni case, in order to objectively assess whether any aspects of the case may still be relevant to current day EU agencies.

In the Meroni case, the applicant company Meroni contested the decision of the High authority which was adopted in application of Decisions Nos 22/54 of 26 March 1954 and 14/55 of 26 March 1955 establishing machinery for the equalization of ferrous scrap imported from third countries. The implementation of the system defined in Decision No 14/55 was entrusted to the so-called Brussels Agencies and the High authority had delegated powers for the financial operation of the ferrous scrap regime to these bodies under Belgian private law. The applicant challenged the decision, among others, on the basis that the delegation of powers which General Decision No 14/55 granted to the Brussels agencies was illegal. The complaint concerned the manner in which the powers were delegated, as well as the actual principle of delegation. In the former case, the applicant specifically complained that the High Authority had delegated to the Brussels agencies powers conferred upon it by the Treaty, without subjecting their exercise to the conditions which the Treaty would have required if those powers had been exercised directly by it.[91] In the latter case the applicant complained that the High Authority had delegated powers to agencies ill-qualified to exercise them.[92]

The CJEU found that Decision No 14/55 did in fact grant a true delegation of powers to the Brussels agencies.[93] With reference to the manner in which the authority was delegated, the CJEU found that the delegation resulting from Decision No 14/55 was an infringement of the Treaty, on the basis that the decision of the Brussels agencies was not made subject to the rules to which the

[88] See Meroni e Co., Industrie Metallurgiche, SpA v. High Authority. Case 9 and 10/56. ECR 11-48, 53-86. ECJ 1958.
[89] Chamon (2011), p. 1056.
[90] Chamon (2011), p. 1058.
[91] Meroni case, p. 146.
[92] Meroni case, p. 146
[93] Meroni case, p. 149

decisions of the High Authority were subject under the Treaty.[94] Regarding the complaint that the High Authority had delegated to the Brussels agencies powers which the agencies were ill-qualified to exercise, the claimant argued that Article 8 of the European Coal and Steel Community (ECSC) Treaty required the High Authority 'to ensure that the objectives set out in this Treaty are attained in accordance with the provisions thereof' meaning that the Treaty did not provide the power for the High Authority to delegate its powers.[95] The CJEU did not exclude the possibility of entrusting certain tasks to bodies established under private law, but did however proceed to identify the manner in which such tasks can be entrusted.[96] The CJEU found that Article 53 of the ECSC Treaty which articulates the power of the High Authority to authorize or make the financial arrangements necessary gave the High Authority the right to entrust certain powers to bodies but subject to conditions to be determined by it and subject to its supervision.[97] Such delegations of powers were considered legitimate only if the High Authority recognized them 'to be necessary for the performance of the tasks set out in Article 3 and compatible with this Treaty, and in particular with Article 65' of the ECSC Treaty.[98] The CJEU made particular reference to the objectives set out in Article 3 of the ECSC Treaty, making the point however that it was uncertain whether all the objectives could be simultaneously pursued in their entirety in all circumstances and that reconciliation of the objectives implied the exercise of real discretion on the High Authority's part.[99] The CJEU concluded that:

> The objectives set out in Article 3 are binding not only on the High Authority, but on the 'institutions of the Community ... within the limits of their respective powers, in the common interest'. From that provision there can be seen in the balance of powers which is characteristic of the institutional structure of the Community a fundamental guarantee granted by the Treaty in particular to the undertakings and associations of undertakings to which it applies. To delegate a discretionary power, by entrusting it to bodies other than those which the Treaty has established to effect and supervise the exercise of such power each within the limits of its own authority, would render that guarantee ineffective.[100]

Despite the Meroni decision being often cited as the key authority on the limitations imposed on the ESAs' rule-making powers, a careful consideration of its elements shows that its relevance to today's agencies should be called into

[94] Meroni case, p. 150.
[95] Meroni case, p. 151.
[96] Meroni case, p. 151.
[97] Meroni case, p. 151.
[98] Meroni case, p. 151.
[99] Meroni case, pp. 151-152.
[100] Meroni case, p. 152 and Case 25/70 Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster, Berodt & Co [1970] ECR 1161 whereby an alteration of the 'balance of powers' as between the EU institutions was referred to as the 'institutional imbalance' between EU institutions, which constitutes one of the main aspects of the Meroni case that several authors reflect on in the discussion of the restrictions imposed on EU agencies.

question.[101] The problem in applying the Meroni doctrine to current day EU agencies arises first and foremost from the fact that there are key differences regarding the conditions surrounding the Brussels agencies as compared to the current day EU agencies. More specifically, the Meroni decision concerned agencies which were established under private law and not public law, as are the current day EU agencies and also the operation of the agencies in Meroni was assessed under the ECSC Treaty, whereas the current agencies operate under the EU Treaties.[102] These differences aside however, even when the doctrine is applied to current day agencies, it is not applied in a consistent manner. Academic literature, according to Chamon, has not been particularly helpful in this respect.[103] One standpoint applies the Meroni principle to current day agencies, but does not provide an answer on how the operation of the decision-making agencies can be reconciled with the prohibition to delegate powers set out in the Meroni decision.[104] Another standpoint links the 'balance of powers' referred to in the Meroni case to the principle of 'institutional powers' as set out in the case of Chernobyl[105], which prevents the agencies from being given discretionary powers.[106] In legal terms the principle of institutional imbalance represents the rule that institutions have to act within the limits of their competences. The balance established by the Treaties has evolved throughout the history of the Community, with the progressive growth of the powers of the Parliament to the detriment of the other institutions, especially that of the Commission.[107] Chamon argues however that the 'balance of powers' of the Meroni case should be distinguished from the notion of 'institutional powers', because the Meroni case referred to a concern regarding the Treaty's system of judicial protection and not a concern about inter-institutional relations.[108] He objects to applying the modern interpretation of the principle of institutional balance to EU agencies, in view of the fact that a qualitative leap has occurred from the 'balance of powers' of the Meroni case to the 'institutional balance'.[109]

Another highly relevant case, yet less referenced compared to the Meroni case, is the Romano case, which sets out the principle concerning the prohibition on administrative bodies to adopt measures of general application with the force of law.[110] The Romano case concerned the power of delegation of legislative power by the Council to the Administrative Commission for the

[101] See Chamon (2011), p. 1060 who argues that closer consideration should be given to the extent to which the doctrine in Meroni is still relevant to the functioning of the EU agencies and Chiti (2009), p. 1422 who also argues that the jurisprudence of 1958 cannot be considered a sufficient foundation to justify clear-cut solutions on the limits imposed on the powers on current day agencies.
[102] Chamon (2011), p. 1059.
[103] Chamon (2011), p. 1058.
[104] Chamon (2011), p. 1058 who on this point refers to the work of Van Ooik (2005), p. 151.
[105] Case 70/88, European Parliament v. Council of the European Committees [1990] ECR I-2041.
[106] Chamon (2011), p. 1058, who refers to the work of Vos E (2003), p. 131.
[107] Jacque (2004), p. 387.
[108] Chamon (2011), p. 1059.
[109] Chamon (2010), p. 295.
[110] Case C-98/80, Romano v Institut National d' Assurance Maladie Invalidite [1981] ECR 1241, para. 20.

Social Security of Migrant Workers, an auxiliary body to the Commission. The main concern dealt with by the CJEU was that of judicial protection. As stated:

> *… it follows both from Article 155 of the Treaty and the judicial system created by the Treaty, and in particular Articles 173 and 177 thereof, that a body such as the Administrative Commission may not be empowered by the Council to adopt acts having force of law...*[111]

The case appears to be of more relevance to EU agencies compared to Meroni, considering that Romano (i) was ruled under the EEC Treaty and not the ECSC Treaty, (ii) concerned the delegation of powers by the legislator, *in casu* the Council and not by the Commission or the High Authority, and (iii) the delegatee was a body established under secondary law and not private law.[112] Chamon observes that the CJEU in Romano was not so much concerned with the delegation by the Council, but rather that the Council did not delegate the task to the Commission and chose another body instead.[113] The scope of the prohibition contained in the judgment of Romano if broadened to apply to any binding decision whether of general or individual application, adds to the uncertainty of which powers may be conferred on the agencies.[114] Chamon rightly points out however that in order to ascertain how Romano applies to the operation of today's agencies one needs to explore whether the Treaty revisions enacted since Romano have accommodated concerns raised in the judgment and whether the legal and political context that the agencies operate in today could make the principle established in Romano no longer relevant to the agencies.[115]

The Meroni case and the limits imposed on delegation therein were often cited as the standard in later judgments.[116] A more recent case however deserves attention, as it arguably implicitly recognises which elements of the Meroni and the Romano cases may still be of relevance and which not. The case was also decided in relation to an EU agency and with reference to the new Treaties and can therefore provide an up to date and better understanding of the issues

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[111] Case C-98/80, Romano v Institut National d' Assurance Maladie Invalidite [1981] ECR 1241, para. 20.
[112] Chamon (2011), pp. 1060-1061.
[113] Chamon (2011), p.1063.
[114] Chamon (2011), p. 1065.
[115] Chamon (2011), p. 1065.
[116] See Case C-301/02 P Carmine Salvatore Tralli v. ECB [2005] ECR I-4071 (The *Tralli*), para. 43 whereby the CJEU made clear that the restrictions outlined in the Meroni case were still applicable on the conferral of power to one of the organs of the ECB, namely delegation of the power to adopt and amend the rules implementing the Conditions of Employment from the Governing Council of the ECB to the Executive Board and see joined cases C-154/04 & C-155/04, The Queen on the application of Alliance for Natural Health and Others v. Secretary of State for Health and National Assembly for Wales [2005] ECR I-6451 (*Alliance for Natural Health* case), para 90 whereby the CJEU held that '…when the Community legislature wishes to delegate its power to amend aspects of the legislative act at issue, it must ensure that power is clearly defined and that the exercise of the power is subject to strict review in the light of objective criteria (see, to that effect, Case 9/56 Meroni v High Authority [1958] ECR 133, at p. 152) because otherwise it may confer on the delegate a discretion which, in the case of legislation concerning the functioning of the internal market in goods, would be capable of impeding, excessively and without transparency, the free movement of the goods in question'.

surrounding the delegation standard in relation to EU agencies. In the case C-270/12 UK v Council and Parliament, the CJEU dismissed the UK's challenge to the powers conferred on the ESMA by the Short Selling Regulation. The Regulation gives ESMA the power to require persons to notify or publicise net short positions and to prohibit or impose conditions on the entry by natural or legal persons into a short sale or similar transactions[117] when certain conditions outlined in article 28(2) of the Short Selling Regulation arise. One of the conditions referred to is the occurrence of a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the EU arises.[118] The Commission had adopted a delegated regulation to specify what criteria should be taken into account in determining the existence of the threats referred to in the Short Selling Regulation, allowing nevertheless room for further discretionary judgment to be made on the ESMA's part.[119] Article 28(3) of the Regulation on Short Selling provides that:

> where taking such measures ESMA shall take into account the extent to which the measure:
>
> (a) significantly addresses the threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union or significantly improves the ability of the competent authorities to monitor the threat;
>
> (b) does not create a risk of regulatory arbitrage;
>
> (c) does not have a detrimental effect on the efficiency of financial markets, including by reducing liquidity in those markets or creating uncertainty for market participants, that is disproportionate to the benefits of the measure.

One of the arguments brought forward by the UK to challenge the legality of Article 28 of the Regulation on Short Selling was that it was contrary to the Meroni principle, in view of the fact: (i) that it entailed 'a very large measure of discretion' and (ii) that in taking such decisions involved 'ESMA in the implementation of actual economic policy and require it to arbitrate between conflicting public interests, make value judgments and carry out complex economic assessments.'[120] A claim was also made that Article 28(3) of the Short Selling Regulation specifically referred to factors that encompassed tests which were 'highly subjective' and that it was contrary to the Meroni principle to vest the ESMA with wide discretionary powers as to the application of the policy in

[117] Article 28(1) of the Regulation 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps.
[118] Article 28(2) of the Regulation 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, which power is based upon Article 9(5) of the Regulation 1095/2010 establishing ESMA.
[119] See Article 24(1) (a) of the Commission Delegated Regulation (EU) No 918/2012 of 5 July 2012 supplementing Regulation (EU) No 236/2012 of the European Parliament and the Council on short selling and certain aspects of credit default swaps.
[120] Case C-270/12 United Kingdom v European Parliament & Council of the EU, Para. 27-34.

question.[121] The CJEU however, in disagreement with the UK, as well as with the AG Jääskinen, held that the Meroni principle was satisfied considering that the ESMA's discretion was limited by various conditions and criteria. The CJEU noted that in this case, distinguishing it to the Meroni case, ESMA was a European entity created by the European legislature and not a body created under private law[122]and that, without making reference to the distinction between executive and discretionary powers, it pointed out that the exercise of powers was circumscribed by various conditions and criteria, which limited the ESMA's discretion.[123] However, as rightly identified, although the ESMA can only act when a threat to the functioning of the financial market arises and when competent authorities cannot *adequately* address the threat, it remains at the ESMAs' discretion to determine what a 'threat' and what 'adequate' is.[124]

An important point raised in the case C-270/12 UK v Council and Parliament by the Parliament and the Council, with the support of the Commission and the Kingdom of Spain, the Republic of France and the Republic of Italy, was to call on the CJEU to consider the case law on which the United Kingdom relies, not in a vacuum, but in the light of 'the modernisation of EU agency law that occurred under the Lisbon Treaty, particularly with respect to judicial review of acts of agencies having legal effects'.[125] The interpretation given to the Meroni doctrine by the CJEU may well be a modernised approach to the limits of delegation. As Sholten and Van Rijsbergen claim, the CJEU in this case formulates a new delegation doctrine in relation to EU agencies, allowing for EU agencies to be the recipients of executive discretionary powers on the condition that this discretion is limited.[126]

In the Case C-270/12 United Kingdom v European Parliament & Council of the EU, the UK also sought to challenge the legality of Article 28 of the regulation on short selling on the basis that the article was not properly adopted under the legal basis of Article 114 TFEU.[127] The AG in his Opinion advocated that Article 28 did not amount to internal market harmonisation so as to permit the use of Article 114 as a legal basis, but should have rather been adopted under Article 352 TFEU.[128] More specifically, the AG concluded that Article 28 'creates an EU level emergency decision-making mechanism that becomes operable when the relevant competent national authorities do not agree as to the

[121] Case C-270/12 United Kingdom v European Parliament & Council of the EU, Para. 27-34.
[122] Case C-270/12 United Kingdom v European Parliament & Council of the EU, Para. 43.
[123] Case C-270/12 United Kingdom v European Parliament & Council of the EU, Para. 45.
[124] Scholten and Van Rijsbergen (2014), p. 395.
[125] Opinion of AG Jääskinen in Case C-270/12, para. 5.
[126] Scholten and Van Rijsbergen (2014), p. 390.
[127] Case C-270/12 United Kingdom v European Parliament & Council of the EU, Para. 88.
[128] Opinion of the AG Jääskinen in Case C-270/12 and see Fahey (2011)), pp. 593-594 who refers to Article 352 TFEU as an alternative legal basis for EBA and points out that with reference to Article 114 TFEU there remains a question of legitimacy of employing it as a tool for institutional solutions to highly exceptional problems of the European Union.

course of action to be taken.'[129] The distinction is mostly important in light of the fundamental differences between the exercise of discretionary as opposed to emergency powers. As Marjosola (2014) explains:

> The ESMA's discretionary powers under Article 9(5) of the ESMA Regulation are not consistent with the emergency decision-making mechanism created by Article 18. Article 9(5) powers are fundamentally different in that their exercise is not dependent on mandatory political safeguards, but they rather rely on ad hoc safeguards established by subsequent sectoral legislation…..the relationship between emergency measures based on Article 9(5) and Article 18 of the ESMA Regulation seems ambiguous: the powers overlap but the political and procedural safeguards they are subjected to are very different.[130]

The CJEU however held that Article 28 comprises of measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States and that the purpose of the powers provided for in Article 28 of the regulation was in fact to improve the conditions for the establishment and functioning of the internal market in the financial field, so that it satisfied all the requirements laid down in Article 114 TFEU.[131]

Another argument brought forward by the UK concerned the infringement of Articles 290 and 291 TFEU on the basis that the Council could only confer the powers to adopt non-legislative acts of general application, as well as implementing acts, to the Commission. The CJEU found that Article 28 of Regulation No 236/2012 vested ESMA with certain decision-making powers in an area which requires the deployment of specific technical and professional expertise and that this conferral of powers did not correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU.[132] The CJEU, referring to the legal framework establishing the Short Selling Regulation (Regulation No 1092/2010, the ESMA Regulation and Regulation No 236/2012), dismissed the plea of the UK on the basis that the powers conferred on the ESMA should not be considered in isolation, but rather that they should be perceived as forming part of a series of rules designed to endow the competent national authorities and ESMA 'with powers of intervention to cope with adverse developments which threaten financial stability within the Union and market confidence'.[133] The AG pointed out in his Opinion that the powers vested in the ESMA by Article 28 of the Short Selling Regulation have not been conferred on the ESMA via Article 290(1) TFEU nor by Article 291(4) TFEU, but rather directly from the EU legislature through an Article 289(3) TFEU legislative Act[134] and concludes that the requirements set out in Article 291 TFEU and

[129] Opinion of the AG Jääskinen in Case C-270/12, para. 51.
[130] Marjosola (2014) (I), p. 14.
[131] Case C-270/12 United Kingdom v European Parliament & Council of the EU, para. 97-119
[132] Case C-270/12 United Kingdom v European Parliament & Council of the EU, para. 82-83.
[133] Case C-270/12 United Kingdom v European Parliament & Council of the EU, para. 85.
[134] Opinion of the AG Jääskinen in Case C-270/12, para. 89-90.

general constitutional laws governing conferral of implementing powers were fully respected.[135] The fact that comitology applies only to Article 291 TFEU implementing acts however, as Marjosola explains, leaves the issue of how the use of executive powers by EU agencies is controlled, making demands for constitutionalising and systematising the forms of EU executive rule-making outside existing formal procedures necessary.[136]

An overview of the cases shows that the extent to which the delegation of rule-making powers is available to EU agencies remains a relatively open question. The confusion arises not only from the fact that the above mentioned cases fail to provide a concrete answer to the question of what the exact limitations imposed on the powers of the authorities are and what the legal basis for the restrictions is but mostly, from the fact that the often cited cases of Meroni and Romano are outdated and cannot be safely applied to the operation of current day EU agencies, such as the ESAs. Academic scholarship has similarly failed to provide an answer. In reviewing the academic literature which addresses the two judgments Chamon finds that no author has been in a position to reconcile the two judgments of Meroni and Romano, nor explain how other EU authorities have been given the power to take binding decisions.[137] More recently however, the ESMA Short-Selling case decided within the institutional framework established by the TFEU Treaty, arguably establishes a new delegation doctrine.[138] The CJEU concluded that the fact that the agency's acts may be subject to judicial review by the CJEU (Article 263 TFEU) and the subject of a plea of illegality (Article 277 TFEU) implies the creation of EU agencies, as well as the delegation of powers to EU agencies to issue acts of general application, on the condition that such powers are precisely delineated and are circumscribed by various conditions and criteria which limit the discretion of the agencies.[139] The need for the modernisation of the delegation doctrine has been highlighted by the AG in his Opinion on the Case C-270/12 United Kingdom v European Parliament & Council of the EU who stated that:

> In my opinion, the changes introduced by the Lisbon Treaty, both with respect to the clarification of the distinction between (normative) delegated measures and implementing (executive) powers, and amendments that copper-fasten judicial review of the acts of EU agencies into the judicial architecture of the European Union, mean that the *Romano* and *Meroni* case law needs to be re-positioned into the contemporary fabric of EU constitutional law.[140]

[135] Opinion of the AG Jääskinen in Case C-270/12, para. 101.
[136] Marjosola (2014)(II), p. 519.
[137] Chamon (2011), p. 1068
[138] See Scholten and Van Rijsbergen (2014), p. 401.
[139] Case C-270/12 United Kingdom v European Parliament & Council of the EU, para. 1.
[140] Opinion of the AG Jääskinen in Case C-270/12, para. 60.

Scholten and Van Rijsbergen adopt the view that the ESMA-Short-Selling case has in part overturned the Meroni and Romano cases respectively, as it relaxes the rigidness of the Romano's ban on delegating powers to agencies with 'the effect of law' on the one hand and allows room for agencies to exercise discretionary powers within confined boundaries on the other.[141] Marjosola also comments on the implications of the case by stating that the practical relevance of the judgment with regard to Meroni is the guidance it provides for *in casu* assessments of the boundaries and conditions of the delegation (and conferral) of powers.[142] The judgment does not only bring the jurisprudence to the post-Lisbon age, but also makes the point that Meroni applies regardeless of whether the act under scrutiny is a sub-delegation by the Commission, or a direct empowerment embedded in the legislative act itself.[143] According to Scholten and Van Rijsbergen however, two issues remain unresolved.[144] Firstly, if empowering the ESAs entails a conferral of discretionary powers, rather than delegation, there is no legal framework to govern the scope, conditions and limits of it. Secondly, the CJEU in the Short Selling Regulation case, as opposed to the Meroni case, entrusts EU agencies with limited discretionary powers but does not provide answers to the question of what kind of discretion can be conferred.

Reference to a series of key judgments on the constitutional limits to which EU agencies are assumed to be subject to, makes clear that the delegation doctrine has not remained stagnant but has evolved. What can be stated with certainty is that notwithstanding the standards on delegation set out in the Meroni and the Romano cases respectively, the ESAs are now subject to a different set of constitutional constraints. But despite the Case C-270/12 United Kingdom v European Parliament & Council having been helpful in shedding some light on the modernisation of the doctrine and how it may apply to current day agencies, the case has also opened up a series of issues in relation to the delegation of rule-making powers to the ESAs.

4.2 Political Concerns and Functional Objectives

Constitutional fundamentals are undoubtedly the starting point concerning the limitations to which the regulatory powers of the ESAs' are subject to. Political considerations relating to the operation of certain EU bodies, as well as Member States themselves, should not however be overlooked. As Chamon explains, the Commission and the Parliament seem less concerned with the constitutional positioning of the agencies and more concerned with the political control over the agencies, so that when the Commission refers to the Meroni ruling to

[141] See Scholten and Van Rijsbergen (2014), p. 401.
[142] Marjosola (2014)(II), p. 514.
[143] Marjosola (2014) (II), p. 515.
[144] See Scholten and Van Rijsbergen (2014), pp. 402-403.

interpret the position of the agencies, it is more inspired by the Commission's need to stay in control of the agencies than anything else.[145] Chiti similarly identifies that the application of the Meroni doctrine, which limits delegation to outside bodies to purely executive powers, represents the option politically preferable both for the Commission and national governments, as it serves a convenient balance between 'light and controlled enforcement' and common administrative action.[146]

Even to date, the Commission appears reluctant to openly consider an expansion of the ESAs' regulatory powers. The Commission's latest report highlights the fact that the ESAs are set up as decentralised agencies and that despite having an important role to play in contributing to the implementation of Union policies, the ESAs' role remains distinct from that of European institutions and that their role within the regulatory process needs to be assessed within the limits posed by the Treaty.[147] The statement, which reads overly generic, is outdated however, as it fails to address the complexity and evolution of the restrictions deriving from the Meroni doctrine, the jurisprudence that has followed the Meroni case to date, the evidence brought forward by the financial crisis and the amendments which the Treaties have been subject to. It is obvious that despite reference having been made to the Meroni ruling as regards the functioning of the agencies, the limitations imposed are closely linked to the Commission's policy of keeping a check on the powers of agencies.[148]

However, it is not only the Commission, but also Member States that would possibly object to the elaborate powers of the ESAs. On the political dimension of the European financial architecture, Spendzharova explains that it is important to explore the reasons behind Member States' reservations toward the new European financial regulation framework in order to understand how national regulatory authorities can be integrated closely in a centralized European financial regulatory framework.[149] Her research, which focuses on the EU's Central and Eastern European new Member States' position towards the regulatory proposals for financial supervision, concludes that the larger the market share for foreign banks, the more reservations the countries express about transferring regulatory powers to the EU level.[150] Most importantly, it is found that the more the governing political parties are opposed to EU integration in general, the more reservations are found in a country's official

[145] Chamon (2010), p. 304.
[146] Chiti (2009), pp. 1404-1405.
[147] COM (2014) 509 final, p. 5, but also note that stakeholders and the ESAs themselves have put forward the proposal to increase the involvement of the ESAs in the preparation of 'level 1' financial services legislation.
[148] See Chamon (2010), p. 287 who emphasises the fact that in its policy documents the Commission shows an awareness of the fact that a balancing act between controlling the agencies and reassuring Member States that the ESAs remain independent in their exercise of powers is necessary. Stakeholders and the ESAs themselves put forward the proposal to increase the involvement of the ESAs in the preparation of 'level 1' financial services legislation.
[149] Spendzharova (2012), p. 315.
[150] Spendzharova (2012), p. 328.

position on the new EU financial architecture.[151] Therefore, political constraints may also form the barrier to the evolution of the regulatory powers vested in the ESAs, even if an enlightened interpretation of the constitutional limitations to which the powers of the ESAs are assumed to be subject to takes place.

A pragmatic view, which considers the options available by setting the political considerations addressed above aside, is to move away from a rigid application of the doctrines of the past, to a functional application of the subsidiarity test when it is considered necessary and on a case by case basis.[152] Pelkmans and Simoncini put forward this proposal on the basis that necessary centralisation is either not coming about or is immensely slow due to the existence of vested interests that benefit from fragmentation and the rigidity of the Meroni doctrine.[153] The Meroni doctrine, as they argue, has been preventing discussions on the functional need of EU agencies to regulate from going forward.[154] The authors do not argue against the application of the Meroni doctrine altogether, but rather in favour of allowing for some flexibility in the application of the doctrine in those instances where there is a compelling case for the establishment and proper functioning of the single market.[155] The latest referred to CJEU case, as they argue, is evidence that at present there is some flexibility in the application of Meroni, which aims to find a balance between the constitutional principle of legitimate delegation and the principle of establishing and ensuring the functioning of the internal market.[156]

5 A discussion of the quasi-rulemaking process

To turn now to the question of whether the limitations imposed by the no-delegation doctrine inhibit the authorities from effectively exercising their role and achieving their objectives, it is worth taking a closer look at the *process* followed in adopting the different types of rules. The present author takes the view that the way in which technical aspects of the ESAs' rule-making are followed in practice are an indication that the discussion on the procedure observed in relation to the exercise of the ESAs' rule-making powers is equally as important as is the discussion on the perceived constitutional limitations to which their powers are subject to.

5.1 Quasi-Rulemaking Process

[151] Spendzharova (2012), p. 328.
[152] CEPS Commentary. Pelkmans J and Simoncini (2014) p. 4, who bring forward the example of network industries, where the establishment and proper functioning of the single market can simply not be accomplished without the centralisation of rule-making and enforcement, partly through the EU agencies.
[153] CEPS Commentary. Pelkmans and Simoncini (2014), p. 4.
[154] CEPS Commentary. Pelkmans and Simoncini (2014), p. 4.
[155] CEPS Commentary. Pelkmans and Simoncini (2014), p. 5.
[156] CEPS Commentary. Pelkmans and Simoncini (2014), p. 5.

Regarding the procedure followed for the adoption of the different types of rules, a distinction can be made between an *internal procedure* and an *external procedure*. *Who* by law is enabled to take the initiative to introduce draft technical standards, *how* draft technical standards are devised and *what procedure* needs to be followed in order to adopt, reject or amend the proposal, all determine the level of power that the ESAs *actually* have. An outline of the ESAs' governance structure will help understand the internal procedure followed in the exercise of the ESAs' quasi-rulemaking powers. Each ESA comprises of a Board of Supervisors, a Management Board, a Chairperson, an Executive Director and a Board of Appeal.[157] The *Board of Supervisors* comprises of members appointed by Member States and is the governing body of the ESA. The Board of Supervisors, as each authority's decision-making and rule-making body, is responsible for adopting draft technical standards, as well as guidelines and recommendations. The appointed members represent Member States' respective banking, securities markets and insurance/pensions regulators accordingly. The Board of Supervisors is specifically composed of the Chairperson, the head of the national public authority competent for the supervision of the particular sector of each Member State (supervision of credit institutions for EBA; supervision of financial market participants for ESMA; supervision of insurances, occupational pensions for EIOPA), one representative of the Commission, one representative of the ESRB and one representative of each of the other two ESAs.[158]

It is important to note, that from the members comprising the Board of Supervisors it is only the 28 members, representatives of the national competent authorities or bodies involved in the respective fields of supervision, that have voting power. The decisions adopted by the Board of Supervisors are as a rule decided on by simple majority through a system of one vote per member[159], but decisions on particular matters are, as an exception, decided on by qualified majority.[160] The regulatory technical standards, the implementing technical standards and the guidelines and recommendations[161], as well as the decisions adopted under the third subparagraph of article 9(5) of the Regulation, and budgetary matters[162] are all adopted on a qualified majority basis.[163] The Chairperson and the voting members of the Board of Supervisors, when carrying out the tasks conferred upon it by this regulation, are required to act independently and objectively in the sole interest of the Union as a whole and

[157] EBA, ESMA and EIOPA Regulations, Article 6.
[158] EBA, ESMA and EIOPA Regulations, Article 40.
[159] EBA, ESMA and EIOPA Regulations, Article 44.
[160] EBA, ESMA and EIOPA Regulations, Article 44.
[161] EBA, ESMA and EIOPA Regulations, Articles 10 to 16.
[162] EBA, ESMA and EIOPA Regulations, Articles 62 to 66.
[163] EBA, ESMA and EIOPA Regulations, Article 44 subparagraph 2.

shall neither seek nor take instructions from Union institutions or bodies, or Member States.[164]

The participation of the heads of the national competent authorities of the 28 Member States in the governance structure of the *Board of Supervisors* of the ESAs means that the authorities retain a close link to and dependence on the national supervisory authorities. In relation to the governance structure of the ESAs it is noted that while the shift away from a decision-making process based on consensus to actual voting is a step forward, the fact that the representatives of the national competent authorities maintain a predominant role in the decision making process gives rise to concerns that national views rather than EU-wide interests dominate the proceedings.[165] The Commission Report of 2014 makes this point by noting that consideration should be given to options that will strengthen the effectiveness and efficiency of the ESAs, while maintaining a high level of accountability.[166] In this respect the Commission states that it intends to explore options on how to improve the governance of the ESAs to ensure that decisions are taken in the interests of the EU as a whole. [167]

5.2 The Balance of Powers in the Rule-Making process

As described in section 4 above, the procedure for the adoption of regulatory technical standards and the implementing technical standards[168], as well as the procedure for the adoption of soft law measures in the form of guidelines and recommendations, both involve an initial process of consultation, relevant stakeholder group participation and a cost/benefit analysis.[169] For the adoption of binding technical standards the ESA engages in a public consultation procedure and prepares a draft of the technical standards, which it submits to the Commission. The Commission may then adopt or reject the standards in whole or in part, but may not amend the standards without the ESAs' agreement.

Reflecting on the process, Busuioc draws attention to the fact that firstly, the initiative for the draft regulatory standards belongs to the ESA and secondly, that in the case in which the Commission does not endorse the proposal or proposes amendments to the proposal, it is required to justify its position to the authority.[170] The Commission can only introduce amendments to the proposals made by the authority if the proposals are incompatible with Union law, if the proposals do not respect the principle of proportionality or if the proposals run counter to the fundamental principles of the internal market for financial

[164] EBA, ESMA and EIOPA Regulations, Article 42.
[165] COM (2014) 509 final, p. 9.
[166] COM (2014) 509 final, p. 10.
[167] COM (2014) 509 final, p. 9.
[168] EBA, ESMA and EIOPA Regulations, Article 10(1) and 15(1) respectively.
[169] Chiti (2013), p. 103.
[170] EBA, ESMA and EIOPA Regulations, Article 14.

services.[171] Chamon identifies that the competence of the ESAs as established in the founding regulations not only impinge on the prerogatives of the Commission, but also implies that the ESAs wield quasi-legislative powers subject to the limited scrutiny of the Commission.[172]

It could well be argued that the process outlined significantly limits the Commission in its exercise of delegated powers.[173] The active role that the ESAs assume in the process of adopting binding technical standards can also be evidenced with reference to the information the Commission provides in its latest report. As noted, during the review period of the ESAs' inception to December 2013, more than 150 technical standards were submitted in form of draft technical standards to the Commission and the Commission approved more than 45 technical standards in total, of which only three were sent back to the ESAs for further amendments.[174]

The ESAs' power to issue guidelines and recommendations pursuant to Article 16 of the ESAs' founding regulations should similarly not be underestimated. Although guidelines and recommendations are non-binding in nature, they nevertheless impose an obligation on the competent authorities and financial institutions to 'comply or explain'.[175] Enforcement tools, such as the threat of public disclosure in cases of non-compliance, are also made available to the competent authorities, which as Busuioc explains, are likely to have a real impact on the behaviour of the competent authorities and the financial institutions.[176] However, in the Commission's report, the point was made that although guidelines and recommendations have proven to be a flexible instrument for convergence, stakeholders pointed to some uncertainties relating to the concrete scope and nature of these measures.[177] The Commission focused on the fact that the ESAs' powers must be solidly grounded on the legal basis covering their acts and that the objectives set out in Article 16(1) of the founding regulations, namely to establish 'consistent, efficient and effective supervisory practices' and to ensure the 'common, uniform and consistent application of Union law' have to be read cumulatively.[178] Stakeholders argued that the possibility of challenging guidelines and recommendations under EU

[171] Busuioc (2013), p. 116, whereby reference to support this argument is made to Recital 23, Preamble of Regulation (EU) No 1093/2010, OJ 331/12, 15.12.2010 and Regulation No 1095/2010, OJ L 331/84, 15.12.2010. Recital 22, Preamble Regulation (EU) No 1094/2010, OJ L 331/48, 15.12.2010.
[172] Chamon (2011), p. 1069.
[173] Busuioc (2013), p. 119.
[174] COM (2014) 509 final, p. 6.
[175] EBA, ESMA and EIOPA Regulations, Article 16(3); Also see Busuioc (2013) pp. 118-119 who points out that although these soft law tools are not legally binding, they cannot be ignored by national competent authorities or financial institutions, considering that the financial institutions are required to report 'in a clear and detailed way' whether they are indeed complying with the guideline or recommendation, whereas the national authorities are required to inform the ESA whether they comply or intend to comply with the guidelines or recommendations and in a case of non-compliance state the reasons; Also see COM (2014) 509 final, at 5 which emphasises the importance of the obligation of 'comply or explain'.
[176] See Busuioc (2013), pp. 118-119.
[177] COM (2014) 509 final, p. 5.
[178] COM (2014) 509 final, p. 5.

law needed further clarity, contrary to the Commission's view that Article 60 of the founding regulations was limited to decisions and thus does not provide a legal basis for challenging guidelines and recommendations. [179] It may well be argued that issues of accountability make it important for these acts to be subject to review under Article 263(1) TFEU, considering that recommendations and guidelines are intended to produce legal effects vis-à-vis third parties.[180] This consideration may in turn demand that a more prescriptive set of provisions exists on the role of the ESAs when exercising their rule-making powers in both the context of binding technical standards and soft law measures.

When exercising their powers to issue technical standards a tension exists between the Commission and the ESA. As Busuioc observes, if the powers between the two bodies are not well preserved, two extreme scenarios may take place. On the one hand, problems may arise in a situation whereby the Commission is discouraged to depart from the draft submitted by the Authority.[181] The Commission may not call the draft submitted by the ESA into question in light of the technical nature of ESAs' acts and in light of the ESAs' specialised expertise. [182] Thus, the informational asymmetries which run in the ESA's favour might enable the authorities to become *de facto* rule makers.[183] On the other hand, the Commission may become overbearing, keen to maintain its institutional prerogatives in exercising its power to amend, reject or endorse a standard.[184] A stance as such, may compromise the valuable input stemming from the ESAs' specialised expertise, and the ESAs' inside knowledge of and closeness to the market.[185]

The Commission recognises the importance of better regulating the process of the ESAs' quasi rule-making. In its 2014 Report the Commission proposes to enhance the transparency of the regulatory process, including setting an adequate time frame for responding to public consultations and providing more detailed feedback on the input received at this occasion.[186] It is also suggested that the ESAs should ensure high quality cost-benefit analysis, draft legal texts for draft technical standards and that draft technical standards should systematically be subject to public consultations[187] The Commission stipulates that it will pay particular attention to the appropriateness of timelines and the scope of empowerments for technical standards in its draft legislative proposals and during discussions taking place within the legislative process.[188]

[179] COM (2014) 509 final, p. 5.
[180] COM (2014) 509 final, pp. 5-6.
[181] Busuioc (2013), p. 122.
[182] Busuioc (2013), p. 123.
[183] Busuioc (2013), pp. 123-124.
[184] Busuioc (2013), p. 122.
[185] Busuioc (2013), pp. 122-123.
[186] COM (2014) 509 final, p. 6.
[187] COM (2014) 509 final, p. 6.
[188] COM (2014) 509 final, p. 6.

An overview of the process and the relationships between the parties involved in the exercise of the ESAs' quasi-rulemaking shows the influential role that the ESAs play in shaping regulatory standards and practices. In assessing the process Busuioc considers that despite the limitations imposed, the ESAs' powers remain considerable, far-reaching and exceptional in the EU agencification context.[189] However, issues of accountability and a clear picture concerning the constitutional limitations to which the ESAs' quasi rule-making powers are subject to remain an issue. What is more so problematic is that the distinction between technical standards and policy decisions is not that clear-cut.[190] It rests upon the Commission therefore, when observing its role in endorsing the draft technical standards submitted, to reject proposals which potentially evidence signs of the ESA having abused its powers by entering into the fields of policy reaction rather than explanatory technical standards that facilitate uniform interpretation and application of EU law.

5.3 Union Interests

The ESAs' objective to act 'in the interests of the Union alone' affirms the need to further define their role. A suggestion to consider would be to make the requirement that technical standards be accompanied by an explanatory note dedicated to the ways in which the particular standards further Union objectives within the scope of the financial market integration project. The ESAs' independence may be further compromised by their internal composition, with representatives of the national authorities comprising the supervisory boards of the ESAs. In this respect an alternative governance model which facilitates Union inspired representatives governing the ESAs could be the way forward. A rotation of Member State participation for example could potentially guarantee that a culture of more Union inspired regulation is facilitated.

It may well be argued that national authorities present on the Supervisory Board do not give the ESAs the prestige and Union character that the authorities should have. A discussion on the independence of the ESAs' from national interests, gives rise to the question of what constitutes 'the sole interest of the Union as a whole' as stated in the articles of the founding regulations of the ESAs. Is 'the sole interest of the Union as a whole' purposefully referred to in the regulations as an undefined concept or should an interpretation with specific reference to the function of the ESAs be sought after? An option that may well be considered in order to improve the governance of the ESAs is to establish a membership of the board of supervisors on a system of rotation or to comprise the body with independent members which are not affiliated to the Member States. A different synthesis of the supervisory body, could potentially

[189] Busuioc (2013), pp. 115-117.
[190] Kost de Sevres and Sasso (2012), p. 29 and Busuioc (2013), pp. 113-114.

guarantee that decisions are taken in the interests of the EU as a whole, rather than serve respective national interests.

6 Conclusion

The present analysis has taken a narrow focus on the powers of the ESAs by examining their regulatory powers within the context of what can be understood as the constitutionally permissible, politically achievable and functionally desirable controls to which their powers are or should be subject to. More specifically, the ESAs' legal basis, the ESAs' governance structures and the process via which the ESAs exercise their regulatory powers have been addressed.

Hofmann emphasises the institutional deficit which exists explaining that, notwithstanding the fact that the Lisbon Treaty introduces the new types of acts encompassed in Articles 290 and 291 TFEU, it nevertheless fails to acknowledge the existence of agencies in primary Treaty law, allowing for a continuously growing gap between the creation of the agencies and the conferral of powers to them.[191] From a brief overview of a series of cases it becomes apparent that cases have little to offer in terms of guidance on the regulatory role of the ESAs. Having highlighted the fundamental differences between the agencies in the Meroni case and the current day EU agencies, Chamon's contribution to the debate is helpful, as it places less weight on the Meroni ruling as a means via which to draw conclusions on the limitations to which the regulatory powers of the ESAs are subject to, when compared to the Romano and other cases.[192] Hofmann makes a similar point by placing emphasis on the fact that the CJEU has itself incrementally moved away from the Meroni doctrine in its more recent case law allowing for the division between the constitutional provisions and the requirements of the architecture of the emerging European networked administration, including European agencies, to potentially increase in the future.[193]

Although the Romano case appears more relevant to the agencies, it is nevertheless more restrictive than the Meroni ruling concerning the possibility to attribute implementing powers to auxiliary bodies.[194] Furthermore, as Chamon well identifies, in light of the CJEU's objection in the Romano case, that the Treaty only provides for the Commission or the Council to implement policy at EU level, the role of the ESAs in the implementation of delegated and implementing acts becomes even more questionable.[195] Moreover, despite the Treaty of Lisbon having updated the Treaty's system of judicial protection, it

[191] Hofmann CH (2009), pp. 46-48.
[192] Chamon (2011), p. 1074.
[193] Hofmann CH (2009), pp. 46-48.
[194] Chamon (2011), p. 1074.
[195] Chamon (2011), p. 1075.

remains silent as to what role the EU agencies are called to play in the implementation of EU policy, so that the *institutional deficit* remains.[196] Chiti explains that there is an option of exploiting the potentialities of the ESAs as specialised regulators in the field, which as he contends, is not only functionally justified but also legally possible.[197]

Chiti suggests that Article 290 and 291 TFEU should not be read as necessarily requiring centralised action, Meroni should be read in a way so as not to exclude that EU agencies can exercise a subject to conditions degree of discretion and that emphasis should be placed on the ESAs' regulatory role as inherent to the fundamental dynamics of the making of the single market in financial services.[198] From another perspective, Scholten and Van Rijsbergen argue that from a legitimacy point of view, it is necessary for a Treaty based legal framework governing the conferral of discretionary powers to agencies to be introduced.[199] More specifically, they explain that entrusting the ESAs with discretionary powers, even if limited, makes ESAs' decisions of legislative nature, which creates problem of legitimacy within the constitutional set up in the EU.[200] They thus propose a Treaty amendment which will define the ways, means and limits of conferral, as well as secondary legislation, which will outline the principles and mechanisms governing the operation and accountability of agencies.[201]

A point has also been made on the political constraints to which the regulatory powers of the ESAs' are subject to. It can well be argued that the ESAs' role is not so much controversial due to the obscurity surrounding its constitutional limitations, but rather because of the political considerations which exist between EU institutions themselves and between the EU institutions and Member States respectively. In its legal update, the law firm Mayer Brown highlights the concerns that the CJEU decision on the ESMAs' powers is likely to cause Member States which are already apprehensive towards the transfer of existing national powers and wide new powers on EU bodies.[202]

The ambiguity surrounding the balance observed between the authorities, the Commission and the Member States during the exercise of the ESAs rule-making powers may be partly attributed to the fact that the regulations establishing the ESAs only provide for a basic outline of the process that needs to be followed.[203] It is worth considering therefore, whether in striking a balance

[196] Chamon (2011), p. 1075.
[197] Chiti (2015), p. 5.
[198] Chiti (2015), p. 5.
[199] See Scholten and Van Rijsbergen (2014), p. 404.
[200] See Scholten and Van Rijsbergen (2014), p. 404.
[201] See Scholten and Van Rijsbergen (2014), p. 404.
[202] Mayer Brown Legal Update (2014), p. 4.
[203] See Chiti (2013), pp. 101-102 who points out that with regard to European Agencies in general, the different phases of rulemaking, such as agenda setting, the definition of precise modalities of involvement of the various relevant actors through consultation, the identification of an area which requires rulemaking and the

between the various parties involved in the process, a reform of the procedural rules could also take place, making them more prescriptive and formalised to avoid negative scenarios as the ones highlighted by Busuioc.[204] This would also better address the concerns surrounding the ESAs' accountability in the process of exercising its quasi-rule-making powers.

Setting the constitutional and political controls aside, but with adherence to these controls, the present analysis supports the proposal that priority should be given to what is practically desirable so as to meet the objectives of financial integration, alongside the objective for which the ESAs were primarily set up for, namely financial stability. It is noticeable that although in theory the ESAs are largely dependent on the Commission for endorsement in the exercise of their quasi-rule-making powers, the ESAs nevertheless retain an influential role in shaping regulatory standards and practices. More consideration should be given to improving the regulatory process followed, by clarifying the responsibilities that the Commission assumes in reviewing draft technical standards. A simple reliance on the obscure limitations that derive from the Meroni or any other ruling, creates confusion and obstructs the ESAs from achieving their objectives with assurance that their role in the regulatory process is well defined and accepted. Clarification on their role and objectives would potentially guarantee that a better balance is struck between the ESA and the Commission in the exercise of the ESAs' regulatory powers and help ensure that an effective accountability mechanism is in place were conflicts to arise.

requirements of publication, are not definitively outlined in the process. ESAs are however mentioned as the authorities which exemplify a positive example for other European agencies in this respect.

[204] Busuioc (2013), p. 124.

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