# THE ADMINISTRATIVE ARCHITECTURE OF FINANCIAL INTEGRATION. INSTITUTIONAL DESIGN, LEGAL ISSUES, PERSPECTIVES

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CONTENTS

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# EUROPEAN FINANCIAL SUPERVISION AFTER THE CRISIS: MULTI-SPEED MODELS WITHIN A TWO-TRACK FRAMEWORK

## 1. *The Financial Crisis and EU Financial Supervision*

The financial crisis – which started in 2007 in the area of subprime mortgages, went global after *Lehman Brothers* collapsed in 2008, and evolved into a debt crisis in the European Union (EU) – gave rise to a number of political and legal responses, both at global and EU level[1]. As for the latter, the efforts to show that the EU was capable of facing the crisis focused, on the one hand, on EU economic governance and public finances (Six Pack, Fiscal Compact, etc.), and, on the other hand, on private finance[2].

As for the latter, there have been two major structural reforms. Firstly, in January 2011, the European System of Financial Supervision (ESFS) was established, made up of three European Supervisory Authorities (ESAs) – the European Banking Authority (EBA), the European Securities and Markets Authorities (ESMA) and the European Insurance

[1] For a general overview, see L. Quaglia, «The Regulatory Response of the European Union to the Global Financial Crisis», in R. Mayntz (ed.), *Crisis and Control. Institutional Change in Financial Market Regulation* (Frankfurt-New York: Campus, 2012) 171, and S. Cassese, «La nuova architettura europea», *Giornale di diritto amministrativo*, 2014, 79.

[2] On EU reforms in the area of public finance, see P. Craig, «The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism», *European Law Review*, 2012, 231; M. Ruffert, «The European Debt Crisis And European Union Law», *Common Market Law Review*, 2011, 1777; B. de Witte, *The European Treaty Amendment for the Creation of a Financial Stability Mechanism*, SIEPS European Policy Analysis, 2011, available at www.eui.eu/Projects/EUDO-Institutions/Documents/SIEPS20116epa.pdf; G. Napolitano, «Il meccanismo europeo di stabilità e le nuove frontiere costituzionali dell'Unione», *Giornale di diritto amministrativo*, 2012, 461, and R. Perez, «Il Trattato di Bruxelles e il Fiscal compact», *ibidem*, 469.

and Occupational Pensions Authority (EIOPA) – and the European Systemic Risk Board (ESRB)[3]. Secondly, a European Banking Union (EBU) was set up between 2013 and 2014 comprising the Single Supervisory Mechanism (SSM) (in which the European Central Bank (ECB) has been given significant supervisory tasks across the Euro Area[4]) and the Single Resolution Mechanism (SRM) (in which bank resolution is to be managed through a Single Resolution Board (SRB) and a Single Resolution Fund (SRF)[5]).

[3] The regulations establishing the ESAs are: Regulation (EU) No. 1093/2010 of the European Parliament and of the Council of 24th November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/78/EC (EBA Regulation), Regulation (EU) No. 1094/2010 of the European Parliament and of the Council of 24th 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 (EIOPA Regulation), Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24th 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 (ESMA Regulation). See also Directive 2010/78/EU of the European Parliament and of the Council of 24th November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) (Omnibus Directive), Council Regulation (EU) No. 1096/2010 of 17th November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board, all in OJ 2010 L 331.

[4] See Council Regulation (EU) No. 1024/2013 of 15th October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OL 2013 L 287 (SSM Regulation).

[5] Regulation (EU) No. 806/2014 of the European Parliament and of the Council of 15th July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms within the framework of a Single Resolution Mechanism and a

The setting up of the ESFS and of the EBU has had a tremendous impact on EU financial governance. Hence, it comes at no surprise that both reforms attracted widespread attention in legal scholarship[6] – especially the EBU, by far the most radical reform[7]. Even commentators giving an overall optimistic assessment of the new EU financial architecture, though, suggest that one of the main weaknesses of the new system lies in the asymmetry of the models of financial supervision taking place in the Euro area and in the internal market[8]. Andrea Enria, chairperson of EBA, warned of «the risk of a split two-tier system» of the ESFS and the EBU[9]. This chapter aims at contributing to the debate, investigating this asymmetry. It argues that, within what can be broadly

Single Resolution Fund and amending Regulation (EU) No. 1093/2010 (SRM Regulation), OJ 2014 L 225.

[6] Concerning features and limits of the ESFS, see E. Ferran, «Understanding the New Institutional Architecture of EU Financial Market Supervision», in G. Ferrarini, K.J. Hopt and E. Wymeersch (eds.), *Financial Regulation and Supervision. A post-crisis analysis* (Oxford: Oxford University Press, 2012), 111; E. Wymeersch, «The European Financial Supervisory Authorities or ESAs», *ibidem*, 232; M. Everson, *A Technology of Expertise: EU Financial Services Agencies*, LEQS Paper No. 49, June 2012.

[7] Concerning the EBU, see B. Wolfers and T. Voland, «Level the playing field: The new supervision of credit institutions by the European Central Bank», *Common Market Law Review*, 1463; E. Ferran and V. Babis, «The European Single Supervisory Mechanism», *Journal of Corporate Law Studies*, 2013, 255; E. Wymeersch, *The Single Supervisory Mechanism or «SSM», Part One of the Banking Union*, Financial Law Institute, Universiteit Gent, Working Paper No. 1/2014, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2397800; G.A. Ferrarini and L. Chiarella, *Common Banking Supervision in the Eurozone: Strengths and Weaknesses* August 1st, 2013. ECGI – Law Working Paper No. 223/2013, available at SSRN: http://ssrn.com/abstract=2309897 or http://dx.doi.org/10.2139/ssrn.2309897; E. Barucci and M. Messori (eds.), *The European Banking Union* (Florence: Passigli, 2014); F. Capriglione, *L'Unione Bancaria Europea* (Milano: Utet, 2013).

[8] N. Moloney, «European Banking Union: Assessing its risks and resilience», *Common Market Law Review*, 2014, 1609, 1661.

[9] A. Enria, *The Single Market after the Banking Union*, speech at the AFME and EBF Banking Union in Europe Conference, Brussels, 18 November 2013, 3, available at https://www.eba.europa.eu/documents/10180/490003/2013+11+18+-+AFME+-+EBF+-+Brussels+-+A+Enria.

defined as a two track framework, multi-speed models of supervision are emerging.

The division of supervisory competencies between national competent authorities (NCAs) and European ones – both of the ESFS and the EBU – vary not only according to the currency adopted (Euro or non-Euro), or the financial market concerned (banking, securities or insurance), but also because of the existence of emergency situations, the size of a financial institution (significant or non-significant banking institution), and the specific matter concerned (money laundering and consumer protection fall out of the scope of the EBU; the ESMA has been given direct supervisory powers in areas such as Credit Rating Agencies (CRAs) and derivatives) (§ 2). These different supervisory models vary in the degree of integration (§ 3), as well as in the type of independence (Section 4) and the accountability of the regulators (§ 5). This variety of supervisory models – the result of political compromises – shows that in the aftermath of the crisis differentiated integration is increasing in the EU; yet, at least in the financial area, this could be at the expenses of regulatory efficiency (§ 6).

## 2. *The ESFS, the EBU and the patchwork of supervisory competences*

As it is very well known, the decision to form the European Monetary Union (EMU) dates back to the Maastricht Treaty in 1992 and the building of the European System of Central Banks (ESCB) was put into place in 1998. Already during the works which eventually led to the approval of the Maastricht Treaty, the project of providing the ECB with banking supervisory tasks, along with monetary policy, was strongly advocated. At the time though, political resistance from the States against such a proposal prevailed[10].

[10] M. Mancini, *Dalla vigilanza nazionale armonizzata alla Banking Union*, Quaderni di Ricerca Giuridica della Banca d'Italia, 2013, n. 73, 8. For a more recent discussion of the link between the monetary union

The model in place before the crisis was based on the harmonization of financial regulation and home-country responsibilities for prudential supervision[11]. The so-called «third level committees» – the Committee of European Securities Regulators (CESR), the Committee of European Banking Supervisors (CEBS) and the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) made up of representatives of national authorities[12] – operated in the context of the Lamfalussy procedure put in place in 2001[13]. Briefly, they essentially played a consultative role in the implementation of directives and regulations and were pivotal in building cooperation between national authorities[14]. They were long considered as a compromise, a step on the way to the establishment of a European system of financial supervision[15].

The crisis triggered a momentous change in this process. The de Larosière group of experts identified the limits of the existing model of supervision which emerged dramatically during the crisis: the lack of cooperation between national authorities in a context of emergency, the lack of resources

and the banking union, see H. Geeroms and Karbownik, *A Monetary Union Requires a Banking Union*, Bruges European Economic Policy Briefings, No. 33/2014.

[11] There were some specific cases of host-countries competencies: see L. Dragomir, *European Prudential Banking Regulation and Supervision. The Legal Dimension*, (New York: Routledge, 2010), 167.

[12] Set up respectively with decisions 2001/527/Ec of 6th June 2001, amended by decision 2004/9/Ec of 5th November 2003, and decisions 2004/6/Ec and 2004/7/Ec of 5th November 2003.

[13] The procedure was named after the chairman of the group of experts which set it forth, Alexandre Lamfalussy: *Final report from Wise Men on Securities Markets Regulation*, 15th February 2001, at http://ec.europa.eu/internal_market/securities/lamfalussy/index_en.htm.

[14] K. Lannoo and M. Levin, *Securities Market Regulation in the EU: Everything You Always Wanted to Know about the Lamfalussy Procedure*, Ceps Research Report In Finance And Banking, No. 33, 2004, and L. Saltari, *Amministrazioni nazionali in funzione comunitaria* (Milano: Giuffrè, 2007), 145.

[15] See E. Wymeersch, *Global and Regional Financial Regulation. The Viewpoint of a European Securities Regulator*, October 2009, available at http://ssrn.com/abstract=1484632, 7.

and legal instruments to adopt a common decision of the three level committees, and the inconsistencies in the powers of national supervisory authorities across the Member States[16].

The report suggested setting up the ESFS, made up of the three ESAs, the ESRB, the Joint Committee of the ESAs and the national authorities, as the appropriate institutional solution to the crisis. The three ESAs have been established with three different regulations which are widely consistent in their provisions. Other competencies have been added by specific regulations (this is the case, for example, of ESMA).

The «core business» of ESAs is regulation. They can adopt regulatory technical standards and implement technical standards[17]. Nevertheless, under Articles 17-19 of ESAs Regulations, they also have supervisory powers in three areas: they can ensure consistent application of EU law by NCAs; they can adopt binding decisions addressed to NCAs or credit institutions in emergency situations; they can settle disagreement between competent authorities in cross border situations. These supervisory competencies, however, are tightly constrained and restrictive conditions apply. Due to such restraints, in the first three years from their setting up the use of these supervisory powers by the ESAs has been extremely limited, as reports drafted by the Commission and the EU Court of Auditors show[18]. It must be added that some ESAs have been given strong direct supervisory powers in sector regulation: this is notably the case of ESMA for credit rating agencies, short selling of credit default swaps (CDS) and trade repositories (*infra*, § 3).

[16] See The High Level Group on Financial Supervision in the EU, *Report* (so called De Larosière Report), February 2009, available at http://ec.europa.eu/finance/general-policy/docs/de_larosiere_report_en.pdf, 44-5.

[17] *Supra*, Chapter 1.

[18] See EU Commission, *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)*, COM (2014) 509 final, and EU Court of Auditors, *European Banking Supervision Taking Shape – EBA in its Changing Context*, 2014, available at www.eca.europa.eu/Lists/ECADocuments/SR14_05/SR14_05_EN.pdf, 8.

This setting up of the ESFS was followed shortly after by the EBU[19]. This new and momentous reform was triggered by the sovereign debt crisis. The need to «break the vicious circle between banks and national finances» overcame the initial refusal of Member States to entrust the ECB with the task of supervision of the EU banks[20].

The EBU is based on two far-reaching new structures: the SSM, in which the ECB has been given significant supervisory tasks across the Euro Area, and the SRM, intended to manage the orderly resolution of banks, at the center of which there are the SRB and the SRF. Contrary to the aforementioned two pillars of the EBU which were considered in the first proposal, the third one regarding deposit schemes has changed remarkably: instead of a single mechanism at the European level, agreement has been reached – with Directive 2014/49/EU of 16 April 2014 – on harmonization of national deposit rules. Lastly, it must be remembered that structural remodelling goes hand in hand with the reform of the EU banking regulatory framework as the «foundation of the banking union» is the «single rulebook», applying to banks in all twenty-eight Member States and intended to prevent a bank crisis and – should

[19] See the first proposal of the Commission, available at http://ec.europa.eu/europe2020/banking-union/index_en.htm, subsequently endorsed by the Council (see http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131201.pdf). A few months later, the Commission published the Communication *A Roadmap for a Banking Union*, COM (2012) 510 final, setting forth a tight timetable for the enactment of the EBU which was surprisingly met despite its compromises.

[20] The De Larosière Report considered the option of entrusting the ECB with supervision but rejected it (De Larosiere Report, cit., at 43). According to Lorenzo Bini Smaghi, «the objections contained in the De Larosière Report proved to be a mere excuse» as in the aftermath of the crisis «not only did the ECB show that it had supervisory competencies, but it played an important role in fostering coordination in the stress tests and helped implement some bank rescue operations, also providing a bridge between national authorities, thanks to its independence. By contrast, the national supervisors lost credibility»: see L. Bini Smaghi, «Monetary policy and supervision: moral hazard and conflicts of interest?», in E. Barucci and M. Messori (eds.), *The European Banking Union*, cit., 17.

a bank end up in difficulty – help manage the resolution process[21].

In order to untangle the patchwork of EU financial supervision, it is necessary to clarify the respective scope of the ESFS, the SSM, and the SRM, on the one hand, and the division of competencies between national and EU bodies within the SSM and the SRM, on the other. While the analysis of the ESFS can take into account the activity of the ESAs in the first years from their launch, the analysis of the EBU can only be based on the exam of the legal framework. Only the implementation of the EBU, which will take place in the next years, will show how the actual division of competencies will be interpreted.

The ESFS comprises all financial institutions in the EU (both Euro and non-Euro). The SSM, on the contrary, supervises credit institutions of the Eurozone (non-Euro Member States being able to opt-in). Hence, there are two types of institutions falling beyond the SSM: non-banking financial institutions and banking institutions outside the Eurozone. This means that several types of financial institutions will not be subject to the SSM: first, credit institutions must be qualified as such under EU law (meaning that financing institutions qualified as subject to prudential supervision according to the law of the Member States will stay under national supervision); moreover, other financial institutions not qualified as banks (insurance firms because of an explicit exception, but also Central Clearing Counterparties (CCPs) or broker dealers) are outside the scope of the SSM[22].

This supervisory system can be described as a two-track or a dual one[23] (working within the common regulatory framework of the Single Rulebook): the SSM apply to

[21] See EU Commission, *Banking union: restoring financial stability in the Eurozone*, memo/14/294, 2014, 2.

[22] See E. Wymeersch, *The Single Supervisory Mechanism or «SSM», Part One of the Banking Union*, cit., 27-28. On the exclusion of CCPs, see Chapter 9.

[23] See G.L. Tosato, «The governance of the banking sector in the EU – A dual system», in E. Barucci and M. Messori (eds.), *The European Banking Union*, cit., 23.

banking institutions of the euro-area and of the non-Euro States freely adhering to it, while the ESFS applies to all Member States. This means, in general terms, that the supervisory authority for banking institutions in the Euro-area (and States which have opted in) is the SSM, and for banking institutions in non-Euro and not opting in and for all other financial institutions are the NCAs in the context of the ESFS. Yet, within this dual framework, the division of competencies is much more blurred.

First, under Articles 17-19 of the establishing Regulations, ESAs are given limited supervisory powers, resolving cases of disagreement between national supervisors, ensuring consistent application of technical rules of EU law and guaranteeing coordination in emergency situations, and this also still applies in the area of banking which falls within the scope of the SSM.

Second, some banking supervisory tasks are explicitly excluded from the scope of the SSM and thus remain within the competence of the NCAs: this is the case of credit institutions from third countries establishing a branch or providing cross-border services within the Union, payments services, money laundering, terrorist financing and consumer protection (SSM Regulation, Recital 28).

Third, an important feature in the functioning of the SSM must be remembered: only significant credit institutions (assessed on the basis of the criteria of size, importance for the economy and significance of cross-border activities, and roughly corresponding to 130 institutions[24]) are subject to ECB direct supervision, while non-significant institutions are subject to the supervision of the NCAs. Yet, in this second situation NCAs do not act as supervisory authorities as they would in the context of the ESFS, but they exercise supervisory tasks under the tight control of the ECB in the context of the SSM (NCAs have to follow the instructions of the ECB, the latter being able to exercise direct powers «when necessary to ensure consistent application of high supervisory standards»: SSM Regulation, Article 6/5(b)).

[24] See Art 6/4 SSM Regulation.

| Banking | Before 2011 | After 2011 | After 2014 |
|---|---|---|---|
| | NCAs/Committee of European Banking Supervisors (CEBS) | NCAs/European Banking Authority (EBA) | **Non-euro area:**<br>NCAs/European Banking Authority (EBA)<br>**Euro area**: SSM<br>Non-significant institutions: NCAs<br>Significant institutions: ECB<br>Payments Services, Money laundering, Consumer protection: NCAs/EBA<br>Breach of Union law, emergency situations and settlement of disagreement between competent authorities in cross border situations: EBA<br>Stress Tests: EBA/ECB |
| | | Stress tests: EBA | |
| Securities Markets | NCAs/Committe of European Securities Regulators (CESR) | NCAs/European Securities and Markets Authorities (ESMA) | NCAs/ESMA<br>CRAs: ESMA<br>Trade repositories: NCAs/ESMA<br>Short selling of CDS: NCAs/ESMA |
| Insurance | NCAs/Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) | NCAs/European Insurance and Occupational Pensions Authority (EIOPA) | NCAs/EIOPA |

Fourth, as mentioned above, some ESAs have been given strong direct supervisory powers by specific provisions. For example, the ESMA has been given direct supervisory powers in the areas of credit rating agencies, short selling of credit default swaps and trade repositories. This constitutes a model different from the general one for securities supervision working in the ESFS system, specific to some institutions or operations. Also EBA's role in the area of stress tests can be considered as a case of direct supervision (*infra*, § 3).

It can be concluded that a patchwork of supervisory models coexist under the two-track framework of the ESFS and the EBU.

The first model is the one in which the NCAs still are the key supervisory authorities for securities, insurance and banking in the non-Euro area, in the context of the ESFS. This model also applies to banking supervisory tasks in the Euro area not explicitly conferred on the SSM (bodies covered by the definition of credit institutions under national law and not under Union law; credit institutions from third countries establishing a branch or providing cross-border services in the Union; payments services, money laundering, terrorist financing and consumer protection).

The second model is the one for banking in Euro-countries falling within the scope of the SSM: this second model is two-tier according to whether the credit institution concerned is a significant or non-significant one (direct supervision of the ECB in the first case, indirect in the second case meaning: the supervisory authorities are the NCAs, but the ECB directs them and can take the competence upon itself to ensure consistent supervision).

A third model is the one in which direct supervisory tasks are attributed to the ESAs. Also in this case, though, there is a differentiation within the model (as happens within the SSM, but according to different criteria). While supervisory powers defined in Articles 17-19 of ESAs Regulations are restricted by complex procedural conditions, and, as mentioned above and as will be more deeply discussed (*infra*, § 3), have had limited implementation in the last years, those

given by specific regulations to a single ESA are broader and have a significant impact[25].

Before looking more deeply at these models of supervision, the way banking resolution tasks have been distributed must also be explained.

The link between resolution and supervision is extremely strong. As Huertas puts it, the «future of banking depends on whether or not banks become resolvable, that is, whether they can fail in an orderly manner at no cost to the taxpayer and without significant disruption to financial markets or the economy at large»[26]. Solving (or rather, ending) the «too big to fail» problem is probably the key issue in current reforms. Agreement on sharing responsibility and resources for orderly resolution would not have been achieved without common controls thus the SSM is a prerequisite for the SRM[27].

Notwithstanding the strong link between supervision and resolution, new EU resolution authorities have been put in place in order to perform these types of tasks. While the Banking Recovery and Resolution Directive (BRRD) applies in all 28 Member States[28], the Regulation establishing the SRM only applies to the EBU, i.e. to credit institutions (and other institutions in its remit such as financial hold-

[25] See ESMA, *ESMA supervision of Credit Rating Agencies and Trade Repositories. Annual report 2014 and work plan*, 16th February 2015, available at file:///Users/macbookair/Documents/RICERCHE%20IN%20CORSO/UBE/ESMA%20report%20CRAs%20and%20trade%20repositories.pdf.

[26] T.F. Huertas, *Safe to Fail. How Resolution Will Revolutionise Banking* (London: Palgrave, 2014), 1.

[27] See M.P. Chiti, «The Transition from Banking Supervision to Banking Resolution. Players, Competences, Guarantees», in E. Barucci and M. Messori (eds.), *The European Banking Union*, cit., 89.

[28] Directive 2014/59/EU of the European Parliament and of the Council of 15th May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No. 1093/2010 and (EU) No. 648/2012, of the European Parliament and of the Council, OJ 2014 L 173.

| | Before 2014 | After 2014 |
|---|---|---|
| Euro-area | NCAs | SRM (SRB and NRAs)/ Council/Commission/ECB |
| Non-Euro area | NCAs | NRAs (in the context of the BRRD) |

ing companies and investment firms and consolidated firms under consolidated supervision) in the Euro area.

As Mario Chiti puts it[29], compared to the SRM, the SSM is a «relatively simple» mechanism. Even though in the SSM there are varying criteria for the division of competencies between the ECB and the NCAs thus entailing different models of integration, the actors who intervene are only of two types: namely, the NCAs and the ECB, both technical and specialized institutions. In the SRM, there is a similar pattern, as there is a division of tasks between the SRB and national resolution authorities (NRAs), which are responsible for some specific tasks[30]. Yet, this pattern – EU technical authority/national authorities – is further complicated because, in addition, the Commission and the Council – i.e., a supranational and an intergovernmental body –, have strong powers in deciding on the resolution of banks. Also the ECB plays a key role in assessing whether the resolution procedure has to be started. The «mechanism» for resolution clearly departs from the other ones and appears to be the more complex.

Within the two main architectures – the ESFS and the EBU – highly differentiated models coexist and combine. What are the features of these models as regards the type of integration they put into place and the degree of independence and accountability? This chapter will now examine each of these features.

[29] See M.P. Chiti, «The Transition from Banking Supervision to Banking Resolution. Players, Competences, Guarantees», cit., 90.

[30] Art. 7 SRM Regulation.

## 3. *Centralization, integration and cooperation*

European models of supervision emerging from the construction of the ESFS and of the EBU depart from the previous decentralized system of supervision in which such task was performed by national authorities. But how far do they go in departing from it? As will be shown, no single model of integration is followed; rather, different patterns emerge, some of them being similar to existing ones and others being truly original.

*a*) The first model concerns supervision of securities (with the exceptions *sub c*), insurance, banking in the non-Euro area and specific banking supervisory tasks in the Euro area which have not been given to the SSM (payments services, money laundering, consumer protection, etc.). In all these cases, NCAs are the supervisory authorities within the context of the ESFS, under the coordination of the ESAs. As Ferrarini and Chiarella put it, this model – the one of the European supervisory architecture introduced in 2010 – corresponds to that of «enhanced' cooperation»[31]. Even though this model is similar to the one already known in other sectors of the networks of regulators[32], it departs from it because of the greater powers which have been given to the ESAs (*sub b*) compared to other EU agencies[33].

*b*) Within the ESFS, ESAs are given direct supervisory powers in case of disagreement between national supervisors

[31] G. Ferrarini and L. Chiarella, *Common Banking Supervision in the Eurozone: Strengths and Weaknesses*, cit., 4.

[32] See E. Chiti and C. Franchini, *L'integrazione amministrativa europea* (Bologna: Il Mulino, 2003), 87. More specifically, concerning networks first established in the area of telecommunications and electricity, see S. Cassese, «Il concerto regolamentare europeo delle telecomunicazioni», in Id., *Lo spazio giuridico globale* (Roma-Bari: Laterza, 2003) 105, and G. della Cananea, «L'organizzazione comune dei regolatori per l'energia elettrica e il gas naturale», *Rivista italiana di diritto Pubblico comunitario*, 2004, 1385.

[33] Concerning EU agencies, see E. Chiti, «An important part of the EU's institutional machinery: Features, problems and perspectives of European agencies», *Common Market Law Review*, 2009, 1395, and Id., «"European Agencies" Rulemaking: Powers, Procedures and Assessment», *European Law Journal*, 2013, 93.

in order to ensure consistent application of EU law and in emergency situations. The type of powers given to the ESAs (and the independence of these authorities: *infra*, § 4) suggest they constitute an emerging new model of agencies[34]. Nevertheless, these powers are constrained within tight procedural limits, which prevented the ESAs from using them. In August 2014, the Commission published a report on the operation of the ESAs and the ESFS (following a specific provision in ESAs Regulations, according to which a report should be drafted after three years of activity of the authorities) showing that since 2011 the ESAs have never issued any recommendations or binding decisions under Articles 17 to 19 of the ESAs Regulations. Two reasons are given for this: the current governance structure of the ESAs «which does not favour decisions or proceeding against national authorities», and «the lack of clarity of the founding Regulations as to the scope of and triggers for binding mediation»[35]. As for the EBA, also staff and financial resources were insufficient to fulfil its supervisory functions in its start-up phase[36].

*c*) A third case is one of direct supervisory powers which have been given to the ESAs on the basis of specific

[34] See E. Chiti, «An important part of the EU's Institutional machinery: Features, problems and perspectives of European agencies», cit., 1427. See also V. Cerulli Irelli, «Dalle agenzie europee alle Autorità europee di vigilanza», in M.P. Chiti and A. Natalini (eds.), *Lo spazio amministrativo europeo. Le pubbliche amministrazioni dopo il Trattato di Lisbona* (Bologna: Il Mulino, 2012), 137. Interpretations on the innovative impact of these provisions vary: according to N. Moloney, «The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (1) Rulemaking», *European Business Organization Law Review*, 2011, 41, a centralization of functions has taken place; see, L. Szegedi, «Challenges of Direct European Supervision of Financial Markets», *Public Finance Quarterly*, 2012, 347, arguing direct supervisory powers are granted only in exceptional cases.

[35] EU Commission, *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)*, cit., 6-7.

[36] See EU Court of Auditors, *European Banking Supervision Taking Shape – EBA in its Changing Context*, cit., 8.

regulations. As mentioned above, the ESMA has been given direct supervisory powers in the areas of credit rating agencies and trade repositories. More specifically, the ESMA has been given all supervisory powers over credit rating agencies since July 2011 (with the possibility for ESMA to delegate some specific tasks to national authorities, when it is «necessary»[37]). Thus, in the area of CRAs a centralization of supervision has been put into place[38]. Moreover, the European Markets Infrastructure Regulation (EMIR) entrusted the ESMA with direct supervisory tasks regarding the registration, supervision and recognition of Trade Repositories (TRs) (which centrally collect and maintain the records of derivatives and are crucial to enhance transparency of the derivatives markets) based outside the EU. So, also in this area the ESMA has direct supervisory tasks but only for TRs based outside the EU: authorization for TRs based in the EU is asked from the NCAs. In this area, there is a principle of division of competencies between NCAs and the ESMA, and for those which are given to the latter, its competence is exclusive[39]. ESMA activity in these two areas has been remarkable: as November 2014, CRAs registered and certified in the EU were 27, while TRs were 6 (processing a total of almost 10 billion trade reports)[40]. These tasks are at the core of ESMA's work plan for the following years as well[41].

Direct supervisory competence has been conferred to the ESMA also in the area of short selling of CDS. These powers of intervention, though, can be activated only in exceptional

[37] Regulation (EU) No. 513/2011 of the European Parliament and of the Council of 11th May 2011 amending Regulation (EC) No. 1060/2009 on credit rating agencies, OJ 2011 L 145, Art. 30.

[38] See M. Perassi, «Verso una vigilanza europea. La supervisione sulle agenzie di rating», *Analisi giuridica dell'economia*, 2012, 407.

[39] Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparts and trade repositories.

[40] See ESMA, *ESMA supervision of Credit Rating Agencies and Trade Repositories. Annual report 2014 and work plan*, cit., 4-5.

[41] *Ibidem*, 5.

circumstances, otherwise being in the competence of NCAs. Here too, then, a model based on division of competencies takes place. These powers attracted widespread attention, as they originated the ECJ decision stating the legitimacy of the delegation to ESMA of this type of direct powers[42]. However, since the activation of these supervisory powers is limited by very specific conditions[43], unsurprisingly they have not been used yet[44].

A last example of direct supervisory powers given to an ESA by specific provisions is the one of stress tests on credit institutions. Testing exercises, aimed at showing potential losses faced by EU banks under economic conditions worse than expected, were conducted already in 2009 and 2010. Yet, in such a context the Lamfalussy Committee CEBS was playing a purely coordination role, while the responsibility to undertake the exercise was of the national authority[45]. In its original text, Regulation 1092/2010 provided for the EBA to «develop an adequate stress-testing regime to help identifying those institutions that may pose systemic risk» (Article 22/2). Accordingly, in 2011 stress-tests the EBA provided the methodological framework, but it was in the NCAs' remit to have direct contact with the banks and conduct the first quality check on the banks' results. The EBA conducted second level quality check, aimed at reducing

[42] Case C-270/12, *United Kingdom of Great Britain and Northern Ireland vs European Parliament, Council of the European Union*, EU: C: 2014: 18.

[43] They can be activated only if there is a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the EU financial system, if there are cross-border implications, and no competent authority has taken measures to address that threat.

[44] Bans adopted in the last years were introduced by national authorities: see ESMA, *ESMA's technical advice on the evaluation of the Regulation (EU) 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps*, 2013, available at http://www.esma.europa.eu/content/ESMA%E2%80%99s-technical-advice-short-selling-regulation, 39-40.

[45] See CEBS, ECB and EU Commission, *Questions & Answers 2010 EU-wide stress testing exercise*, 2010, available at www.eba.europa.eu/documents/10180/15938/QAs.pdf/afab0363-e85d-4830-92e5-19b30f13286a, 2.

inconsistencies across countries. This limited role of the EBA «affected the overall reliability of the stress tests results»[46]. Regulation 1092/2010 was amended in 2013, giving EBA stronger powers in the area of stress testing. Firstly, EBA has been explicitly given the power to decide whether to initiate, at least annually, an EU-wide stress-test and whether to disclose results for each participating financial institution (Article 22/1a). Secondly, the EBA may, on the one hand, request information directly from the financial institutions, and, on the other hand, require competent authorities to carry out on-site inspections, having at the same time the right to participate in such on-site inspections (Article 32/3a). Hence, in 2013 the EBA was provided with the competence to seek information directly from the banks and to take part in the inspections carried on by NCAs. However, after the setting up of the SSM the competence in this area is blurred again, as the SSM Regulation gives also to the ECB the right to carry out stress test and their publication, «including where appropriate in coordination with EBA» (Article 4/1 (f)). Coordination between the supervisory powers of the EBA and the ECB in the area of stress testing is one of the challenges in the functioning of the new system.

*d*) As for banking in the Euro area (and non-Euro States adhering to it), there is no single model of supervision because the SSM itself is made up of different models. Entrusting the ECB with direct supervisory tasks, the SSM undoubtedly departed from the previous decentralized system of supervision in which such a task was performed by national authorities.

Detailed analyses of this extremely complex mechanism have been conducted elsewhere[47]. Suffice here to recall the two main techniques that combine in this model: separation of competencies and cooperation. On the one hand, separation of competencies takes place since in principle the ECB is entrusted with a number of supervisory tasks

[46] See EU Court of Auditors, *European Banking Supervision Taking Shape – EBA in its Changing Context*, cit., 29.

[47] See the contributions quoted above, footnotes 8 and 9.

in relation to significant banking institutions, while competence for non-significant banking institutions remains at national level[48]. Moreover, tasks conferred exclusively to the ECB are explicitly listed[49]. On the other hand, cooperation is a distinctive feature of the model as even in the area of the ECB exclusive competencies «national competent authorities shall be responsible for assisting the ECB»[50]. A tighter pattern of cooperation is set forth for some specific procedures – such as authorization – which correspond to a composite procedure[51].

Even though cooperation is at the basis of the SSM, it must be recalled that when carrying on supervision, NCAs «shall follow the instructions given by the ECB»[52], and that the ECB may at any time, «when necessary to ensure consistent application of high supervisory standards», decide to exercise directly itself all the relevant supervisory powers also on non-significant financial institutions[53]. Hence, within the «mechanism», the ECB plays the central oversight role, being in a position of supremacy[54].

*e*) A last model concerns the area of resolution. As mentioned above, this model is particularly complex and problematic as it involves a number of actors of different types (not only technical, but also political). A brief examination of the procedure for the adoption of a bank resolution

[48] Art. 6/4 SSM Regulation. The criteria which must be used in order to assess the significance of credit institutions are set forth in the SSM Regulation.

[49] *Ibidem*, Art. 4.

[50] *Ibidem*, Art. 6/3.

[51] See M. Clarich, *I poteri di vigilanza della Banca Centrale Europea*, in *Diritto Pubblico*, 2013, p. 975.

[52] Art. 6/3 SSM Regulation.

[53] Art. 6/5 (b) SSM Regulation

[54] For a similar perspective, see E. Wymeersch, *The Single Supervisory Mechanism or «SSM», Part One of the Banking Union*, cit., 40 (arguing the ECB plays an oversight role on the entire system). See also M. Mancini, *Dalla vigilanza nazionale armonizzata alla Banking Union*, cit., 27 (according to whom the ECB is the apex of the mechanism) and L. Torchia, «L'Unione bancaria europea: un approccio continentale?», *Giornale di diritto amministrativo*, 2015, 11, 14, arguing that a centralization is taking place, within a hierarchical system.

scheme shows this. First, the ECB assesses whether the conditions for starting the procedure are met (e.g. if the credit institution is failing or is likely to fail, if there is no reasonable prospect that any other measure would prevent its failure within a reasonable timeframe and a resolution action is necessary in the public interest)[55]. Second, the SRB has to transmit its resolution scheme to the Commission and that resolution scheme may enter into force only if no objection has been expressed by the Council or by the Commission within a period of 24 hours after its transmission by the Board[56]. As Bassan puts it, the three EU institutions – the ECB, the Commission and the Council – «revolve around a new agency (SRM), that has neither the power to initiate (this is up to the ECB) nor the power to decide (entrusted to the Commission and – in a way – to the Council)»[57]. In this case, there is a model of «shared competencies» between EU institutions and a new EU agency.

## 4. (*Revised) Independence*

Another feature, which varies across the different models of financial supervision, is the one of independence. In the past two to three decades, a common claim has been that the stronger the independence of the (national) supervisory authority, the more effective its action.

Two types of independence have been pursued: independence from political pressure and independence from the interests of the industries concerned. The call for independence is not peculiar to the financial sector: on the contrary, it is a common goal to be achieved within regulatory agencies across different areas. In the area of financial regulation, the specific rationale is that political pressure

[55] Art. 18/2 SRM Regulation.

[56] *Ibidem*, Art. 18/7.

[57] See F. Bassan, «The Resolution Procedure: Misunderstanding the Institutional Balance», in E. Barucci and M. Messori (eds.), *The European Banking Union*, cit., 101.

would negatively affect the quality of regulation and hence prevent the regulatory authority from fulfilling their mandate and preserving financial stability.

In the aftermath of the crisis it has been observed that authorities which were more independent did not perform better than less independent ones[58]. This has led some scholars to argue that independence is not the crucial feature that determines how effective an authority can be[59]. Others, alternatively, have called for independence to be preserved and extended to bodies (such as international financial standard setters) which are deemed to be lacking this feature[60].

How independent are the European supervisors acting in the context of the ESFS and the EBU? All the bodies intervening in financial supervision are required to act «in the interest of the Union as a whole» and not to seek instruction from the institutions or bodies of the Union, from any government of a Member State or from any other public or private body[61]. Requirement for the appointment of the members are similar, and are based on technical expertise[62]. Yet, different degrees of independence can be

[58] See G. Sherf, *Financial Stability Policy in the Euro Zone: The Political Economy of National Banking Regulation in an Integrating Monetary Union* (Wiesbaden: Springer, 2014), 97-99.

[59] *Ibidem*, 99-100.

[60] See R. Bismuth, «The Independence of Domestic Financial Regulators: an Underestimated Structural Issue in International Financial Governance», *Göttingen Journal of International Law*, 2010, 93.

[61] As for the ESAs, see Art. 42 of EBA Regulation, Art. 46 of EIOPA Regulation, and Art. 49 of ESMA Regulation; for the SSM, see Art. 19 SSM Regulation (since integration is one of the distinguishing feature of this model of supervision, the principle of independence applies not only to the ECB, but also to the national supervisory authorities); for the SRM, see Art. 47 of SRM Regulation.

[62] The Chairpersons of the ESAs are appointed on the basis of merit, skills, knowledge of financial institutions and markets, and of experience relevant to financial supervision and regulation, following an open selection procedure: Art. 48 of EBA, EIOPA and ESMA Regulations. The Chair and the members of the Supervisory Board (SB) of the ECB shall be appointed from among persons of recognized standing and experience in banking and financial matters: see Art. 26/3 SSM Regulation and

found in the ESAs, in the SSM and in the SRM, because of their diverging composition, methodologies of appointment and financial arrangements.

The ESAs governing bodies are: the Board of Supervisors, made up of the heads of the NCAs and a number of non-voting members[63]; the Management Board, bringing together the Chairperson and six members of the Board of Supervisors, elected by the NCAs participating in the Board of Supervisors; an executive director. Hence, the methodology of appointment used for the governing bodies of the ESAs is based on an agreement among the national authorities. The independence of the ESAs from national authorities taking part in it is thus rather weak: a criticism which has been underlined in the recent report on the operation of the ESAs drafted by the Commission and in the comments presented to the report itself by interested parties[64].

The composition of the SSM is completely different. First of all, it must be pointed out that, in order to avoid conflicts of interests, organisational separation of the staff competent for supervisory tasks from the staff responsible for carrying out monetary policy functions is a distinctive feature of the new architecture[65]. To this purpose, a specific Supervisory Board (SB) responsible for supervisory matters has been set up. The SB comprises: a Chair and a vice-chair, appointed by the Council upon proposal of the ECB and approval of the Parliament; four representatives of the ECB, appointed by the Governing Council (GC); representatives of the national supervisory authorities in each Member State[66]. The Commission may participate as

Decision of the ECB of 6th February 2014 on the appointment of representatives of the ECB to the Supervisory Board (ECB/2014/4), Art. 1/1.

[63] The Chairperson and representatives of the Commission, of the ECB, of the ESFS, and of the two other ESAs.

[64] EU Commission, *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)*, cit., 7.

[65] Recital 65 and Art. 25 SSM Regulation.

[66] *Ibidem*, Art. 26/1, 3 and 5.

an observer, upon invitation[67]. It is useful to compare the SB to the bodies of the ECB with monetary functions, since their extremely high independence is widely recognized[68]. The Executive Board (EB) is made up of the President, the vice-President and four members, and its members are appointed by the European Council upon recommendation of the Council, after it has consulted the European Parliament and the GC. The GC comprises the members of the EB and the Governors of the central banks of Member States. Hence, the methodology of appointment of the SB is more similar to the one of the EB than to the one of ESAs, since the Council, the Parliament and the GC are involved – a feature increasing its independence. Contrary to the EB of the ECB, though, in the SB national supervisory authorities are directly represented and would be decisive in the voting procedure (as decisions are normally taken by simple majority): hence, national interests could affect the activity of the SB much more than they do in the EB.

From the point of view of composition and methodology of appointment, the SRB structure is similar to the one of the SB[69]: it is made up of representatives for each national resolution authority plus six full-time members, appointed through a complex decision-making procedure in which the Commission, the Parliament and the Council intervene (even though in the case of the SB the Commission also enjoys the power to present a short list of candidates). The term of office of the Chair is similarly five years[70].

What impinges most on the independence of the SRB – unlike the SB – is the scope of its supervisory au-

[67] *Ibidem*, Art. 26/10.

[68] See J. de Haan and H. Berger (eds.), *The European Central Bank at ten* (Heidelberg-New York: Springer, 2010); about the issue of independence, 127. For a critical perspective, see D. Howarth and L. Basingstoke, *The European Central Bank: the new European leviathan?* (Hampshire: Palgrave Macmillan, 2005).

[69] See M. Macchia, «The independence status of the supervisory board and of the single resolution board: an expansive claim of autonomy?», in E. Barucci and M. Messori (eds.), *The European Banking Union*, cit., 117.

[70] Art. 56 SRM Regulation.

tonomy namely the provisions according to which it has to transmit its resolution schemes to the Commission and that the resolution scheme may enter into force only if no objection has been expressed by the Council or by the Commission within a period of 24 hours after its transmission by the Board[71]. Obviously, this deeply affects the action of the SRB, so that in the crucial moment of deciding whether to resolve a credit institution, the EU institutions would be in charge of blocking the decision[72].

Other critical features are the dismissal of the members, the length of their term and financial arrangements.

The Chairperson of the ESAs may be removed by the European Parliament, following a decision of the Board of Supervisors, but the grounds for its dismissal are not identified. The dismissal of the members of the SB – a decision taken by the Council when the Chair is concerned, and by the SB for ECB representatives – might be decided in cases where they no longer fulfil the conditions required «for the performance of his or her duties, or if he or she has been guilty of serious misconduct»[73]. The lack of determination of the grounds of dismissal of the Chairperson of ESAs negatively affects its independence[74].

A somewhat troublesome feature is the one of the length of the mandate: the five year mandate is a common feature of the Chairperson of ESAs, of the SB and of the SRB[75], in contrast to the EB longer mandate (lasting eight years)[76] – the latter being better suited to guarantee

[71] Art. 18/7 SRM Regulation.

[72] See M.P. Chiti, «The Transition from Banking Supervision to Banking Resolution. Players, Competences, Guarantees», cit., 91-92.

[73] Art. 26/4 SSM Regulation and Decision of the ECB/2014/4, cit., Art. 1/5.

[74] See D. Masciandaro, M.J. Nieto and M. Quintyn, *The European Banking Authority: Are its governance arrangements consistent with its objectives?*, 7th February 2011, available at www.voxeu.org/article/european-banking-authority-are-its-governance-arrangements-consistent-its-objectives.

[75] Art. 26/3 SSM Regulation and Decision of the ECB/2014/4, cit., Art. 1/2.

[76] Art. 283/3 TFEU.

independence – for financial independence, ESAs' budget comes from mandatory contributions from national supervisory authorities and from the EU general budget. As for the SB, the ECB's expenditure for carrying out supervisory tasks shall be separately identifiable within the budget of the ECB[77]. Hence, the SB budget insulated from political pressure and the separation from the budget devoted to monetary functions increases this autonomy. The SRB has an autonomous budget as well[78].

As shown above, there are some problematic features in the composition of the SB (direct representation of national authorities in it, shorter term than the one of the EB), which could make this body less independent than the one with monetary functions, the EB. However, the methodology of appointment of the SB is much more similar to the one of the EB than to the one of the ESAs: the first one, being based on the involvement of EU institutions, and the second one, being based on an agreement among the national authorities. This aspect impinges on the independence of the ESAs since they are largely influenced by national authorities which can have conflicting views and, instead of acting in the European interest, can be heavily affected by national ones.

As for the SRB, its independence is limited in its decision-making because of veto powers given to the Council and the Commission. The rationale behind this choice is clearly the one of giving to political institutions the decision-making power about burden sharing in the painful case of banking resolution. Even though it is doubtful whether the solution adopted for the SRB is the best suited for this end (on the one hand, it makes the decision-making process in the crucial phase of deciding whether to resolve a bank extremely long[79]; on the other hand, for the way the resolution procedure has been set forth in the SRM Regulation,

[77] Art. 29 SSM Regulation.

[78] Art. 58 SRM Regulation.

[79] See M.P. Chiti, «The Transition from Banking Supervision to Banking Resolution. Players, Competences, Guarantees», cit., 93.

several choices on burden sharing – such as the provisions on bail-in – have already been made through the legislative process[80]), in the case of SRB reduced independence is connected to a political choice. In the case of the ESAs, recent reports show its reduced independence is impinging negatively on their capacity to fulfil their mandate and thus should be reformed[81].

## 5. (*Enhanced) Accountability*

A last feature which needs to be taken into account in order to assess the existing models of financial supervision is the one of accountability standards.

The accountability of the ESAs is based on an obligation to report upon request of the Parliament (it is not explicitly required that the report should be on an annual basis)[82], but also on financial accountability (since the budget of the EBA comes partially from contributions of national authorities and partially from the EU)[83].

The accountability framework for the SSM provided in Regulation 1024/2013 is far more detailed, comprising: an

[80] The bail-in mechanism means that the first ones to bear the burden of the losses will be the shareholders and the creditors of the banks; only if banks' losses are more than 8% of total liabilities of the banks, they will be able to access the SRF resources: see G. Pennisi, «Muddling Through, On-The-Brink: The Single Resolution Mechanism, in The European Banking Union», in E. Barucci and M. Messori (eds.), *The European Banking Union*, cit., 42. The implementation of this mechanism leaves place to broad discretionary interpretation; however, according to some simulations taking into account banks' obligations under Basel III rules, «the bail-in procedure is so ample as to cover all the bank losses even in extreme cases»: see E. Barucci and M. Messori, «Limits of the Bail-In Process», in E. Barucci and M. Messori (eds.), *The European Banking Union*, cit., 54.

[81] EU Commission, *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)*, cit., 7-9.

[82] Art. 50 EBA, EIOPA and ESMA Regulations.

[83] *Ibidem*, Art. 62.

obligation to report on an annual basis to the Parliament, the Council and the euro group; an obligation to participate in a hearing upon request of the Parliament; an obligation to hold confidential oral discussions behind closed doors with the chair and the vice-chair of the competent committee of the Parliament; the obligation to cooperate sincerely with any Parliamentary investigation[84]. Moreover, the ECB and the Parliament shall conclude appropriate arrangements on the processes of democratic accountability, including access to information[85].

The accountability pattern of the SRB is modelled on that of the SB and thus comprises the obligation to report (both on an annual basis and upon specific request of the Parliament), and to participate in hearings, etc. Yet, it is even broader in its scope because it explicitly includes the option for the ECB and the Parliament to conclude «appropriate arrangements on the modalities of democratic accountability» that shall encompass also «rules on the handling of other classified or other confidential information»[86]. Thus, the control on the activity of the SRB might be further extended.

Accountability standards set for the ESAs, the SB and the SRB are high, thus addressing some of the legitimacy concerns which fuel the debate on the proliferation of EU agencies[87]. Moreover, a development can be traced, as the SSM and the SRM, being established after the ESAs, are a step further. However, a proper assessment of this diversity must take into account the different levels of independ-

[84] Art. 20/2, 5, 8 and 9 SSM Regulation.

[85] Art. 20/9 SSM Regulation.

[86] Art. 45/8 SRM Regulation.

[87] For an analysis of the issue of accountability of EU agencies, which takes into account the most recent experiences, see M. Everson, C. Monda and E. Vos (eds.), *EU Agencies In Between Institutions And Member States* (Alphen an de Rijn: Kluwer, 2014); M. Busuioc, *European Agencies. Law and Practices of Accountability* (Oxford: Oxford University Press, 2013) and Id., «Accountability, Control and Independence: The Case of European Agencies», *European Law Journal*, 2009, 599; M. Egeberg and J. Trondal, «EU-level agencies: new executive centre formation or vehicles for national control?», *Journal of European Public Policy*, 2011, 868.

ence of these bodies, examined above (*supra*, § 5), as «the perennial challenge that underlies agencies governance» is precisely the one of the «balance between the autonomy of agencies, arguably the crucial ingredient for the operation of this model, and the accountability they must render, critical to their legitimacy»[88].

As noted above, the ESAs' level of independence is modest, because of the crucial role of national authorities and hence of the potential influence of national interests in it[89]. A limited counterbalance has been identified in the participation of the Commission as an observer in the board of the ESAs[90]. The obligation to report to the Parliament could theoretically work as a counterbalance as well. Since their launch, the ESAs have published a report on their activity at least annually[91]. Nevertheless, in its report on the first three years of activity of the ESAs the Commission endorsed the view – presented by the stakeholders – that the role of the representatives of NCAs in the decision-making process was predominant and that it caused the lack of activation of direct supervisory powers by the ESAs[92]. Hence, it seems that existing obligations intended to make the ESAs accountable to the EU institutions are not strong enough

[88] See M. Busuioc and M. Groenleer, «The Theory and Practice of EU Agency Autonomy and Accountability: Early Day Expectations, Today's Realities and Future Perspectives», in M. Everson, C. Monda and E. Vos (eds.), *Eu Agencies In Between Institutions And Member States*, cit., 175, at 176.

[89] See D. Masciandaro, M.J. Nieto and M. Quintyn, *The European Banking Authority: Are its governance arrangements consistent with its objectives?*, cit., considering accountability standards of EBA to be very high and in sharp contrast with its modest level of independence.

[90] See A. Ottow, «The New European Supervisor Architecture of the Financial Markets», in M. Everson, C. Monda and E. Vos (eds.), *Eu Agencies In Between Institutions And Member States*, cit., 123, at 135.

[91] See www.eba.europa.eu/about-us/annual-reports; www.esma.europa.eu/documents/overview/10; https://eiopa.europa.eu/publications/annual-reports.

[92] EU Commission, *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)*, cit., 7-9.

to counterbalance national interest much more effectively incorporated in the very governance structure of the ESAs.

The case of SB and of the SRB looks much different. The accountability standards of the SB go far beyond the model used by the ESAs. Moreover, the degree of independence of the SB – as shown above – is stronger, and more similar (for the system of appointment and composition) to that of the EB of the ECB. Thus, the SB puts into place a new model combining a medium level of independence (since national authorities have the majority – opposite to the EB of the ECB – and hence national interests could jeopardize its action) with unprecedented accountability linkages.

The SRB, on the other hand, is similar to the SB from the point of view of accountability patterns, but it couples them with lower independence, as the decision-making powers of the SRB can be blocked by the Commission and the Council.

## 6. *Financial Supervision: a «Variable Geometry» Concept*

Financial supervision in the EU is currently a «variable geometry» concept. Within the two main architectures – the ESFS and the EBU – there are models highly differentiated from the point of view of integration, independence and accountability. This is not a «two speed» system – corresponding to the division of the Euro and the non-Euro area, or banking vs. other areas of financial markets –, but can better be described as a «multi-speed one».

A first model of supervision is the one of enhanced cooperation, in which the NCAs act as supervisory authorities in the context of the EFSF. It applies not only to securities and insurance but also to some areas of banking in the Euro area (such as systems of payments and consumer protection).

The second model is the one of the SSM, which is the competent authority for banking in the Euro area. As noted above, this model of supervision cannot be described as simple centralization provided that the ECB and the NCAs share competencies and the division of labour varies accord-

ing to the type of institution (significant or non-significant) concerned. Yet, in both contexts the ECB plays a strong oversight role (for non-significant institutions, giving instructions to the NCAs and being able to attract the competence upon itself in order to ensure consistent supervision), so that the SSM puts in place an unprecedented and strong model of integration.

A third model is the one in which direct supervisory powers are given to the ESAs. On the one hand, in the context of the EFSF, the ESAs can use direct supervisory powers in case of disagreement between national supervisors in order to ensure consistent application of EU law and in emergency situations. Yet, these direct supervisory powers are limited because of the conditions under which they can be activated according to ESAs Regulations, so that in the first three years of activity they have never been used. On the other hand, much stronger direct supervisory powers – resulting in a real centralization of supervision – have been given to the ESAs in some specific sectors. The powers of the ESMA in the areas of CRAs and TRs are particularly significant.

Without a substantive reform of the general provisions on the mediation and emergency powers of the ESAs – which have been called for by both the Commission and the EU Court of auditors[93] –, these powers risk becoming a «dead letter»[94]. On the contrary, the conferral of specific powers by sector regulations is being used as a privileged channel to accelerate centralization of supervision.

These models of supervision vary steadily also from the point of view of the independence and the accountability of the supervisors. The most critical issue is the one of the potential influence of national interests on these bodies

[93] EU Commission, *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)*, cit., 7 and EU Court of Auditors, *European Banking Supervision Taking Shape – EBA in its Changing Context*, cit., 38, Recommendation 3.

[94] N. Moloney, «European Banking Union: Assessing its risks and resilience», cit., 1668.

(also in the case of the SB, where, contrary to the body of the ECB with monetary functions, representatives of national authorities have the majority). Whether mechanisms intended to make the SB accountable to EU institutions will be sufficient to counterbalance this risk is, at this stage, a matter of speculation. In the case of ESAs, on the contrary, limitations to independent supervision stem from their very composition and governance structure, and are among the reasons which restricted their supervisory role in the past years[95].

This complex combination of multi-speed models of supervision emerging in the financial area within a two-track framework confirms that, after the crisis, differentiated integration in the EU is increasing[96]. This matches a tendency in public finance reforms (for example, the European Stability Mechanism applies only to the Eurozone, the European Semester to all member States, the Fiscal Compact to twenty-five of them)[97]. Instead of a «two-speed» Europe, the system which is emerging is much more complex since drivers for stronger cooperation can vary according to a variety of reasons[98] (not only the adoption of the single currency, but also the features of a specific issue: for example it has been argued that the option for centralization of supervision of CRAs lies in the fact that the threat to States of being

[95] EU Commission, *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)*, cit., 7.

[96] On this point, see also E. Ferran, *European Banking Union and the EU Single Financial Market: More Differentiated Integration, or Disintegration?*, University of Cambridge Faculty of Law Research Paper No. 29/2014, available at SSRN: http://ssrn.com/abstract=2426580 or http://dx.doi.org/10.2139/ssrn.2426580.

[97] See de Schoultheete, «Preface», in M. Lepoivre and S. Verhelst, «Variable geometry union: how differentiated integration is shaping the EU», *Studia Diplomatica*, 2013, 3.

[98] See J.-C. Piris, *The Future of Europe: Towards a Two-Speed EU?*, (Cambridge, Cambridge University Press, 2012), advocating for a two-speed EU. For a critique, see P. Craig, «Two-Speed, Multi-Speed and Europe's Future: A Review of Jean-Claude Piris on the Future of Europe», *European Law Review*, 2012, 800.

called to rescue these types of operation with tax payers' money is very remote).

But is this complexity conducing to a more efficient supervision of financial markets, or is it impairing the very purpose of the EU legislator in reforming EU supervision after the crisis? As mentioned above, a certain degree of differentiation is inevitable, because of the variety of issues covered. Nevertheless, some specific features of this complex system are problematic. It must be recalled that among the reasons for the failure of the system of financial supervision based on harmonization and home country control, in place when the crisis started, identified in the de Larosière report, were the lack of resources and legal instruments for the Lamfalussy committees to adopt a common decision and the lack of cooperation between national authorities in a context of emergency (*supra*, § 2). As the analysis has shown, within the current system the ESAs lack the resources and the clear legal basis to activate the mediation and emergency direct supervisory functions. Moreover, a lack of clarity has been identified in the division of responsibilities between the EBA and the ECB (for example, in the area of stress tests).

This type of complication does not stem from – and is not justified because of – the particularity of the issue covered, but – as far as the ESAs are concerned – from the reluctance of national authorities to give up their own powers. As for the division of powers between the ECB and the EBA, the problem is the one of finding the right balance between the two institutions. Yet, the crisis showed that there is a necessity for an efficient mechanism to overcome divergence between national authorities, especially under emergency circumstances, and to clarify the respective areas of responsibilities, and therefore in this aspect, reform is strongly needed.