

Relative Authority in Global and EU Financial Regulation:

Linking the Legitimacy Debates

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I. Global Regulation, the EU, and the New Separation of Powers

Global financial regulation appears as a polycentric, highly fragmented regime.¹ Transnational regulatory networks ('TRN') such as the Basel Committee on Banking Supervision ('BCBS'), the International Organization for Securities Commissioners ('IOSCO') and the International Association of Insurance Supervisors ('IAIS'), started setting standards for banking, securities and insurance in the 1980s.² The number of global regulators intervening in global regulation increased over time. As a response to the global financial crisis, the G20 started meeting as a summit of the heads of State or government in 2008, setting the agenda of financial reforms. At the same time, a second, powerful actor was established: the Financial Stability Board ('FSB'), a 'network of networks' bringing together the TRNs for banking, securities and insurance as well as national authorities from the G20 countries, not only representatives of regulatory agencies, but also financial ministers³.

The legitimacy concerns connected with the activity of these bodies became more pressing and were exacerbated with the global financial crisis.⁴ Research perspectives have

¹ Fragmentation is a feature common to many global regulatory regimes: see S Cassese, *The Global Polity*.

² The BCBS, established in 1974, started setting the first standards on banking at the end of the decade: see EB Kapstein, *Governing the Global Economy. International Finance and the State* (Cambridge, Harvard University Press, 1994). The IOSCO and IAIS were set up in 1983 and in 1994, respectively.

³ For an analysis of global financial regulators, see M De Bellis, *La regolazione dei mercati finanziari* (Milan, Giuffrè, 2012).

⁴ See, among many, C Brummer, 'How International Financial Law Works (and How it Doesn't)' (2011) 99 *Georgetown Law* 257 and M Goldmann and S Steininger (eds), 'Democracy and Financial Order – Legal Perspectives Special Issue' (2016) 17 *German Law Journal* 705. The debate is widespread well beyond the worlds of legal scholars. For a sociological (and critical) perspective, see S Sassen, 'Global Finance and Its

focused on each of these actors. A decade ago, Anne-Marie Slaughter identified transgovernmental networks as the key feature of the new financial architecture.⁵ Ngaire Woods emphasised the role that the IMF and the World Bank play within the new international financial architecture.⁶ More recently, analysis focused on the leading role of the G20⁷ and of the FSB,⁸ arguing that, because of their composition (purely political for the first body, and hybrid for the second one), they lead to a politicisation of global financial regulation.⁹ Given this fragmentation of powers in financial regulation, however, the perspective of relative authority appears better suited to properly assess the impact of each global regulator. It investigates precisely how powers are distributed between the different actors and what are the connections and relationships of the different entities. That is essential in order to fully understand the respective role of the many different actors engaged in financial regulation.

The analysis will show that before the crisis there was a roughly tripartite separation of powers in global financial architecture: technical bodies (transnational regulatory networks such as the BCBS and the IOSCO) were the key standards setters, while a political body like the G7 attempted to set the agenda of financial reforms. In addition, intergovernmental organisations, such as the International Monetary Fund (IMF) and the World Bank, put in place powerful institutional mechanisms in order to foster the implementation of standards. After the crisis, a tectonic shift can be observed in global regulation.¹⁰ On the one hand, the

Institutional Spaces' in K Knorr and A Preda (eds), *The Oxford Handbook of the Sociology of Finance* (Oxford, Oxford University Press, 2012).

⁵ A-M Slaughter, 'The Real New World Order' (1997) 76 *Foreign Affairs* 183.

⁶ See N Woods, *The Globalizers. The IMF, the World Bank, and Their Borrowers* (Ithaca, Cornell University Press, 2006) and DD Bradlow and DB Hunter (eds), *International Institutions and International Law* (Alphen a/d Rijn, Wolters Kluwer, 2010).

⁷ S Cho and CR Kelly, 'Promises and Perils of New Global Governance: A Case of the G20' (2012) 12 *Chicago Journal of International Law* 491, 507; and AC Eernisse, 'Banking on Cooperation: The Role of the G-20 in Improving the International Financial Architecture' (2012) 22 *Duke Journal of Comparative & International Law* 239.

⁸ S Griffith-Jones, E Helleiner and N Woods (eds), 'The Financial Stability Board: An Effective Fourth Pillar of Global Economic Governance?', Centre for International Governance Innovation Special Report' (2010) Centre for International Governance Innovation, 32, www.cigionline.org/sites/default/files/g20_no_3_0.pdf; and DW Arner and MW Taylor, 'The Global Financial Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation' (2009) 32 *University of New South Wales Law Journal* 488 and DW Arner and MW Taylor, 'The Global Financial Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation' (2009) 32 *UNSW Law Journal* 488, 488.

⁹ D Zaring, 'International Institutional Performance in Time of Crisis' (2010) 10 *Chicago Journal of International Law* 475.

¹⁰ J Black, 'Restructuring Global and EU Financial Regulation: Character, Capacities and Learning' in E Wymeersch, KJ Hopt, and G Ferrarini (eds), *Financial Regulation and Supervision: a Post-Crisis Analysis* (Oxford, Oxford University Press, 2012) 23.

G20 took over and reinforced, in unprecedented ways, the agenda-setting function. On the other hand, a significant re-centralisation took place as the FSB moved beyond a purely coordination role, taking over new powers, ranging from setting its own standards to conducting peer reviews. As a result, the current regulatory landscape does not correspond to a logic of separation of powers, but it may well be grasped through the lens of a division of relative authority.¹¹

This perspective is all the more relevant since the purpose of this chapter is not merely descriptive, but includes a normative dimension. The different actors engaging in financial regulation do not differ only because of their structure, but also due to their grounds of legitimation.¹² While the TRNs, made up of regulatory authorities, are technical bodies with a high level of expertise, the G20 constitutes a political body. The FSB—as will be further discussed—is a hybrid body, where both political and technical components are represented. Should these differences be reflected in the type of tasks these actors exercise and the standard used to assess their legitimacy? The analysis will show that efforts directed toward a clearer articulation of powers encounter many limits, stemming both from the practical unfeasibility of reforms and from the type of powers exercised. This suggests that the legitimacy of bodies involved in the exercise of public authority should be grounded on different sources.

Public authority is relative also in the context of EU financial regulation. In the aftermath of the crisis, the EU established a complex financial regulatory architecture, as a result of two major reforms. In 2010, three new agencies were set up: the European Banking Authority ('EBA'), the European Securities and Markets Authority ('ESMA') and the European Insurance and Occupational Pensions Authority ('EIOPA'), collectively known as the European Supervisory Authorities ('ESAs'), which, together with the competent national authorities, form the European System of Financial Supervision ('ESFS').¹³ The building of the ESFS was followed by the European Banking Union ('EBU'), comprising the Single

¹¹ See J Mendes and I Venzke, 'Introduction: The Idea of Relative Authority in European and International Law' (this volume).

¹² See S Rose-Ackerman, *Democratic Legitimacy and Executive Rulemaking: Positive Political Theory in Comparative Public Law* (this volume).

¹³ The regulations setting up the ESAs are: Reg of 24 November 2010 no 1093/2010, establishing a European Banking Authority; no 1094/2010 establishing a European Insurance and Occupational Pensions Authority; no 1095/2010 establishing a European Securities and Markets Authority.

Supervisory Mechanism ('SSM')¹⁴ and the Single Resolution Mechanism ('SRM').¹⁵ Within the SRM, another new agency was established (the Single Resolution Board ('SRB')). At the same time, the European Central Bank ('ECB') was entrusted with new supervisory competences. As the analysis will show, a proper understanding of how authority is divided in this domain at the EU level should not underestimate the role of the Commission and of the Council. Moreover, the analysis of interactions between different actors must take into account the type of functional division that the new legal framework tentatively put in place: the distinction between regulation, supervision and resolution. This distinction does not focus on the type of power, but on the phase of financial regulation in which an agency intervenes. This paper will speak of a 'division of functions' only to refer to this specific differentiation, the fruit of EU policy choice.

Also in this domain, the perspective of relative authority can be fruitful in assessing the respective role of the different EU actors. What is more, very few researches investigated the interplay between global regulators and EU ones.¹⁶ This chapter argues that the authority of EU financial regulators is not only 'relative' when taking into account other EU institutions or agencies. It is 'relative' also because of the impact that rules established by global regulators have on the EU's regulatory autonomy. This means, for instance, that a profound revision of the rules about capital requirements does not take place within the rule-making activity of the European agency for banking, the EBA, but within the transnational regulatory network, the BCBS (in which the EBA and the European Commission take part). Hence, a proper understanding of the limits of the powers and authority of the new EU financial bodies needs to take into account the global/EU interplay. Taking into account the global/EU interplay is relevant also in order to address both the legitimacy of the global regulators and of the new EU financial architecture.

The focus of the analysis will be twofold. First, the features of the new European financial architecture might provide useful insights for addressing the shortcoming of the

¹⁴ See Council Reg (EU) no 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

¹⁵ Reg (EU) no 806/2014 of the European Parliament and of the Council of 15 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 Single Resolution Fund and amending Regulation (EU) no 1093/2010.

¹⁶ The EU Parliament commissioned a number of papers in order to fully understand the EU role in international economic for a: [www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2015\)542193](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2015)542193); see also L Quaglia, *The European Union and Global Financial Regulation* (Oxford, Oxford University Press, 2014) and D. Mugge (ed.), *Europe and the Governance of Global Finance*, Oxford, Oxford University Press, 2014.

global financial architecture.¹⁷ This statement might sound counterintuitive, given the controversies on the legitimacy of the EU agencies themselves. However, the Court of Justice of the European Union (CJEU) judgment in *Esma/Short selling* suggested that different paradigms of legitimation for EU agencies can and do coexist¹⁸. Albeit raising some criticism,¹⁹ the approach of the CJEU intends to link the legitimacy of the agencies with procedural requirements, subject to judicial review. Compared to other agencies, often lacking a well-developed procedural legal framework,²⁰ the financial ones seem better placed, having put in place a well-shaped procedural framework. From this point of view, the European financial architecture, in spite of its shortcomings, might even contain lessons for confronting the global architecture.

Second, the analysis complements current debates on the legitimacy of the EU agencies themselves. The legitimacy of EU agencies in general is a highly debated topic.²¹ Given the relevant regulatory and supervisory powers that financial agencies enjoy, doubts and criticism about the legitimacy of these new bodies is particularly widespread.²² The object of *Esma/Short selling* were precisely the boundaries within which the delegation of powers to the financial agencies is legitimate. Shedding light on the impact of global regulators within the EU shifts the terms of the debate on the legitimacy of the EU bodies. If the activity of the latter is effectively shaped by the global regulators, then efforts intended to ensure that EU agencies' activity is legitimate should be extended accordingly.

In order to conduct an analysis focused on the allocation of authority between the different actors engaging in financial regulation, a clarification of the type of rules adopted by

¹⁷ For this type of perspective, but looking at the global economic governance executive and in particular at the European Council, see J Wouters and T Ramopoulos, 'The G20 And Global Economic Governance: Lessons From Multi-Level European Governance?' (2012) 15 *Journal of International Economic Law* 751.

¹⁸ Case C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union (ESMA-shortselling case)* [2014] EU:C:2014:18.

¹⁹ M Scholten and M van Rijsbergen, 'The Limits of Agencification in the European Union' (2014) 15 *German Law Journal* 1223.

²⁰ E Chiti, 'European Agencies' Rulemaking: Powers, Procedures and Assessment' (2013) 19 *European Law Journal* 93.

²¹ M Everson, C Monda and E Vos (eds), *EU Agencies In Between Institutions And Member States* (Alphen a/d Rijn, Wolters Kluwer, 2014); M Egeberg and J Trondal, 'EU-level Agencies: New Executive Centre Formation or Vehicles for National Control?' (2011) 18 *Journal of European Public Policy* 868; M Scholten, *The Political Accountability of EU Agencies: Learning from the US Experience* (Maastricht, Universitaire Pers Maastricht, 2014).

²² C Harlow, 'Editorial: Transparency, accountability and the Privileges of Power' (2016) 22 *European Law Journal* 273, 276.

the global regulators is needed. The first part of the chapter will thus be devoted to analysing the features of global financial standards, clarifying in which sense they have a ‘hard’ impact (section II). Second, the chapter will examine the current fragmentation of powers in global regulation, showing how powers shifted over time and giving account of the increasing centralisation of powers in the FSB, raising several problems regarding its interaction with the G20 (section III). Third, it will be shown how public authority is divided in the financial domain at the EU level, and how the authority of EU institutions is limited because of the impact of global rules (section IV). Lastly, the legitimacy of both the global and EU regulators will be discussed (sections V to VII).

II. A Preliminary Caveat: Global Financial Standards between Soft and Hard Law

In order to fully understand the scope of the powers of global financial regulators, as well as their influence within the EU, it is necessary to clarify the features of global financial standards. There is no agreement on the definition of standards between standard-setters, especially on whether instruments may be qualified as standards if they are, even from a purely formal point of view, mandatory.²³ The scientific debate looks divided as well. Some scholars tend to contrast standardisation and regulation on the basis of the binding force of the latter,²⁴ others tend to refuse such a restrictive definition of standards.²⁵

Generally, global financial standards are at first drafted as voluntary, purely soft law. For instance, when the BCBS or the IOSCO publish a standard, national regulatory authorities participating in these networks are expected to implement these standards through rule-

²³ For example, while the WTO TBT Agreement, Annex 2, para 1, contrasts standards, which are deemed to be voluntary, with technical regulations, that are, on the contrary, mandatory, the ISO and the IEC consider as standards also mandatory rules. For a comment, see OECD, ‘Regulatory Reform and International Standardization’, www.oecd.org/tad/benefitlib/1955309.pdf.

²⁴ D Kerwer, ‘Rules That May Use: Standards and Global Regulation’ (2015) 18 *Governance* 611.

²⁵ KW Abbott and D Snidal, ‘Hard and Soft in International Governance’ (2000) 54 *International Organization* 421, 421 and 434; see also, about the advantages of soft law contrasted to hard law, D Shelton, ‘Introduction: Law, Non-Law and the Problem of “Soft Law”’ in D Shelton (ed), *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System* (Oxford, Oxford University Press, 1999); S Charnovitz, ‘International Standards and the WTO, The George Washington Law School Public Law and Legal Theory’ (2005) GWU Law School Legal Studies Research Paper 133, 6 <http://ssrn.com/abstract=694346>; HV Morais, ‘The Quest for International Standards: Global Governance vs Sovereignty, The Quest for International Standards: Global Governance vs Sovereignty’ (2002) 50 *University of Kansas Law Review* 779 and D Zaring, ‘International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations’ (1998) 33 *Texas International Law Journal* 281.

making acts. Drivers of compliance are identified in the standard-setting bodies' expertise²⁶ and capacity of persuasion.²⁷ In principle, the same drivers work also for implementation by national authorities that do not participate in the network. Next to other workings of power this could explain why, for example, the Basel capital accords were applied worldwide.²⁸

International organisations leverage several mechanisms to improve the implementation of global financial standards; mechanisms that, according to some commentators, make the adoption of the standards 'essentially mandatory'.²⁹ A first mechanism leading to this result is conditionality, often used by IMF.³⁰ Second, monitor compliance has for long been an influential mechanism. This is the case of the Reports on the Observance of Standards and Codes ('ROSCs'), part of the Financial Sector Assessment Program ('FSAP').³¹ The most recent mechanism intended to foster the implementation of the standards are the FSB peer reviews, put in place in the aftermath of the crisis.³²

Albeit formally soft law, global financial standards have a 'hard impact'.³³ This hard impact can be a matter of perception, as in the case of peer reviews putting in place soft pressure to comply, or it can result from formal incorporation in binding acts. This is often the case of the EU, where Basel capital accords were incorporated in the Capital Requirements Directive. Also the Credit rating agencies ('CRAs') Regulation draws widely upon IOSCO

²⁶ D Kerwer, 'Standardising as Governance: the Case of Credit Rating Agencies' in A Heritier (ed), *Common Goods: Reinventing European and International Governance* (Lanham, Rowman & Littlefield Publishers, 2002).

²⁷ A-M Slaughter, *A New World Order* (Princeton, Princeton University Press, 2009) 213.

²⁸ According to some studies, more than 100 States complied with the 1988 Capital Accord: PP Jackson, 'Capital Requirements and Bank Behaviour: the Impact of the Basel Accord' (1998) Basel Committee on Banking Supervision Working Papers 1/1999, 1, www.bis.org/publ/bcbs_wp01.pdf. Even though the financial crisis which started in 2008 slowed down the implementation process, Basel II, published in 2004, was implemented in more than 80 jurisdictions: BIS, 'Implementation of the new capital adequacy framework in non-Basel Committee member countries: Summary of responses to the 2006 follow-up Questionnaire on Basel II implementation', www.bis.org/fsi/fsipapers06.htm. According to the Financial Stability Institute, Basel III is being implemented in 98 non-BCBS countries: FSI, 'Survey. Basel II, 2.5 and III Implementation' (2015), www.bis.org/fsi/fsiop2015.pdf.

²⁹ RP Delonis, 'International Financial Standards and Codes: Mandatory Regulation Without Representation' (2004) 36 *International Law and Politics* 563.

³⁰ *ibid.*

³¹ See IMF-World Bank, 'International Standards: Strengthening Surveillance, Domestic Institutions, and International Markets' (2003) 3, www.worldbank.org/ifa/intlstandards.pdf.

³² See para 3.B.

³³ Slaughter, above n 27, 224; See also Brummer, above n 3, 268–70.

standards.³⁴ Increasingly so, the incorporation of global standards through legislative binding acts in the EU appears to be the preferential method of implementation when standards are perceived as crucial for financial stability. This means that there is a huge difference in the implementation process in the EU and, for example, in the US. While US regulatory authorities participating in a network implement a global standard through an act of rule-making, in the EU the implementation of global standards goes through the approval of a directive or a regulation, and the (newly established) European agencies exercise their (circumscribed, as it will be seen³⁵) rule-making prerogatives further specifying these EU legislative acts. The degree of specificity of global financial standards can notably vary between broad principles and some highly specific standards.

III. The Fragmentation of Powers in the Global Financial Regulatory Architecture

A. The Evolution of Global Financial Regulators and the Separation of Powers before the Crisis

Transnational cooperation between banking authorities dates back to 1974, when the Basel Committee on Banking Supervision ('BCBS') was established by the G10 central banks. The BCBS started drafting the first standards on banking at the end of the decade, and eventually evolved into the most powerful and well-known transgovernmental regulatory network.³⁶ Also the origins of the BCBS counterpart for securities, the IOSCO, date back to 1974, when the Interamerican Association of Securities Commissions was established.³⁷ In 1983, after the Banco Ambrosiano crisis, this association was transformed in a universal network.³⁸ The International Association of Insurance Supervisors ('IAIS') was established in

³⁴ For an analysis of EU financial regulations implementing global standards, see M De Bellis, *La regolazione dei mercati finanziari* (Milan, Giuffrè, 2012).

³⁵ See para IV.A.

³⁶ About BCBS's history, structure and activity, see DR Wood, *Governing Global Banking. The Basel Committee and the Politics of Financial Globalization* (Aldershot, Ashgate Publishing, 2005).

³⁷ About IOSCO, see AA Sommer Jr, 'Iosco: its Mission and Achievement' (1996-97) 17 *Northwestern Journal of International Law & Business* 15; and C Bummer, 'Post-American Securities Regulation' (2010) 98 *California Law Review* 327.

³⁸ J Braithwaite and P Drahos, *Global Business Regulation* (Cambridge, Cambridge University Press, 2000) 88 and 143.

1994 and sets standards for insurance.³⁹ Similar to the IOSCO and contrary to the BCBS, the IAIS is a universal network.

In the mid-1990s, the G7 and the IFIs started to be involved in global financial governance. In the Halifax Summit in 1995, the G7 recognised, for the first time, the significance of the cooperation taking place within the BCBS and the IOSCO. At the 1996 Lyon Summit, the G7 identified the broad objectives the standard-setting activities should have.⁴⁰ During the late 1990s, the G7 was increasingly involved in the shaping of the financial reform agenda,⁴¹ considering financial standards-setting and dissemination crucial components.⁴² Moreover, the G7 explicitly called on the IMF and the World Bank to ‘monitor, in close co-operation with the standard-setting bodies, the implementation of these codes and standards’ and ‘to work closely together to provide advice and, where necessary, assistance to countries to help them meet these internationally agreed codes and standards’.⁴³ In such a context, the IMF and the World Bank developed specific programmes aimed at fostering compliance with global financial standards (the FSAP mentioned above⁴⁴).

In the aftermath of the Asian financial crisis, two new bodies were established. First, the G20, bringing together G10 countries and emerging ones, was a step forward in the direction of more inclusiveness and representation.⁴⁵ Yet, until 2008 it met only as a group of financial ministers. Second, the Financial Stability Forum (FSF) was set up, a network aimed at bringing together, on the one hand, international financial institutions and TRNs, and, on the other hand, representatives of advanced economies’ national authorities. The FSF was a very informal body, which did not have any statute or bylaws. Its main task was the one of promotion, coordination and information exchange among authorities responsible for financial stability.⁴⁶ It lacked autonomous standard-setting powers.

³⁹ Kapstein, above n 2.

⁴⁰ G7, ‘Economic Communiqué: Making a Success of Globalization for the Benefit of All’ (Lyon Summit Economic Communiqué, 1996), http://europa.eu/rapid/press-release_DOC-96-5_en.htm.

⁴¹ See W Murden, ‘Banking Supervision and Government Policy: the Role of Regulators in International Financial Reform’ (1999) 4 *Fordham Finance, Securities and Tax Law Forum* 35, 36–37.

⁴² IMF, ‘Declaration of G7 Finance Ministers and Central Bank Governors’ (30 October 1998) www.imf.org/external/np/g7/103098dc.htm.

⁴³ *ibid.*

⁴⁴ *ibid.*, para 1.

⁴⁵ Such as Argentina, Brazil, China, India, Indonesia, Korea, Mexico, Russia, Saudi Arabia, South Africa and Turkey. RD Germain, ‘Global Financial Governance and the Problem of Inclusion’ (2011) 7 *Global Governance* 411.

⁴⁶ See G7, ‘Statement by the G7 Finance Ministers and Central Bank Governors’ (Washington DC, 3 October 1998)

Before the crisis, there was thus a tripartite separation of powers: the TRNs were recognised as the standard-setting bodies; the G7 took over the agenda-setting task and asked the standard-setters to report on their activity; the IFIs were called to establish themselves as standard enforcers. The role of the G20 was limited and the FSF had a merely coordination task.

B. Concentrating Powers: the FSB as the Centre of Global Financial Governance

After the global financial crisis of 2007/2008, a debate about the most appropriate reforms of financial governance took place. It was argued that flexibility and voluntary standard setting had proven unsatisfactory and that a radically new and stronger mechanism was needed.⁴⁷ Some authors advocated the establishment of a World Financial Authority with binding powers.⁴⁸ However, the approach of broadening and strengthening existing institutions prevailed. The BCBS membership, originally limited to G10 authorities, was broadened to include representatives from the G20 countries.⁴⁹ Most notably, the two bodies that had been established in the late 1990s, the G20 and the FSF, were reinforced. The choice of tightening a dispersed system of financial regulation, instead of setting up a new authority, is at the core of the current financial architecture.

As mentioned above, until 2008, the G20 met only as a group of financial ministers. It is only in November 2008 that the first G20 political summit took place in Washington. The originally named Financial Stability *Forum* was reorganised as Financial Stability Board ('FSB') after the G20 London Summit in April 2009.⁵⁰ In order to assess how these reforms resulted in powers shifting in global financial regulators, the new role of the FSB—the new 'head' of global regulation, according to some observers⁵¹—must be examined in its interactions with the G20.

para 3, www.g8.utoronto.ca/finance/fm100398.htm.

⁴⁷ See B Eichengreen, 'Not a new Bretton Woods but a New Bretton Woods Process' in B Eichengreen and R Baldwin (eds), *What G20 Leaders Must Do to Stabilise our Economy and Fix the Financial System* (London, Centre for Economic Policy Research, 2008) 25–26.

⁴⁸ See H Davies, 'Global Financial Regulation After The Credit Crisis' (2010) 1 *Global Policy* 185, 186–87.

⁴⁹ Central bank governors and heads of supervision from Argentina, Indonesia, Saudi Arabia, South Africa and Turkey, together with Hong Kong and Singapore are now members of the Committee: see BCBS, 'Basel Committee Broadens its Membership' (Press Release, 10 June 2009) www.bis.org/press/p090610.htm.

⁵⁰ See FSB, 'Financial Stability Forum re-established as the Financial Stability Board' (Press Release, 2 April 2009) www.financialstabilityboard.org/press/pr_090402b.pdf.

⁵¹ Black, above n 9.

The reorganisation of 2009 modified both the structure and the functions of the Board. As for the membership, the Board brings together the IFIs and the transnational networks, on the one hand, and national authorities, on the other hand. The latter are not only from G10 countries plus Australia, Hong Kong, Netherlands, Singapore and Switzerland (which were already members of the Forum), but also from Argentina, Brazil, China, India, Indonesia, Korea, Mexico, Russia, Saudi Arabia, South Africa, Spain and Turkey.⁵² In this way, FSB membership corresponds to the one of the G20. Also the EU Commission and the ECB have been admitted. As for the type of national authorities admitted, they are diverse, including treasury departments, central banks and supervisory authorities. However, not all member jurisdictions have three representatives. According to article 11 of the FSB Charter, '[t]he number of seats in the Plenary (the decision-making body of the FSB) assigned to Member jurisdictions reflects the size of the national economy, financial market activity and national financial stability arrangements of the corresponding member jurisdiction'. As a result of the application of these general criteria, G7 and BRICS countries have three representatives, while other countries have one or two. In this second scenario, only the central bank or the financial ministry are represented. Currently, the Plenary comprises 70 members.⁵³

The structure and the mandate of the Board are clearly set forth in its founding Charter:⁵⁴ a big change from the complete informality of the FSF, which did not have a Charter, nor bylaws or a statute. The Plenary, which takes decisions by consensus, is the decision-making body of the FSB, adopting the reports and standards.⁵⁵ The Plenary also establishes Standing Committees and working groups: it is within these committees that the drafting of the reports and the standards take place, while the Plenary endorses their activity.⁵⁶ However, not only a mere formalisation took place. On the contrary, the mandate of the Board was significantly broadened.⁵⁷ As a result, the FSB seems to play a threefold role in global financial

⁵² See FSF, 'The Financial Stability Forum decides to broaden its membership' (Press Release, 12 March 2009) www.financialstabilityboard.org/press/pr_090312b.pdf.

⁵³ Members of the Financial Stability Board, www.fsb.org/about/organisation-and-governance/members-of-the-financial-stability-board.

⁵⁴ The Charter was adopted in 2009 and amended in 2012: see FSB, *Financial Stability Board Charter* (June 2012) www.financialstabilityboard.org/publications/r_120809.pdf.

⁵⁷ Its most relevant tasks are: assessing the vulnerabilities affecting the global financial system and identifying related citations needed to address them and their outcomes; promoting coordination and information exchange among authorities responsible for financial stability; monitoring market developments; monitoring best practice in meeting regulatory standards; undertaking joint strategic reviews of the policy development work of the international standard setting bodies to ensure their work is timely, coordinated, focused on priorities and

governance: a) it identifies priorities and actions to be taken (which it has been doing by not only preparing periodic reports, but also by publishing recommendations and guidelines); b) it coordinates the activity of the standard setting bodies; c) it monitors the implementation of the standards through peer reviews. In contrast to the division of powers before the global financial crisis, two tasks are now particularly relevant: the FSB directly sets some standards, and it is involved in standards implementation through peer review programmes.

The FSB standard-setting activity of the last years focused on issues that are commonly identified as crucial in triggering the crisis and in its exploitation. That is the case of the sets of recommendations about over the counter ('OTC') derivatives, which are intended to overcome the lack of transparency of the derivatives market. The recommendations on systemically significant financial institutions ('SIFI') and on effective resolution regimes for financial institutions, aim at overcoming the 'too big to fail' problem. Two main observations can be made: first, the FSB standard activity does not substitute the TRNs in their areas of competence, but focuses on specific problems; second, the FSB standard setting activity was more frequent in the immediate aftermath of the crisis than in most recent years (most standards were drafted in the years 2010–2011).⁵⁸

On the contrary, the FSB activity as a standard enforcer increased over the years. In 2010, the FSB launched the 'Strengthening Adherence to International Standards' project, aimed at fostering the implementation of standards.⁵⁹ It is based on two types of peer reviews: thematic, ie focused on specific sets of standards (for example, peer reviews on compliance with FSB Principles on compensation have been conducted), and country specific.⁶⁰

As mentioned above, the FSB sets its own standards, but they are intended to fill the gaps of the rules established by other standard-setters. Similarly, the FSB clearly states that its peer reviews do not substitute existing assessment mechanisms, but build on them. The FSB takes part in standard-setting and standard enforcement, but does not substitute the other actors exercising these types of powers. In this way, the tripartite separation of powers that could be sketched before the crisis looks much more blurred in the current framework. A crucial point

addressing gaps; collaborating with the International Monetary Fund ('IMF') to conduct Early Warning Exercises; promoting member jurisdictions' implementation of agreed commitments, standards and policy recommendations through monitoring of implementation, peer review and disclosure. FSB Charter, art 2, para 1.

⁵⁸ See www.financialstabilityboard.org/publications/policy-documents/?mt_page=1.

⁵⁹ See FSB, 'Framework for Strengthening Adherence to International Standards' (9 January 2010) http://www.fsb.org/wp-content/uploads/r_100109a.pdf?page_moved=1.

⁶⁰ FSB, 'Handbook for FSB Peer Reviews' (12 March 2015) 3 www.fsb.org/2015/03/handbook-for-fsb-peer-reviews.

which needs to be further disentangled in order to fully assess the role of the FSB is its relationship with the G20. In particular: how far do the G20 powers go in directing and controlling the FSB?

IV. The Limits of Concentration: Assessing the G20 Role Vis-à-vis the FSB

After 2008, the G20 started playing a leading role and the link between the G20 and the re-established FSB has been strengthened. It is now set forth clearly in the FSB Charter. According to Article 4 of the Charter, the FSB has to periodically report progress in its work to the Finance Ministers and Central Bank Governors of the Group of Twenty, and to Heads of State and Governments of the Group of Twenty. This provision can be better understood in the context of provisions governing the relationship of the FSB with the standard-setting bodies. On the one hand, the mandate of the FSB includes ‘undertaking joint strategic reviews of the policy development work of the international standard setting bodies to ensure their work is timely, coordinated, focused on priorities and addressing gaps’.⁶¹ On the other hand, the standard-setting bodies have an obligation to report to the FSB.⁶²

Hence, the FSB Charter tentatively sketches a division of powers as follows: the FSB identifies the priorities, coordinates the standard-setting activity, so that it corresponds to such priorities and, subsequently, gives account through periodic reports to the G20 (both at the ministerial and political level). The TRNs (but also other standard-setters as the International Accounting Standard Board (IASB)) carry on the standard-setting activity. The G20 endorses the priorities identified by the FSB and is the recipient of the reports. However, a deeper understanding of the interactions taking place between the Board and the G20 requires a closer look at their activity in the last years. Even though usually the Board plays a crucial preliminary function, so that the G20’s role is often limited to a simple endorsement of the Board’s activity, it shows that the G20 has stepped in when crucial issues were being discussed.

The specific impact of the G20 can be understood in light of the process that led to the drafting of FSB standards about SIFIs, which aimed at addressing the ‘too big to fail’

⁶¹ FSB Charter, art 2, para 1.

⁶² FSB Charter, art 6, para 3: ‘the standard setting bodies will report to the FSB on their work without prejudice to their existing reporting arrangements or their independence. This process should not undermine the independence of the standard setting process but strengthen support for strong standard setting by providing a broader accountability framework’.

problem, probably the key issue of current reforms.⁶³ Bail-outs heavily affected public finances. On the one hand, banks must be made resolvable: that is the aim of resolution regimes.⁶⁴ On the other hand, some have argued that such an approach would be ineffective: given the complexity and interconnectedness of SIFIs, they should be restricted in the activities that present too high risk-taking and hence conflicts of interest.⁶⁵ Hence, structural reforms are advocated.⁶⁶ The difference between the two approaches is self-evident: resolution regimes aim at making markets work, while the approval of structural reforms entails a radical change from the model of supervision which has been enacted in the last 30 years—a ‘revised’ version of the separation of investment and commercial banking. The second approach is at the basis of the Volcker rule in the US and the Vilckers Report in the UK. The new EU rules⁶⁷ about the resolution of banks adopt the first type of approach,⁶⁸ while a proposal for a regulation on banking structural reform was adopted by the Commission in January 2014, but no agreement was reached on the point.⁶⁹

The FSB ‘Recommendations reducing the moral hazard posed by systemically important financial institutions’ do not advocate for structural reforms.⁷⁰ However, in its preliminary documents on the issue, the FSB clearly considered that structural measures could be

⁶³ J Carmassi, E Luchetti and S Micossi, ‘Overcoming Too-Big-To-Fail: A Regulatory Framework to Limit Moral Hazard and Free Riding in the Financial Sector’ (CEPS Task force Reports, March 2010) 5 <http://ssrn.com/abstract=1610214>.

⁶⁴ DW Arner and JJ Norton, ‘Building a Frame Work to Address Failure of Complex Global Financial Institutions’ (2009) 39 *Hong Kong Law Journal* 95.

⁶⁵ See Group of Thirty, ‘Financial Reform: A Framework for Financial Stability’ (January 2009) www.group30.org/images/PDF/Financial_Reform-A_Framework_for_Financial_Stability.pdf. See also N Roubini and S Mihm, *Crisis Economics. A Crash Course in the Future of Finance* (New York, The Penguin Press, 2010) 266.

⁶⁶ See High-level Expert Group on reforming the structure of the EU banking sector: Final report, Brussels, Oct. 2012 (so called Liikanen Report), available at < http://ec.europa.eu/internal_market/bank/docs/high-level_expert_group/report_en.pdf>, , 88.

⁶⁷ Dir 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Dir 82/891/EEC, and Dirs 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 Regs (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council.

⁶⁸ They are intended to make banks resolvable, ie to make market work, and avoid incentives to excessive risk taking. Communication from the Commission, ‘An EU Framework for Crisis Management in the Financial Sector’ (20 October 2010) 2, http://ec.europa.eu/internal_market/bank/docs/crisis-management/framework/com2010_579_en.pdf; J Carmassi, E Luchetti, and S Micossi, ‘Overcoming Too-Big-To-Fail’ (Centre for European Policy Studies Paper, 2010) 10, http://aei.pitt.edu/14484/1/TFR_Bank_Crisis_Resolution.pdf.

⁶⁹ Proposal for a Regulation Of The European Parliament And Of The Council on structural measures improving the resilience of EU credit institutions, COM/2014/043 final.

⁷⁰ See FSB, ‘Reducing the moral hazard posed by systemically important financial institutions’ (20 October 2010) www.fsb.org/wp-content/uploads/r_101111a.pdf?page_moved=1.

necessary in order to make a systemically significant institution resolvable.⁷¹ Later on, though, the FSB documents focused exclusively on resolution regimes, and considered monitoring structural reforms adopted at the national level with the sole purpose of avoiding the risk that they lead to a fragmentation of financial markets.⁷² It is not easy to assess whether this change was autonomously adopted by the Board, or whether it resulted from pressures coming from the G20. However, it must be recalled that in the same year the IMF had suggested the adoption of financial levies for SIFIs,⁷³ a proposal endorsed by the FSB⁷⁴ but rejected by the G20, because of a lack of consent between its members⁷⁵ (eventually leading France, Germany and the UK to adopt a separate statement).⁷⁶ This suggests that, even though preliminary and highly technical work is conducted by the FSB (or, as for fiscal matters connected with financial regulation, by the IMF), the political decisions remain in the realm of the G20. The boundaries of the respective roles of the G20 (purely political body) and the FSB (hybrid body, partly political and partly technical) in agenda-setting remains uncertain and the dynamics governing this power are not transparent. No clear separation of powers is in place in global financial regulation.

V. The Distribution of Powers in the EU Financial Regulatory Architecture

In global financial regulation, horizontal powers can be distinguished between agenda-setting, standard-setting and standard-enforcement—between the identification of the priorities for the elaboration of guidelines, policies and recommendations; the drafting and elaboration of guidelines and recommendations; as well as the use of instruments intended to verify the degree of implementation of these guidelines and recommendations within national jurisdictions. These powers are allocated *horizontally* within different global regulators

⁷¹ FSB, ‘Progress on the global regulatory reform agenda. Letter to G20 Ministers and Governors’ (19 April 2010) 2, www.fsb.org/wp-content/uploads/l_100423.pdf. See FSB, ‘Interim Report on reducing the moral hazard posed by systemically important financial institutions’ (27 June 2010) 5, www.financialstabilityboard.org/publications/r_100627b.pdf.

⁷² See FSB, ‘Structural Banking Reforms. Cross-border consistencies and global financial stability implications’ (Report to G20 Leaders for the November 2014 Summit, 27 October 2014).

⁷³ See IMF, ‘A Fair And Substantial Contribution By The Financial Sector. Final Report For The G-20’ (June 2010), www.imf.org/external/np/g20/pdf/062710b.pdf.

⁷⁴ FSB, above n 74, 2.

⁷⁵ Si v J Kirton, ‘The G20’s Approach to Financial Risk and Risk Management’ (June 2010) 17–18, www.g20.utoronto.ca/biblio/kirton-cccpc-2010.pdf.

⁷⁶ W Lewis, ‘Joint statement by the French, UK and German Governments on bank levies’ (*Propertyreporter.co.uk*, 22 June 2010) www.propertyreporter.co.uk/finance/joint-statement-by-french-uk-and-german-govs-on-bank-levies.html?DT=0.

(TRNs, FSB, G20). The basic *vertical* division of powers at the core of the transnational regulatory networks, as opposed to traditional treaty-based arrangements, is that national regulatory authorities taking part in the network (say, the FED participating in the BCBS) participate in the standard-setting activity and later in implementing the standard, bypassing parliamentary ratification.⁷⁷ While this model prevails in US practice, the implementation of global standards in the EU follows a different path due to the lack, until recently, of financial regulatory agencies and the differences of the powers given to the newly established agencies when compared to their US counterparts.

A. The ESFS, the EBU, and the Division of Regulation, Supervision, and Resolution

In the EU context, the tentative dividing line is not the one between agenda-setting, standard-setting and standard-enforcement but between regulation—ie rule-making—and supervision—ie ensuring that ‘rules applicable to the financial sector are adequately implemented’.⁷⁸ According to Niamh Moloney, ‘[t]he relationship between “rules on the books” (law-making) and “rules in action” (supervision and enforcement) is, of course, symbiotic’; however, even though the line between rules and supervisory practices is blurring, this distinction is necessary to explain EU financial reforms.⁷⁹

As mentioned above, the current architecture is the result of two different reforms: the ESFS, put in place in 2010, and comprising the three ESAs (EBA, ESMA, and EIOPA), the Joint Committee of the ESAs and the national authorities,⁸⁰ and the EBU, started in 2013, and based on the SSM and the SRM⁸¹. The system resulting from the setting up of the ESFS—

⁷⁷ P-H Verdier, ‘US Implementation of Basel II: Lessons for Informal International Lawmaking’ in J Pauwelyn et al (eds), *Informal International Lawmaking* (Oxford, Oxford University Press, 2012) 437.

⁷⁸ N Moloney, ‘The European Securities and Markets Authority and Institutional Design for the EU Financial Market – a Tale of Two Competences: Part (2) Rules in Action’ (2011) 12 *European Business Organization Law Review* 177, 179.

⁷⁹ N Moloney, ‘The European Securities and Markets Authority and Institutional Design for the EU Financial Market: a Tale of Two Competences: Part (1) Rule-making’ (2011) 12 *European Business Organization Law Review* 41, 42.

⁸⁰ Also the European Systemic Risk Board (‘ESRB’), falling outside the scope of this paper, is part of the ESFS. About the features of the ESFS, see E Ferran, ‘Understanding the New Institutional Architecture of EU Financial Market Supervision’ in E Wymeersch, KJ Hopt and G Ferrarini (eds), *Rethinking Financial Regulation and Supervision in Times of Crisis* (Oxford, Oxford University Press, 2012) 111–58; E Wymeersch, ‘The European Financial Supervisory Authorities or ESAs’ in Wymeersch, Hopt and Ferrarini (eds), *ibid* 232–317; M Everson, ‘A Technology of Expertise: EU Financial Services Agencies’ (2012) LEQS Paper No 49.

⁸¹ About the EBU, see B Wolfers and T Voland, ‘Level the Playing Field: The New Supervision of Credit Institutions by the European Central Bank’ (2014) 51 *Common Market Law Review* 1463; E Ferran and V Babis, ‘The European Single Supervisory Mechanism’ (2013) 13 *Journal of Corporate Law Studies* 255; E Wymeersch, ‘The Single Supervisory Mechanism or “SSM”, Part One of the Banking Union’ (2014) *Financial*

applying to all Member States—and the EBU—applying to banking institutions of the euro-area⁸²—has been described as a two-track or a dual one:⁸³ within the ESFs, the three financial agencies have been given broad regulatory powers, while financial supervision is—as a general rule—in the domain of national competent authorities (‘NCAs’). Within the EBU, on the contrary, the ECB—not a newly established European agency, but an established EU institution—has been given supervisory powers on ‘significant’ banking institutions across the Euro Area (non-significant institutions falling under the supervisory competences of the NCAs).⁸⁴ As a first, simplified assessment of the division of competences in the EU after the crisis is the following: as for banking in the euro-area, the EBA has the regulatory role and the ECB is entrusted with direct banking supervisory functions under the SSM (NCAs being competent for supervision on non-significant banking institutions); in the areas of securities and insurance, ESMA and EIOPA have regulatory competences, while NCAs retain supervisory tasks.

Before moving on to showing how the dividing lines of competences are much more blurred than this first sketch suggests, one last clarification needs to be drawn. Within the Banking Union the EU decided to separate day to day supervision from public intervention when a credit institution in crisis needs to be resolved. The separation between supervision and resolution is at the basis of the distinction between the SSM and the SRM. In the first SSM, the EU body entrusted with new powers is the ECB, while in the second, the SRM, the European body responsible to manage the orderly resolution of significant credit institutions is a new European agency, the SRB. However, as the analysis will now clarify, also the authority of the SRB is ‘relative’, in that its powers are limited by the powers given to the Commission, the Council and to the ECB when deciding whether and how to resolve a bank.

Law Institute Universiteit Gent Working Paper No 1/2014, papers.ssrn.com/sol3/papers.cfm?abstract_id=2397800; GA Ferrarini and L Chiarella, ‘Common Banking Supervision in the Eurozone: Strengths and Weaknesses’ (2013) ECGI-Law Working Paper No 223/2013, <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).

⁸² And of the non-Euro States freely adhering to it.

⁸³ See GL Tosato, ‘The Governance Of The Banking Sector In The Eu – A Dual System, in *The European Banking Union*’ in Barucci and Messori (eds), above n 84, 4. I explored this issue more in depth elsewhere: see M. De Bellis, *European Financial Supervision after the Crisis: Multi-Speed Models within a Two-Track Framework*, in E. Chiti and G. Vesperini (eds.), *The administrative architecture of financial integration. Institutional design, legal issues, perspectives*, Bologna, il Mulino, 2015, 61-92.

⁸⁴ In order to avoid conflicts of interests, a specific Supervisory Board (‘SB’) responsible for supervisory matters has been set up within the ECB, providing for organisational separation of the staff competent for supervisory tasks from the staff responsible for carrying out monetary policy functions: Reg (EU) No 1024/2013, recital 65 and art 25.

B. The Blurring Division of Competences

As far as regulation is concerned, the rule-making powers of the ESAs comprise the adoption of technical regulations and the drafting of guidelines and recommendations. The latter are soft law tools.⁸⁵ Technical regulations can be of two types: technical standards or implementing standards. In order to have a binding effect the technical standards must be endorsed by the Commission, which can reject or amend the regulation. Technical standards are endorsed by the Commission as delegated acts under Article 290 TFEU, while implementing standards are endorsed as implementing acts under Article 291 TFEU.⁸⁶ The rule-making activity of the ESAs is thus not completely autonomous, and the Commission retains significant powers.

As for supervision, even though the ESAs are mainly regulatory bodies, they are also entrusted with some supervisory powers. First, the ESA regulations do entrust the three financial agencies with direct supervisory powers in three exceptional cases: in order to ensure consistent application of EU law by NCAs; in emergency situations' and in case of disagreement between competent authorities in cross border situations.⁸⁷ Second, sector regulations gave the ESMA direct supervisory powers in the areas of credit rating agencies, short selling of credit default swaps and trade repositories.⁸⁸ As a result, the distinction drawn above does not reflect accurately the current framework. As mentioned above, for banking supervision in the EBU, the ECB is the supervisory authority only as far as 'significant' credit institutions are concerned (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).⁸⁹ NCAs are competent for supervision over non-significant institutions.

⁸⁵ Reg 1093/2010, art 10-15.

⁸⁶ For a comment, see Ferran, above n 83, 46.

⁸⁷ ESA Regs, arts 17–19.

⁸⁸ Regs (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Reg (EC) No 1060/2009 on credit rating agencies, art 30, and No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories. On the role of ESMA, see Moloney, above nn 81 and 82.

⁸⁹ See Council Reg (EU) No 1024/2013, art 6, para 4.

As for banking resolution, the same criterion—the significance of the institution—applies for the division of competences between national authorities and the SRB.⁹⁰ Yet, this pattern is further complicated because, in addition, the Commission and the Council have strong powers in deciding on the resolution of banks⁹¹ while the ECB plays a key role in assessing whether the resolution procedure has to be started.⁹² As Bassan put 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)’.⁹³

As a result, within the two main architectures—the ESFS and the EBU—there is not one single model according to which functions are divided between European and national authorities, and between different EU agencies and institutions.

Regulation is in the domain of the European financial authorities in the three sectors—banking, securities and insurance—in both the Euro area and outside it. But the Commission can reject or amend the technical standards drafted by the ESAs. The separation of regulation from supervision in the building of the new financial architecture is in any event rather problematic. In particular in the area of banking it leads to considerable overlaps and potential conflicts between the EBA—which is in principle entrusted with rule-making—and the ECB—to which some specific regulatory powers are nevertheless given under the SSM.⁹⁴

The distribution of supervisory competences varies not only according to the specific sector (banking versus other areas of financial markets). As for banking in the euro-area, the ECB and the NCAs share competences, depending on the type of institution (significant or non-significant) concerned.⁹⁵ In other sectors—securities and insurance—the division of competences is even more blurred, since direct supervisory powers have been given for some specific operations or institutions (the powers of the ESMA in the areas of CRAs and of

⁹⁰ Reg (EU) No 806/2014, art 7.

⁹¹ See further, Board Reg (EU) No 806/2014, art 18, para 7.

⁹² Reg (EU) No 806/2014, art 18, para 2.

⁹³ See F Bassan, ‘The Resolution Procedure: Misunderstanding the Institutional Balance’ in Barucci and Messori (eds), above n 84, 40.

⁹⁴ About the rule-making powers of the ECB within the ESFS, see EL Camilli, ‘The Governance of EU Regulatory Powers in the Banking Sector’ in E Chiti and G Vesperini (eds), *The Administrative Architecture of Financial Integration. Institutional Design, Legal Issues, Perspectives* (Bologna, Il Mulino, 2015) 52.

⁹⁵ 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.

derivatives are a case in point). However, for all the three sectors of financial markets, and both in the euro area and outside it, the EU financial agencies have direct supervisory powers under exceptional circumstances.

As for the resolution of credit institutions, the vertical division of competences between the new EU agency SRB and the national authorities is further complicated horizontally, because the SRB has to coordinate with other EU institutions.

C. How 'Relative' is EU Authority in Financial Matters? The Impact of Global Standards on EU Regulation

The authority of EU financial regulators is not only 'relative' when taking into account other EU institutions or agencies, it is 'relative' also because of the impact that rules established by global regulators have on their regulatory autonomy. The tendency of EU institutions to comply with global standards can be traced back to the 1990s and is particularly striking in the area of banking regulation. Directive 93/6/EEC, implementing the first capital accord approved by the Basel Committee in the 1980s, clearly stated that such directive 'forms part of the wider international effort to bring about approximation of the rules in force regarding the supervision of investment firms and credit institutions'.⁹⁶ When the Basel Committee revised its standard for capital requirements of banks, this tendency went even further. According to Enrico Camilli, the approval of the Capital Requirement Directive ('CRD') was 'a mere copycat exercise of decisions agreed in the secretive Swiss club by National authorities'.⁹⁷ The dramatic impact of global standards on the drafting of the EU Directive was recognised by the EU Parliament. In a Resolution of 2003, it criticised that 'the Basel Accord and other international agreements laying down a framework for legislation at EU level came into existence without any form of democratic mandate or control by the European Parliament'.⁹⁸ And it emphasised that, in future, 'questions with such far-reaching political implications should not be determined in advance by expert committees alone'.⁹⁹

⁹⁶ Council Dir 93/6/EEC of 15 March 1993 on the capital adequacy of investments firms and credit Institutions.

⁹⁷ EL Camilli, 'Basel-Brussels One Way? The EU in the Legalization Process of Basel Soft Law' in E Chiti and BG Mattarella (eds), *Global Administrative Law and EU Administrative Law: Relationships. Legal Issues and Comparison* (Berlin, Springer, 2011) 324.

⁹⁸ European Parliament resolution on the adequacy of banks' own funds (Basel II) (2001/2257(INI)) 2 September 2003, 2001/2257(INI) para 4, www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2003-0358+0+DOC+XML+V0//EN.

⁹⁹ *ibid.*

The impact of global standards continued over time and can be considered as a constant feature that is not limited to this sector.¹⁰⁰ This is the case of the Banking Recovery and Resolution Directive ('BRRD') no 2014/59/EU, implementing the FSB Key Attributes of Effective Resolution Regimes for Financial Institutions ('Key Attributes').¹⁰¹ Moreover, the European Markets Infrastructure Regulation ('EMIR') implements the FSB recommendations for OTC Derivatives Market Reforms,¹⁰² and the Credit rating agencies ('CRAs') Regulation complies with the IOSCO Code of conduct for credit rating agencies.¹⁰³

Concerns about the impact of global harmonisation of financial rules notably led the European Parliament ('EP') to adopt a new resolution in 2016, about the EU's role in the framework of international financial, monetary and regulatory institutions and bodies. The goal of the EP is precisely the one of ensuring that 'national parliaments and the European Parliament should not be reduced to a role of mere rubberstamping'.¹⁰⁴ Hence, it is the EU institutions themselves that recognise their authority as 'relative' because of the limitations stemming from the activity of global bodies.

This point is crucial also from a research perspective that is attuned to legitimacy issues. Global standards, despite their form of soft law, are perceived as binding and the drafting of directives and regulations implementing global standards is often a formal process that does not lead to a real public debate that could result in departing from global guidelines. The strengthening of the EU's role in the decision-making process of global standard-setting

¹⁰⁰ See for example EBA Europe, 'Esas Publish Final Draft Technical Standards On Margin Requirements For Non-Centrally Cleared Derivatives' (8 March 2016) www.eba.europa.eu/-/esas-publish-final-draft-technical-standards-on-margin-requirements-for-non-centrally-cleared-otc-derivatives.

¹⁰¹ Dir 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Dirs 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 Regs (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council. Also see L Stanghellini, 'La disciplina delle crisi bancarie: la prospettiva europea' in Banca d'Italia, *Dal Testo unico bancario all'Unione bancaria: tecniche normative e allocazione di poteri. Atti del convegno tenutosi a Roma il 16 settembre 2013* (2014), Quaderno di ricerca giuridica n. 75, 157.

¹⁰² Reg (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories. See FSB, 'OTC Derivatives Market Reforms Seventh Progress Report on Implementation' (8 April 2014) for an analysis of the correspondence between EMIR provisions and FSB standards, www.fsb.org/wp-content/uploads/r_140408.pdf?page_moved=1.

¹⁰³ Reg 1060/2009; See FSB, 'IMN Survey of National Progress in the Implementation of G20/FSB Recommendations, Jurisdiction: EU Commission' (2013) 42, indicating the regulation as the act of primary legislation implementing the IOSCO Code.

¹⁰⁴ European Parliament, 'Resolution on the EU role in the framework of international financial, monetary and regulatory institutions and bodies (2015/2060(INI))' (12 April 2016) www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0108+0+DOC+PDF+V0//EN.

bodies and institutions then becomes crucial. Hence, current debates on the legitimacy of EU financial agencies should be complemented by an in-depth analysis of the global/EU linkage. The chapter will now turn to addressing the legitimacy issue of global and EU regulators and how they interact.

VI. Global Financial Governance and Legitimacy Concerns

The perspective of relative authority, used in this contribution, helps in understanding how the powers are assigned among the different regulators and shows the main weaknesses in the current framework. Instead of being clearly divided among the different actors, powers are assigned along blurring lines of competences. Given the different structures and procedures followed by the various bodies, some guiding criteria can be advanced on how powers should be articulated. However, this desire for clarification encounters both practical limitations, and difficulties stemming from the nature of the powers involved (subsection A below). The legitimacy of the regulators must hence be strengthened also with instruments different from the articulation of powers, especially instruments intended to increase the inclusiveness of the regulators, their respect of due process, and eventually the establishment of instruments of judicial control (subsection B). The analysis will show that also the EU financial regulatory architecture can contribute to this legitimacy enhancing agenda and might even constitute an inspiring template.

A. The Limits to a Clear Articulation of Competences

As mentioned, the current allocation of authority goes roughly as follows: the FSB and the G20 are responsible for agenda-setting; transnational regulatory networks such as the Basel Committee set the standards; the IMF, the World Bank and the FSB monitor the implementation of the standards. The lines of division of powers between the different actors, however, are extremely blurred. First of all, the interaction of the FSB and the G20 in agenda-setting is not clear. As discussed above, while the Board usually identifies the priorities to be met and the G20 endorses them, the G20 can also play a more active role. Second, the criteria adopted by the FSB when deciding whether to proceed in setting a standard autonomously (instead of delegating it to a TRN) are not specified, even though it seemed more active in this regard right after the crisis, than in more recent times.

Given the highly differentiated structures and composition of the various bodies, some of them appear to be better suited to exercise one type of power—standard-setting or agenda-setting—than other bodies. These uncertain lines of competences look problematic and a case for a clearer-cut articulation of powers in financial governance could be made.¹⁰⁵ The G20, comprising the heads of State or Government, is a purely political body. The FSB has a mixed nature, since financial ministries are part of it together with the central bank governors and supervisory authorities. Ideally, the identification of priorities and the guiding principles should be in the domain of political bodies, and the specification and implementation should be done by technical ones. This would not necessarily mean a centralisation of the agenda-setting in the G20, but a clearer correspondence between the type of tasks that the FSB is executing and its composition could be envisaged.

As has also been mentioned, the drafting of the reports and standards takes place in the Standing Committees and working groups, while the Plenary endorses their work. As far as the composition of the committees and groups is concerned, the FSB Procedural Guidelines take into account criteria of balanced geographical representation, but do not distinguish between ministries' representatives and regulatory authorities' representatives, so that currently the composition of the groups involves both. In order to enhance a correspondence between the ground of legitimation of this body and the type of tasks it executes, the composition of the groups entrusted with the standard-setting and standard implementation tasks could be restricted to national regulatory authorities, leaving to the General Assembly, where political representatives sit, the approval of the documents and the identification of the priorities. The TRNs, made up of specialised domestic authorities directly interacting with each other,¹⁰⁶ appear to be the appropriate forum for standard setting, because of their technical expertise.¹⁰⁷

However, a clearer articulation of competences, inspired to a correspondence between the type of functions and the composition and grounds of legitimacy of the regulator, is not easy to pursue in practice. In the immediate aftermath of the global financial crisis in 2008, the

¹⁰⁵ J Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 *Boston College Law Review* 433, 434.

¹⁰⁶ See K Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43 *Virginia Journal of International Law* 1, 4–5.

¹⁰⁷ See D Zaring, 'International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations' (1998) 33 *Texas International Law Journal* 281; *ibid*, 'Informal Procedure, Hard and Soft in International Administration' (2005) 5 *The University of Chicago International Law Journal* 547; P-H Verdier, 'Transnational Regulatory Networks and Their Limits' (2009) 34 *Yale Journal of International Law* 113; and MJ Warning, *Transnational Public Governance. Networks, Law and Legitimacy* (New York, Palgrave, 2009).

building of a world financial organization was suggested, but it was rejected¹⁰⁸. Notwithstanding the undeniable momentum – in terms of the awareness of the unprecedented scope and consequences of the crisis – political willingness to bind to a in international agreements and cede sovereignty was lacking. This type of resistance might apply less to the type of reform suggested above, not aimed at building a treaty based organization. A reform pointing at a more specific division of competences among existing institutions could hence have higher possibilities of success. However, a second reason for the failure of that more ambitious project can be traced: as Eyal Benvenisti and George W. Downs point out, the fragmentation of powers in different networks can favour stronger countries, that can choose the venue that is more favorable to pursue their interests in a given circumstance¹⁰⁹. If this latter interpretation is correct, also a less ambitious reform such as the one suggested above might encounter fierce opposition, since, clarifying the respective domain of each actor and respective responsibility, it could diminish the capacity of the States of switching regimes.

Moreover, an obstacle to a clearer allocation of competences in global financial governance stems also from a basic uncertainty of the whole system: it is the difficulty of distinguishing between global rules equivalent to legislative acts from those that could be assimilated to administrative rule-making. This unclear distinction is rather problematic also in the domestic legal orders¹¹⁰ and it is very well-known within the institutional framework of the EU.¹¹¹ International rule-making often implies fundamental policy choices: this was the case, already before the crisis, of the first two Basel capital accords. The broadening of the agenda of global financial reforms after 2008 increased the scope and impact of global rules. For example, the ‘too big to fail’ problem is closely connected to questions of how to spend public money. The revision of the Basel Committee rules on capital requirements for banks can affect the costs of bank lending and hence the recovery of the economy. If the legislative

¹⁰⁸ Barry Eichengreen, *Out of the Box Thoughts About the International Financial Architecture*, 18-20 (IMF Working Papers, Vol. , pp. 1-26, 2009), available at SSRN: <http://ssrn.com/abstract=1415173>; see also, [calling for a financial administrative law agency](#), Eric J. Pan, *Challenge of International Cooperation and Institutional Design in Financial Supervision: Beyond Transgovernmental Networks*, 11 Chi. J. Int'l L. 243 263-73 (2010). Other authors, on the contrary, suggest incremental reforms of the current setting are preferable, because of efficiency concerns: C. Brummer, *How International Financial Law Works (and How it Doesn't)*, cit., at 311-324 and Jan Wouters and Thomas Ramopoulos, *The G20 And Global Economic Governance: Lessons From Multi-Level European Governance?*, cit., p. 774.

¹⁰⁹ See Eyal Benvenisti and George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, (2007) 60 Stanford Law Review 595–631, at 597-8 (warning on the opportunity to investigate the role of intentionality in the existence of fragmented system of regulation).

¹¹⁰ B Ackerman, ‘Good-bye Montesquieu’ in S Rose-Ackerman and PL Lindseth (eds), *Comparative Administrative Law* (Cheltenham, Edward Elgar Publishing, 2010) 128–33.

¹¹¹ See J Mendes and I Venzke, ‘Introduction’ (this volume).

power cannot be clearly separated from the administrative one, then also determining in a clear cut way what a political body should do vis-à-vis technical ones is more complicated. Both technical expertise and political support are needed in the shaping of global financial rules, even if it still seems reasonable that political bodies—such as the G20 and the ministerial components of the FSB—should be key in identifying the priorities, while technical experts should specify the policies in detail.

B. The Legitimacy of Global Financial Regulation: Perspectives and Research Agenda

A clear articulation of competences between political and technical bodies is difficult to achieve, because of the practicability of reforms. Moreover, as discussed above, the exercise of financial rule-making involves not only technical expertise, but also fundamental policy choices. Because of this interconnection, the criteria for enhancing the legitimacy of regulators should ideally both enhance their inclusiveness, and ensure due process. In this regard, the perspective of relative authority does not exclude other research perspectives that have been advanced in recent years in order to address the legitimacy problems of the exercise of public authority.¹¹² A legitimacy framework for global financial regulators requires extensive future research; here, only the key elements to build on can be sketched.

The first element is the one of representation. While the TRNs for securities and insurance—IOSCO and the IAIS—have universal membership, the membership of both the FSB and the Basel Committee is limited to national authorities coming from G20 countries. It has been argued that the FSB, given its ambition to establish itself as the centre of global financial regulation, should broaden its representativeness beyond the G20 countries.¹¹³ Because of the strong linkages between the FSB and the G20, discussed above, such an enlargement, to be effective, should involve both institutions. However, while the FSB experimented with various systems to involve authorities of countries outside its membership (for example, through a system of regional conferences), the G20 is much more reluctant to open its activity to countries not represented in it. From this point of view, the strengthening

¹¹² On the research perspective on public authority, see A von Bogdandy and I Venzke, *In Whose Name? A Public Law*

Theory of International Adjudication (Oxford, Oxford University Press, 2014). On the Global administrative Law (GAL) normative project, see the opening framework essay B Kingsbury et al, 'The Emergence of Global Administrative Law' (2005) 68 *Law & Contemporary Problems* 15; for the most recent developments of the scholarship, see 'Symposium: Through the lens of time: Global Administrative Law after 10 years' (2015) 13 *International Journal of Constitutional Law* 463.

¹¹³ Black, above n 9, 20 and 27.

of the representativeness of FSB might require making the Board more autonomous from the G20. If this separation were the case, then the political input and endorsement should be centred in the FSB general body, the Assembly, reformed in its composition in order to represent only the political components (instead of its current mixed composition, while the regulatory authorities would constitute the working groups and committees).

Second, at the national level the grounds of legitimation of administrations lie not only in their technical expertise, but also in the formalised procedures they follow.¹¹⁴ In the past years, the TRNs enhanced their transparency and started following notice and comment procedures.¹¹⁵ Also the FSB, according to its Charter, should provide for consultation (even if this is stated in rather vague terms).¹¹⁶ However, in order to effectively increase the legitimacy of a global regulator, procedural requirements should be clearly defined, comprising transparency, participation and duty to give reason, and should not be granted on a case by case basis, but officially recognised.¹¹⁷

Moreover, after the crisis the effectiveness of the TRNs was questioned and it was argued that such failure was the result of a regulatory capture.¹¹⁸ Well-known and extensively investigated in domestic legal systems,¹¹⁹ the risk of a regulatory capture seems even stronger in the global arena.¹²⁰ An effective tool in order to counterbalance the pressures coming from the financial industry is the one of setting up a stakeholders' group, in which also academics

¹¹⁴ See S Rose-Ackerman (this volume).

¹¹⁵ MS Barr and GP Miller, 'Global Administrative Law: the View from Basel' (2006) 17 *European Journal of International Law* 15 (arguing that enhanced due process of the networks had successfully addressed accountability concerns). For a critical point of view on the networks, see M Shapiro, "Deliberative", "Independent" Technocracy v Democratic Politics: Will the Globe Echo the EU?' (2005) 68 *Law & Contemporary Problems* 342, S Picciotto, 'Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism' (1997) 17 *Northwestern Journal of International Law & Business* 1014, and BS Chimni, 'International Institutions Today: An Imperial Global State in the Making', in (2004), 15 *European Journal of International Law*, 1-37.

¹¹⁶ FSB Charter, art 6.

¹¹⁷ M De Bellis, 'Global Financial Standards and Regulatory Failure: Lessons for Reforms' in G della Cananea and A

Sandulli (eds), *Global Standards for Public Authorities* (Napoli, Editoriale Scientifica, 2012) 73–107.

¹¹⁸ D Wood, above n 37, 150.

¹¹⁹ For a general overview of the risks of the interest representation model, see RB Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harvard Law Review* 1667. For regulatory capture in financial regulation, LG Baxter, "Capture" in Financial Regulation: Can We Channel It Toward the Common Good?' (2011) 21 *Cornell Journal Law and Public Policy* 175.

¹²⁰ M De Bellis, 'Global Financial Regulation. The Challenges Ahead and GAL, in Global Administrative Law: An Italian perspective' (2012) European University Institute (EUI) Robert Schuman Centre for Advanced Studies (RSCAS) Policy Papers 2012/04, 41–49, http://cadmus.eui.eu/bitstream/handle/1814/22374/RSCAS_PP_2012_04.pdf?sequence=1.

and consumer associations must have a seat. As will be discussed in the following section, this instrument has been adopted at the EU level, and it is one of the features for which the EU architecture could constitute a model for the global one, for purposes of enhancing its legitimacy.

Third, contrary to other areas of global regulation, where a proliferation of global courts can be traced,¹²¹ in the area of global financial regulation there is no dispute settlement body, probably because the main addressees of the standards are the national regulatory authorities, and not directly private parties. However, if procedural due process is to be conducive to an increased legitimacy of the global regulators, a judicial control is crucial. For both the shaping of procedural rules for global financial regulation, and for building a system of judicial control, the EU financial architecture can work as an inspiring model.

VII. The EU Financial Regulatory Architecture and the Global Financial Architecture: Source of Inspiration or Part of the Solution?

A. Lessons from the EU Architecture for the Global One?

The argument that the new EU financial architecture might work as a source of inspiration might sound odd, given the widespread criticism involving EU agencies in general,¹²² and the recent controversial exercise of powers by the ESMA¹²³ in particular. However, as mentioned at the outset, the CJEU judgment in *Esma/Short selling* shows that different paradigms of legitimation for EU agencies are not mutually exclusive. In particular, the approach of the CJEU links the legitimacy of the delegation of powers to ESMA with compliance with procedural requirements, subject to judicial review. The use of a procedural paradigm to legitimate the activity of regulatory agencies is common in national jurisdictions

¹²¹ A von Bogdandy and I Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification' (2012) 23 *European Journal of International Law* 7; S Cassese, *I Tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale* (Roma, Saggine, 2009).

¹²² About the long standing debate on the accountability of EU agencies, see M Everson, C Monda, E Vos (eds), above n 19; M Busuioc, *European Agencies. Law and Practices of Accountability* (Oxford, Oxford University Press, 2013).

¹²³ Case C-270/12 *United Kingdom of Great Britain and Northern Ireland (Esma-shortselling case)* [2014] EU:C:2014:18. For a comment, see E Vos, and M Everson, 'European Agencies: What About the Institutional Balance?' (2014) Maastricht Faculty of Law Working Paper No 4 SSRN: <https://ssrn.com/abstract=2467469> or <http://dx.doi.org/10.2139/ssrn.2467469>.

as well. From this point of view, the ESAs appear to be particularly well-equipped, compared to other EU agencies.

While EU agencies often lack a well-developed procedural legal framework,¹²⁴ the financial ones do follow a comprehensive procedural framework.¹²⁵ A full assessment of the potentiality of these procedural instruments, of how they connect and are part of a ‘complex accountability’¹²⁶ framework of the EU financial agencies and of how this complex accountability framework could constitute a useful benchmark in assessing the one of global financial regulators fall beyond the scope of this chapter. However, some hints can be given within the continuous search for surrogate devices for democracy that is at the core of the debates on legitimacy beyond the State.¹²⁷ The research perspective of relative authority is here understood as a useful instrument to disentangle and better focus the legitimacy issues connected with the different actors, but does not exclude—and can actually be combined—with the use of other research perspectives, such as those focused on the potentiality of procedural instruments—for example, transparency, participation and giving reasons—in order to address the legitimacy concerns raising from the activity of global and EU regulators.¹²⁸

First of all, the accountability of the ESAs is based on an obligation to report upon request of the Parliament (thus, not on an annual basis),¹²⁹ and on financial accountability.¹³⁰ The accountability standards of the SSM go far beyond the model used by the ESAs, including: an 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

¹²⁴ E Chiti, ‘European Agencies’ Rulemaking: Powers, Procedures and Assessment’ (2013) 19 *European Law Journal* 93, 94.

¹²⁵ See M De Bellis, ‘Procedural Rule-Making Of European Supervisory Agencies (Esas): An Effective Tool For Legitimacy?’ (2016) Working paper to be presented at the Academic Research Network on Agencification of EU Executive Governance (TARN) conference on Constitutionality, powers and legitimacy of EU agencies or agency-like bodies.

¹²⁶ JL Mashaw, ‘Structuring a "Dense Complexity": Accountability and the Project of Administrative Law’ (2005) in *Issues in Legal Scholarship: The Reformation of American Administrative Law* (Berkeley, Berkeley Electronic Press, 2005).

¹²⁷ JHH Weiler, ‘The Geology of International Law – Governance, Democracy and Legitimacy’ (2004) 64 *ZaöRV* 547, 561.

¹²⁸ See s IV of this chapter.

¹²⁹ Reg (EU) 1093/2010, 1094/2010, 1095/2010, art 50. .

¹³⁰ Since the budget of the EBA comes partially from contributions of national authorities and partially from the EU: see Reg (EU) 1093/2010, 1094/2010, 1095/2010, art 62.

vice-chair of the competent committee of the Parliament; the obligation to cooperate sincerely with any Parliamentary investigation.¹³¹ Moreover, the ECB and the Parliament shall conclude appropriate arrangements on the processes of democratic accountability, including access to information.¹³² There are obviously limits in how far this framework can work as an inspiration, given the lack of a global financial legislature with direct representation. However, should the FSB be reformed, reporting obligations could be clarified in a similar sense. Moreover, the ESAs rule-making follows a very detailed procedure, combining oral and written participation, transparency and duty to give reasons, that could constitute a blueprint in shaping the due process of the global standard setters. Lastly, each of the ESAs is required to establish, under its founding regulations, a Stakeholders Group, which, providing for a more balanced representation of all the interests at stake, can counterbalance risks of regulatory capture.¹³³

B. EU Participation in Global Regulation: Addressing the Legitimacy Deficit of EU Agencies' Relative Authority

Debates on the legitimacy of EU agencies are widespread and focus on the impact of 'agencification' on the institutional balance within the EU. With this chapter, I tried to shed light on a neglected facet of the legitimacy concerns connected with financial agencies, ie showing how the exercise of regulatory authority on financial issues by EU bodies is limited by the exercise of authority in this domain at the global level. This suggests that a key—albeit neglected—element in legitimacy debates is the one of EU bodies' representation in global fora, and of their participation in the drafting of global rules, a phase that proves to be crucial, given the limitations to the scope of the autonomy of EU bodies in the implementation of the standards.

How do EU agencies and institutions participate in global regulators? Currently, there is a mismatch in institutional participation of EU bodies in global ones, for two reasons. First, some EU Member States participate in these regulators, so that some national interests are autonomously represented. As a result, there is no single voice channelling EU interests. Second, when the EU is represented, the participating body is often the Commission. The

¹³¹ Reg (EU) No 1024/2013, art 20, paras 2, 5, 8 and 9.

¹³² Reg (EU) No 1024/2013, art 20, para 9.

¹³³ See M De Bellis, above n 126, 10–11.

ECB or European agencies were not admitted until very recently, because of these bodies' development over time.

Two examples show this mismatch. Since the BCBS, originally comprising the G10 Central Bank governors, enlarged its membership in 2009 to include representatives from all the G20 countries,¹³⁴ the banking supervisory authorities of nine EU Member States are members of the Committee.¹³⁵ As for EU institutions, the Commission has long lasting observer status. Recently, however, the ECB and the SSM have been given full membership in the Committee, while the EBA has been recognised observer status.¹³⁶ A similar pattern emerges within the FSB. As for the Member States, six are represented in the Plenary and in all the Standing Committees (in which the actual standard-setting work takes place).¹³⁷ The EU Commission is member of the Plenary and of two Standing Committees, while the ECB is represented in the Assembly and one Standing Committee.¹³⁸

The high number of representatives that could 'voice' EU interests is one potential strength of EU participation in global regulators. However, it has been pointed out that the actual impact of the EU has been weaker than what it could have been, because there were divisions between national representatives.¹³⁹

As for EU representatives, the Commission's participation in both the BCBS and the FSB is a heritage of the lack, until recently, of EU financial agencies. The recent admission of the ECB, the SSM and the EBA, in the BCBS, and of the ECB in the FSB matches the growing centralisation of banking regulatory and supervisory competences in the EU. However, this type of representation does not mirror the current division of powers in the EU: for example,

¹³⁴ Argentina, Indonesia, Saudi Arabia, South Africa and Turkey, together with Hong Kong and Singapore.

¹³⁵ Belgium, France, Germany, Italy, Luxembourg, The Netherlands, Spain, Sweden, and the United Kingdom.

¹³⁶ Basel Committee membership, www.bis.org/bcbs/membership.htm.

¹³⁷ Of which three have full membership, involving three seats corresponding to the central bank governor, the ministry of finance and the supervisory authority (France, Germany, Italy and United Kingdom), while two have two seats (Spain and the Netherlands; their supervisory authority is not represented): www.fsb.org/about/fsb-members.

¹³⁸ France, Germany, are represented in all the standing committee, and the United Kingdom in three, Italy, Spain and the Netherlands in two: see EU Parliament, Directorate general for Internal Policies, 'The European Union's Role in International Economic Fora Paper 2: the FSB' (June 2015) 15, [www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2015\)542191](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2015)542191).

¹³⁹ For the BCBS, EU Parliament, Directorate general for Internal Policies, 'The European Union's Role in Economic Fora Paper 5: the BCBS' (May 2015) (In-depth policy analysis prepared by L Quaglia for the ECN Committee) 17–18, [www.europarl.europa.eu/RegData/etudes/IDAN/2015/542194/IPOL_IDA\(2015\)542194_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/542194/IPOL_IDA(2015)542194_EN.pdf). For the FSB, see EU Parliament, Directorate general for Internal Policies, *The European Union's Role in International Economic Fora Paper 2: the FSB*, 2015, 15.

the agency competent for banking regulation, the EBA, has been recognised only observer status,¹⁴⁰ while the ECB, competent for banking supervision, enjoys full member status. However, this mismatch can be understood in light of the blurring of competences between the EBA and the ECB, discussed above, and the stronger independence of the ECB, recognised in the Treaty. Moreover, the limits of the rule-making powers of the EBA (subject to the Commission's endorsement) would impair its activity in the network.¹⁴¹ Lastly, the very fact that the implementation of standards goes through the legislative process makes the Commission's role in the Committee necessary for the time being—no matter how baroque the architecture looks.

In its 2016 Resolution, the European Parliament considers this misalignment in representation as worrisome, in particular as national representatives of EU Member States often assume positions in international fora that are contrary to decisions adopted in the EU by majority vote.¹⁴² However, if the diagnosis is clear—fragmentation leads to a weak representation of EU interests—the recipe is not easy to identify. The EP considers the Commission to be the actor representing the interests of the EU as a whole.¹⁴³ As for representation in the transnational network for banking, however, it calls for Member States to accept a single representation via the SSM.¹⁴⁴ It does not clarify whether this single representation would mean that the Commission should also give up its seat.

If the instrument better suited to address the legitimacy gap of EU agencies or institutions resulting from the impact of global regulators on their authority is correctly identified in the EP Resolution—ie, fostering EU participation in global fora—the shaping of the most appropriate institutional representation model is not easy, because of the very unclear current horizontal division of competences across different bodies in the EU financial architecture. However, it is necessary to put in place clear and transparent reporting obligations of the EU body (agency or Commission) representing the EU in the global network to the EU Parliament so that an instrument, which is intended to guarantee EU interests be effectively

¹⁴⁰ Basel Committee Membership, www.bis.org/bcbs/membership.htm.

¹⁴¹ For an overview of EU agencies' external actions, see A Ott, E Vos and F Coman-Kund, 'European Agencies on the Global Scene: EU and International Law Perspectives' in Everson, Monda, Vos (eds), above n 19.

¹⁴² European Parliament, above n 107, para 10.

¹⁴³ *ibid*, para 11.

¹⁴⁴ *ibid*, para 19.

into account within global networks, evolves into an instrument that could render the decisions taken within global networks more legitimate for EU constituencies¹⁴⁵.

VIII. Concluding Remarks

Global financial regulation appears fragmented in a number of different networks and clubs. Lines dividing the competences of the different bodies are blurring, even though they can roughly be described as entrusting transnational regulatory networks with standard setting, and the G20 and the FSB with the tasks of setting the agenda and identifying priorities and guiding principles. Efforts geared towards a clearer articulation of powers encounter many limits. Given the variety of powers that each of these bodies exercises, often implying fundamental policy choices, the legitimacy of these bodies should be grounded on both even representation and on procedural standards.

Within the complex financial regulatory architecture established in the EU in the aftermath of the crisis, the public authority of EU bodies is relative not only horizontally (because of the number of EU actors intervening in financial regulation), but also vertically, as limited by global regulators. The focus on the interplay between global and EU regulation helps to address the legitimacy gaps emerging both at the global and at the EU level.

First, the new EU financial architecture—as for some of its specific institutional features—can possibly provide lessons for the global financial architecture, hence contributing to fostering its legitimacy. This is the case of reporting obligations, due process, and the setting up of a stakeholders group, providing a channel for participation of neglected interests and attempting to counterbalance the risk of regulatory capture.

Second, shedding light on the impact of global regulators within the EU shifts the terms of the debate on the legitimacy of the EU bodies themselves. If the activity of the latter is effectively shaped by global regulation, then efforts intended to ensure that EU agencies' activity is legitimate need to extend accordingly. From this perspective, the analysis attempts to complement the debate on the legitimacy of EU regulators.

¹⁴⁵ For a fuller discussion of this point, see M. De Bellis, 'Reinforcing EU financial bodies' participation in global networks: addressing legitimacy gaps?', paper presented at the TARN Workshop, *External dimension of EU agencies and bodies*, University of Luxembourg, Luxembourg, 27-28 June 2017.