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Enhancing the EU Mode of Governance in Finance – ESMA as a Role Model?

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Abstract

The purpose of this paper is to examine the emergence and progress of "*agencification*" (Levi-Faur, 2010) in EU finance on the case study of the European Securities and Markets Authorities (ESMA) as a potential role model for enhancing the EU mode of governance in financial markets. Incorporated European financial markets represent an evolutionary process which begun in the 1960es and was greatly endorsed by political and economic integration. This process was complemented by a proliferation of various organizational entities that ensured coordination of governance between the EU and Member States. Building on this trend, during the (substantive) financial regulatory overhaul in the early 2000s, ESMA's predecessor was diplomatically introduced in the form of a coordinating body, which ensured operational efficiency in financial supervision and greater harmonization in regulatory matters. The last financial crisis, however, opened a window of opportunity for centralizing regulatory powers on the EU level in the form of a re-vamped supervisory authority. Henceforth, ESMA as one of the actors within the network of European Supervisory Authorities embodies this culmination of agency rule-making and supervisory powers in EU financial markets. Against this background the paper firstly surveys ESMA's substantive regulatory capacities, independence and accountability in the context of multiple interests involved. Secondly it explores ESMA's "role-model potential" in respect of enhancing the overall mode of governance in the EU.

Keywords: governance, ESMA, *agencification*, policy capacity

1. Introduction

In the post-crisis environment the trend of *agencification* and agency governance was translated in the institutional re-design of financial supervision at the EU level and the creation of the European System of Financial Supervisors (ESFS). Typified by diversity - with respect to the legal framework, policy capacity and responsibilities, the newly established entities bear diverse denominations: authorities, boards, mechanisms or *agencies* more in general. Their proliferation obviously comes as a by-product of post-crisis regulatory reform but it can also be related to the grander and long-lasting institutional phenomenon of *agencification* occurring at every level of EU governance. The ESFS' macroprudential outtake to monitoring is implemented through the European Supervisory Authorities (ESAs), namely: the European Banking Authority (EBA), European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA).

From a governance perspective these authorities connect the national (decentralized) level with the EU (centralized) levels, which is not a novelty in EU regulatory arrangements. In fact these agencies extend on the institutional basis of their predecessors, the network-based, Lamfalussy Level 3 committees (or LL3Cs). These "LL3Cs" were diplomatically introduced during the financial regulatory overhaul in the early 2000s, as coordinating bodies, which ensured operational efficiency in financial supervision and greater harmonization in regulatory matters. The last financial crisis, however, opened a window of opportunity for centralizing regulatory powers on the EU level in the form of supervisory authorities with re-vamped policy capacities.

Against this background the paper narrates the manner in which governance within the EU financial sector has been redesigned in response to the crisis – with respect to new authorities and agencies, as well as the issue of legitimacy raised by these power structures. It does so by examining the case of ESMA, one of the institutional actors within the ESAs network that embodies the culmination of agency policy powers in the governance of EU financial markets. As a EU regulatory agency, ESMA's tasks are numerous and include significant new powers. At the same time, the most significant and controversial powers have not yet been exercised by ESMA during first three and half years of its operational existence (e.g.: breach of the EU law, emergency situations, binding mediations). In addition, its governance structure and interinstitutional arrangements are inadequate to sustain full operative independence thus raising legitimacy issues. Henceforth, through the case study of ESMA we can review whether *agencification* has helped EU policymakers to strike the right balance between regulatory intrusiveness and financial integration support. ESMA's assessment allows us to examine specific post-crisis developments in the governance of the EU financial sector: 1) The greater focus on "meta-organizations" and the related progress of agency governance or *agencification* as by-products of regulatory reforms post-crisis, 2) The independence, accountability and legitimacy of new power structures, 3) The role-model potential of new power structures, i.e. agencies or authorities, in view of enhancing the overall mode of governance within EU finance.

The paper proceeds as follows: chapter two gives an overview of the emergence and progress of the *agencification* phenomenon in EU governance by referencing the most important literature in the field. Chapter three gives a historical recount of financial crises and their influence on the "technocratization" of regulatory governance in the financial sector. Chapter four gives a practical example of these developments through the case study of ESMA. In the chapter we also discuss ambiguities of such governance developments, concerning primarily ESMA's independence. Lastly, chapter five assesses whether agency governance as embodied by ESMA is really the way forward for the EU financial sector.

2. *Agencification* of EU governance – a literature review

In 2010 Levi-Faur noted the exceptional progressiveness of the EU's system of governance, and valuated it as one of the most important transnational governance systems in the world thanks to its openness to act as a "laboratory for trends in governance"[1]. Judging by the last couple of decades the undisputable trend was "regulatory institutionalization"[2] of governance. This complex term refers to the growing number of agencies and of "statutory regulations"[3] that have altered the balance between bureaucratic autonomy and bureaucratic integration in the EU, by delegating governance activities outside traditional departments of EU's public administration. Tasks that have previously belonged to Member States or to main political institutions, such as the European Commission and the Council, were now being delegated to a set of agencies meant to operate independently.[4] This transfer of policymaking and steering capacities to entities evolving within the market where such entities develop free from political interference is denoted by the term of *technocratization*. This is not a surprising feature of EU legislative activity as conceptually it complements the idea of the "de-politization of the common market"[5] in line with the Union's non-political character (outside its political institutions) and the EU principle of subsidiarity. [6] The increased adoption of these agencies simultaneously raised a number of issues regarding technocratization concerns in EU governance, mainly revolving around the concepts of legitimacy, independency and accountability (in respect of entities developed) as well as the broader question of power allocation within the EU. Irrespective of these concerns the technocratization of decision-making has been a steadily growing trend of EU's legislative activity from the 1980s onwards.

In this respect the financial and sovereign debt crisis have ushered an unprecedented era of technocratic governance in the EU.[7] The technocratization phenomenon initiated by the post-crisis policy reforms has been so substantive that it is now completely transforming EU governance in a variety of policy areas, most notably in finance. This is because in the EU regulatory governance paired with EU's functionalist approach to financial regulation acted as a powerful tool of the technocratization phenomenon in the area of finance. In this respect not only do the above described ESAs embody new paradigms in regulation and governance, they also mark a new evolutionary step in financial supervision, namely that of *agencification*. Indeed, in the wake of the financial crisis this feature of EU

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[1] Levi-Faur, D., *Regulatory Networks & Regulatory Agencification: Toward a Single European Regulatory Space*, Jerusalem Papers in Regulation & Governance, Working Paper No. 30, December 2010, p. 24.
[2] Ibidem.
[3] Regulations articulated and promulgated through independent regulatory bodies.
[4] Busuioc, E. M., *Accountability, Control and Independence: The Case of European Agencies*, European Law Journal, 15(5), September 2009, pp. 599-615.
[5] Majone, G., *Regulating Europe*, Routledge, London, 1996, p. 330.
[6] Hofmann, H. C. H., *Agency Design in the European Union*, Windsor Yearbook of Access to Justice, 28(2), 2010, pp. 309-323.
[7] Everson, M., A., *Technology of Expertise: EU Financial Services Agencies*, LSE 'Europe in Question' Discussion Paper Series No. 49/2012, June 2012, p. 1, 6.

governance manifested itself at the lower level through the establishment of the ESAs. The extent of this phenomenon goes so far that it increasingly defines and shapes not only the European regulatory space but also the future of the financial integration project. Together, regulatory reform and agencies form the backbone of new governance orthodoxy in the EU, which follows the premise that autonomous agencies will improve regulatory performance and efficiency without the externalities of "democratic deficit" and eroding political control often associated with EU governance.[8]

In support to these theoretical and institutional developments, an abundant literature has emerged on the subject of agencies as well as on regulation and regulatory reform in financial markets. All of these contributions identify and discuss the ambiguous impact that technocratic organizational structures – i.e. agencies, exert on the regulation and supervision of integrated financial markets. The set up of the ESAs as a practical embodiment of post-crisis conceptual reforms has only increased the scholarly interest in the *agencification* phenomenon, directing the analytical limelight on its development within finance. At this point it is appropriate to "set the stage" for the ensuing case-study, by defining and connecting three interrelated terms that characterize the discussion on the technocratization of EU governance: the regulatory state, agency (or regulatory agency more specifically) and *agencification*.

There is little doubt that the post-crisis environment is one characterized by the "regulatory state", at least in the case of EU. In this respect Jordana and Levi-Faur note that among a large number of candidates for a label that captures the essence of recent changes in the governance of capitalist economy, the concept of regulatory state is especially convincing[9]. Christensen and Laegreid describe the concept of the "regulatory state" as the ever-increasing public intervention in diverse societal spheres where the regulatory state – by means of regulation as the favored policy tool, corrects negative externalities, promotes competition and protects consumers and citizens[10]. This description easily translates to the context of recent developments in EU financial regulation and can furthermore be complemented by Majone's observations made in the 1990s that the regulatory state is more interested in market regulation than in the market's function of assets' distribution or macroeconomic stabilization[11]. In this regard the regulation promulgated by the regulatory state is predominantly more formal, with privatization as a characteristic feature[12]. Henceforth, regulation increasingly involves a shift from direct to indirect governance, where policy-making powers are delegated to independent technocratic bodies with considerable political leeway, supposed to make objective decisions

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[8] Pollitt, C. et al., *Agencies. How Governments do Things Through Semi-Autonomous Organizations*, Routledge, London, 2004. and Self, P., *Rolling Back the State. Economic Dogma & Political Choice*, St. Martin's Press, New York, 2000.

[9] Jordana, J., Levi-Faur, D., *The Politics of Regulation – Institutions and Regulatory Reforms for the Age of Governance*, London, Edward Elgar, 2004, p. 8.

[10] However, the concept of the regulatory state is not easily translatable. Such terms as "American Regulatory State" or "European Regulatory State" mean slightly different things. See Christensen, T., Laegreid, P., *Regulatory Reforms and Agencification*, Stein Rokkan Centre for Social Studies Working Paper 6-2005, p. 8.

[11] Majone, G., *From the Positive to the Regulatory State – Causes and Consequences from Changes in the Modes of Governance*, Journal of Public Policy, 17(2), 1997, pp. 139-167.

[12] Levi-Faur, D., Gilad, S., *The Rise of the British Regulatory State: Transcending the Privatization Debate*, Comparative Politics, 37(1), 2004, pp. 105-124.

primarily based on expertise and professional competence[13]. This technocratization phenomenon separates regulatory activities from operational ones in the regulatory state as well as the policy-making role from the operational role.

Although this is now a paradigmatic trend judging by recent regulatory developments in the EU in 2004 Jordana and Levi-Faur deemed this approach to the regulatory state as an "over-ambitious answer" to its essence, one that "*(...) ignores effects of path-dependencies, sequencing of policy steps, and timing in general*."[14] In the view of Jordana and Levi-Faur the essence of the regulatory state can be better captured through a more balanced account. Ayres and Braithwaite offer such an approach[15]. By conceptualizing Osborne and Gaebler's division of "state tasks" their description of the regulatory state respects the concept's dynamic nature as an open-minded process of reform between the regulatory state's main tasks: *steering* (i.e. leading, thinking, directing) and *rowing* (i.e. service-provision)[16].
And while the true nature of the regulatory state is elusive, Moran has little doubt that organization and regulation of the government apparatus lay at the heart of this concept, representing its essence[17]. Obviously, this organization and regulation can be carried out through a variety of institutional entities, such as traditional government bodies (e.g. parliament, ministries, etc.), national authorities, private-sector organizations or international organizations, and finally - agencies. Dan gives a succinct definition of an agency describing it as a: "*(...) public sector organization which is: 1. Structurally disaggregated from government ministries, 2. Operates under more businesslike conditions than the core government bureaucracy*."[18] In this respect, this paper focuses on a very specific organizational type through which the regulatory state exercises its power – the regulatory agency.

In practice it is not easy to make clear differentiations between various types of agencies, as they often perform several policy roles. A straightforward differentiation derives from the nature of their functions: managerial tasks, consultations, or the setting of regulatory standards and their enforcement. So agencies whose primary functions are the collection of information, fact finding, rule setting and enforcement may be defined as regulatory agencies. Bouckaert and Peters note that regulatory agencies have a specific advantage over other agency types; namely, these agencies are perceived to be capable of giving unbiased suggestions on policy issues by involving experts in their policy-making process[19]. As such regulatory agencies are a favored governance instrument to isolate or distance regulatory functions from political pressures and to facilitate input into regulatory activities for those affected by the regulation. Such advantages are ascertained in literature which argues that not only do rules and regulations promulgated through

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[13] Christensen, T., Laegreid, P., *Regulatory Reforms and Agencification*, Stein Rokkan Centre for Social Studies Working Paper 6-2005, p. 8.
[14] Jordana, J., Levi-Faur, D., *The Politics of Regulation*, 2004, p. 10.
[15] Ayres, I., Braithwaite, J., *Responsive Regulation: Transcending the Deregulation Debate*, Oxford, Oxford University Press, 1992.
[16] Osborne, D., Gaebler, T., *Reinventing Government*, Reading, MA, Addison-Wesley, 1992.
[17] Moran, M., *Review Article: Understanding the Regulatory State*, British Journal of Political Science, 32, 2002, pp. 391-413.
[18] Dan, S., *The Effects of Agency Reform in Europe: A Review of the Evidence, Public Policy and Administration*, 29(3), 2014, pp. 221-240.
[19] Bouckaert, G., Peters, G. B., *What is Available and What is Missing in the Study of Quangos?*, in Pollitt, C., Talbot, C. (eds.), *Unbundled Government: A Critical Analysis of the Global Trend to Agencies, Quangos and Contractualisation*, London and New York, Routledge, 2004, pp. 22-49.

independent agencies have greater credibility and lower political uncertainty, but they are also favored by the general public as they are perceived to enhance fairness in reforms brought about by political executives[20].

The proliferation of regulatory agencies in EU financial markets is not only a by-product of financial integration and EU's perception as a "regulatory state", it is also part of a grander institutional phenomenon occurring in the European political-administrative order, namely that of *agencification*. Levi-Faur gives its working definition describing it as a phenomenon of "*formalizing roles and missions in organizations with spatial boundaries and formal identities, either by devolution of functions from the core organization or the creation of new organizations for performing of new functions*".[21] In the words of the same author, *agencification* founded on the establishment of agencies as administrative organizations with a distinct, formal identity and functional capacity, serves as the Euorpean Commission's main tool in consolidating EU governance[22]. Christensen and Laegreid's arguments support the observation of regulation and *agencification* co-dependency.[23]

If rule making and *agencification* in the EU go hand in hand, much depends from their credibility and predictability. The same authors note how such features could alleviate political pressures and boost public inclusiveness in respect of regulatory agencies[24]. However, it is not easy to entice the feeling of participation and involvement in the regulatory process, especially in such a complex system of regulatory governance, as is the case with the EU where multiple interests are involved. In fact, some of the most difficult challenges identified by literature regard accountability and legitimacy.

3. Financial crises, regulatory reforms and the rise of "technocratic governance"

Reinhart and Rogoff go back centuries in their historical analysis to show that financial crises have been around "forever".[25] Just during 1980s and '90s there've been 112 episodes of systemic crises recorded in 93 countries and 51 episodes of borderline crises in 46 countries.[26] Approximately "once in a century" financial crises may lead to a great recession. It seems like, no matter what we do, financial crises will always reappear. Keynes highlighted the role of human factor – the "*animal spirit*" in creation of bubbles that may cause serious turbulences of the financial system. Fuelled by greed, people invest irrationally in aspiration for easy money

[20] See for instance Baldwin, R., Cave, M., *Understanding Regulation*, Oxford, Oxford University Press,1999, and Gilardi, F., *Institutional change in regulatory policies: regulation through independent agencies and the three new institutionalism*, in Jordana, J, Levi-Faur, D. (eds.): *The Politics of Regulation*, Cheltenham, Edward Elgar, 2004.
[21] Levi-Faur, D., *Regulatory Networks,* 2010, p. 8.
[22] Ibidem, p. 6.
[23] "Autonomous organizations need regulation and regulation needs autonomous organization." In Christensen, T., Laegreid, P., *Regulatory Reforms,* 2005, p. 6.
[24] Ibidem, p.13.
[25] Reinhart, C. and Rogoff, K., *This Time is Different: Eight Centuries of Financial Folly*, Princeton University Press, 2009. For a historic graphic of financial crises based on Reinhart and Rogoff's work, see: *Cycles of Financial Crises: 1810 – 2010*, http://www.historyshots.com/FinancialCrisis/index.cfm.
[26] Caprio, G. and Klingebiel, D. in Demirguc-Kunt, A. and Kane, E.J. *Deposit Insurance Around the Globe: Where Does It Work?,* Journal of Economic Perspectives, 16(2), 2002, p. 175.

during the bull market, while fear takes over during the downward market trend of selling with the same level of irrationality. In the corporate sector main issues are executive compensations that lead to excessive risk taking and moral hazard in "*to big to fail*" system.

Financial crises are cyclical by nature. Galbraith warned that the watchman will stay passive during the upward trend despite the awareness of the future mess.[27] A new crisis will eventually occur. Policy makers will insist that *"this time is different"* and set up ambitious strategies to repair the damage, restore financial system and rebuild it into a new, efficient, strong and competitive, cautious yet innovative system that will result in a sustainable growth and development while at the same time keeping systemic risk under control and prevent future crises.[28] Instrument to achieve these goals: regulation and supervision.

If we strip it just to regulation, phases of regulation and deregulation alternate regularly and are correlated with rises and falls of regulatory agencies and negatively correlated with the business cycles.[29] For example, in late 1920s there were three national regulatory agencies (NRAs) in the U.S. for the regulation of utilities with relatively modest powers.[30] The rise of "big business" that started in mid 1880s was in the upward trend with the private sector having both power and good reputation.[31] The Great Crash in 1929 and Roosevelt's New Deal marked a new period of more regulation and greater control over private sector with regulatory agencies blooming.

The 1940s and '50s were the period of (mostly) stable economic growth, regulatory agencies were shifted aside of which many had mediocre performance and some have been captured by the regulated parties. Policy makers called for reorganization of regulatory agencies and the *Administrative Procedure Act* was passed in 1946.[32] The 1960s represent the peak of academic criticism of regulatory agencies, especially within Chicago School, its Journal of Law and Economics and development of the theory of economic regulation.[33]

In the late 1970s and onwards the processes of deregulation and liberalization took over. Continued (relatively) stable economic growth, technological innovations and financial globalization accelerated competition in the private sector, and also created some in economic policy sphere. Governments started to compete with one another

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[27] Galbraith, J.K., *The Great Crash*, The Riverside Press, Massachusetts, 1954.

[28] See, e.g. the G-20 London Summit, *Global Plan for Recovery and Reform: The Communiquè from the London* Summit, April 2009, London; European Commission, *Regulating Financial Services for sustainable Growth*, COM (2010) 301, June 2010, etc.

[29] For historical overview of securities regulation that followed the crisis in the U.S., see: Banner, S. *What causes new securities regulation? 300 years of Evidence*, Washington University Law Review 75(2), 1997, p. 849-855. Also, Coffee, J., *The political economy of Dodd-Frank: Why financial reform tends to be frustrated and systemic risk perpetuated*, in Ferran, E., Moloney, N., Hill, J. and Coffee, J., *The Regulatory Aftermath of the Global Financial Crisis*, Cambridge University Press, 2012, p. 301-321.

[30] The Interstate Commerce Commission, est. 1887, The Federal Trade Commission, est. 1914, The Federal Power Commission, est. 1920. In Bernstein, M. H., *Regulating Business by Independent Commission*, Princeton University Press, N.J., 1955, p. 11.

[31] Lilienthal, D.E., *Big Business: A New Era*, Harper & Brothers, New York, 1953.

[32] McCraw, T. K., *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn*., Cambridge, Massachusetts: Harvard University Press, 1984, p. 216-221.

[33] Classical pieces include: Coase, R.H., *The Federal Communications Commission*, Journal of Law and Economics 2, 1959, p. 1-40; Demsetz, H., *Why Regulate Utilities?*, Journal of Law and Economics 11, 1968, p. 55-65; Stigler, G., *Public Regulation of the Securities Markets*, The Journal of Business 37(2), 1964, p. 117-142; Stigler, G. J., *The Theory of Economic Regulation*, The Bell Journal of Economics and Management Science 2(1), 1971, p. 3-21; Posner, R.A., *Theories of Economic Regulation*, The Bell Journal of Economics and Management Science 5(2), 1974, p. 335-358.

for a better rank on global competitiveness scale, providing more business friendly environment and embracing regulatory arbitrage.[34] Self-regulation was the mantra at the time and whoever opposite it would have definitely been "*called men of little faith*".

The U.S. subprime mortgage crisis induced global financial crisis 2007 and changed the cycle once again. Policy response was predictable – more regulation and stricter supervision. Self-regulation mantra was "out" and new phrases such as transparency, consumer protection and stability were "in". The U.S. passed Dodd-Frank Act (Wall Street Reform and Consumer Protection Act) in 2010, a single regulation with an aim to unchain "too big to fail" problem, protect consumers and maintain stability of financial system.[35]

The EU opted for set of legislation. Actually, it seems like the new financial regulatory reform induced by financial crisis came at the "wrong time". The EU had just finished a huge regulatory reform - Financial Services Action Plan (FSAP) from 1999 to 2005 and was taking some time "off" regulation.[36] FSAP came after long period of minimum harmonization, set in the Lisbon Strategy with a goal of completing the Internal Market and creating integrated European financial markets. Motivation for this regulatory reform was also kind of a crisis. The EU competitiveness of the securities markets was lagging behind the U.S. and Japan. Policy makers took seriously (or conveniently) academic research on correlation between the financial development and economic growth, and called for greater competition as an engine motivator for more dynamic and efficient securities markets.[37]

Just when the new financial regulatory framework was starting to collect its first impact assessments, in which almost all parties in the securities markets agreed they were overloaded and exhausted, the U.S. financial crisis spilled over to Europe and the rest of the world.[38] No doubt, new regulation was necessary as a quick response to the crisis. Financial Times described this new set of legislation on top of previously introduced regulatory giant as "*regulation on steroids*".[39]

The second part of the post crisis reform introduced a new organizational setting. In times prior to the financial crisis, establishment of European regulatory agency for securities markets was introduced as an idea but at that time was just out of the question. *"Too early to pursue single supervisor option but may need to be reconsidered in the future if supervisory cooperation proves insufficient to promote true single market"*.[40] The Committee of European Securities Regulators (CESR), ESMA's predecessor, has at the end of 2004 published so called "Himalaya Report", an analytical paper with an objective to present CESR's views on the future of supervisory practices. It carefully introduced ideas such as harmonization of national

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[34] Porter, M. E., *The Competitive Advantage of Nations*, The Free Press, New York, 1990.
[35] More on Dodd-Frank Act, – objectives and implementation, see Coffee, 2012, *op. cit.*, p. 334-367.
[36] European Commission, *White Paper: Financial Services Policy 2005-2010*, December 2005, p. 9-11.
[37] The Cardiff European Council, *Presidency Conclusions*, 15-16 June 1998, point 17, p. 8-9; The Lisbon European Council, *Presidency Conclusions*, 23-24 March 2000; Communication of the Commission, *Financial Services: Building a Framework for Action*, 28 October 1998, p. 1.
[38] E.g. CESR, *Impact of MiFID on equity secondary markets functioning*, Brussels, June 2009; CRA International, *Evaluation of the economic impact of the FSAP*, March 2009.
[39] J. Grant in Financial Times, *Quick View: MiFID gets muscles from Brussels*, 8 December 2010 and *Quick View: Ill-timed FSA reforms setback for markets*, 17 June 2010, (online: ft.com).
[40] The Securities Expert Group, *Financial Services Action Plan: Progress and Prospects, Final Report*, May 2004, p. 19, http://ec.europa.eu/internal_market/finances/docs/actionplan/stocktaking/report-securities_en.pdf.

supervisory practices and CESR's role in mediation between national regulatory agencies (CESR, 2004).[41] A year later, CESR's representative at the Commissions' "Exchange of views" on Financial Services Policy 2005-2010 conference re-emphasized the need for harmonization of national supervisory powers and got immediate response from the audience "*Hasn't Himalaya report sunk like the Titanic?*".[42]

As many times commented, "*it's a shame to waist a good crisis*"[43] the financial crisis 2007 marked a new momentum for changes and some old ideas to be materialized. The aftermath of the financial and sovereign debt crisis marks the beginning of an unprecedented era of technocratic governance within the European financial sector. Initiated by substantive regulatory reforms the "*technocratization*" phenomenon is completely transforming the manner in which policies and decision are adopted and crisis situations managed within the European financial sector. This increasing reliance on technocratic governance and *agencies* comes both as a pragmatic answer to the functional imperative of deeper financial integration and a normative necessity[44]. As we have argued, from a regulatory perspective the ESAs constitute a culmination of agency rule-making powers[45] and a radical shift in the way "*banks, stock markets and insurance companies are policed as of 2011*"[46]. And although the ESAs follow the traditional agency structure in EU governance, their principles of independence and accountability are still to be defined in practice. In 2013 the European Parliament's Committee on Economic and Monetary Affairs reviewed the newly established governance system under ESAs. From all three ESAs, ESMA had the worst score regarding independence, with 48% of respondents perceiving ESMA as having "limited independence".[47] Henceforth, in the following paragraphs we appraise the appropriateness of agency governance for the financial sector, on the case study of ESMA's institutional structure, policy powers and legitimacy.

4. ESMA as a regulatory agency: operational set up, policy capacity and independence

ESMA was built upon CESR, a coordinating body established in 2001 within "Lamfalussy's Procedure" with a goal to endorse operational effectiveness of the

[41] CESR, *Preliminary Progress Report: Which supervisory tools for the EU securities markets? An Analytical Paper by CESR*, Paris, 2004, http://www.esma.europa.eu/consultation/Which-supervisory-tools-EU-securities-markets-Preliminary-Progress-Report-Himalaya-Repo.

[42] European Commission, *Results of the Commission's „Exchange of views" on Financial Services Policy 2005-2010*, Brussels, July 2005, p. 5.
http://ec.europa.eu/internal_market/finances/docs/actionplan/infosession/results_en.pdf

[43] E.g. Lannoo, K., *A crisis is a terrible thing to waste*, CEPS Commentary, May 2009; Coffee, 2012, *op. cit.*, p. 301.

[44] Everson, M., *A Technology of Expertise,* 2012, p. 6.

[45] Busuioc, M., *Rule Making by the European Financial Supervisory Authorities: Walking a Tight Rope*, European Law Journal, 19(1), January 2013, pp. 111-125.

[46] European Parliament, Press release, *Parliament gives green light to new financial supervision architecture,* REF: 2010092, 22.09.2010.

[47] Mazars / European Parliaments Committee on Economic and Monetary Affairs, *Review of the New European System of Financial Supervision, Part 1: The Work oft he European Supervisory Authorities (EBA, EIOPA and ESMA)*, 2013, p. 143.

FSAP regulatory reform[48]. Comprised of senior representatives from NRAs, its tasks were consulting the Commission and coordination between Member States to improve cooperation through soft tools such as peer-reviews and best practices.[49] CESR issued guidelines, recommendations, non-binding technical standards, created databases, published comparative analyses of Member States praxis, impact assessments, economic analyses, etc.[50] Despite a small number of stuff and a modest budget, CESR proved to be very efficient and productive body and have contributed to higher level of transparency and Member States cooperation.[51] However, due to its non-binding nature, certain legal restraints and political obstacles of the Member States, CESR was not able utilize its potential to the maximum[52].

ESMA was created as a hard-core European regulatory agency. Established on New Year's Day in 2011, with headquarters in Paris, ESMA has legal personality, acts independently and objectively and is accountable to the European Parliament and the Council.[53] The objectives of ESMA are: (i) improving the functioning and transparency of the internal market through effective regulation and supervision, (ii) improving supervisory coordination and preventing regulatory arbitrage and (iii) ensuring stability by timely assessing different risks.[54]

ESMA's tasks are to: (i) develop drafts for regulatory technical standards,[55] (ii) issue guidelines and recommendations,[56] (iii) assist or settle disagreements between NRAs in cross-border situations,[57] (iv) adopt individual decisions addressed to a financial market participant or NRAs, only in emergency situations,[58] (v) investigate alleged breach or non-application of the EU law and address it with a recommendation,[59] (vi) directly supervise the credit rating agencies,[60] (vii) contribute to creation of common supervisory culture and coordination between NRAs,[61] (viii)

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[48] Lannoo, K. i Levin, M., *Securities Market Regulation in the EU – Everything you always wanted to know about Lamfalussy Procedure*, CEPS Research Report in Finance and Banking, No. 33, Brussels, 2004.
[49] Preamble, European Commission, *Decision establishing the Committee of European Securities Regulators*, 2001/527/EC, p. 43.
[50] See CESR's *Annual Reports*, http://www.esma.europa.eu/page/annual-and-half-yearly-reports.
[51] Moloney, N., *The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (1) Rule Making*, European Business Organization Law Review 12, 2011, p. 81-83; Ferran, *Understanding the new institutional architecture of EU financial market supervision*, in Wymeersch, E., Hopt, K. and Ferrarini, G. (ed.) *Financial Regulation and Supervision – A Post-Crisis Analysis*, Oxford University Press, 2012, p. 117-125; Wymeersch, E., *The institutional reforms of the European Financial Supervisory System, an interim report*, Financial Law Institute, Gent University, WP 2010-01, 2010, p. 5-7; Fischer-Appelt, D., *The European Securities and Markets Authority: the beginnings of a powerful European securities authority?*, Law and Financial Markets Review 5(1), 2011, p. 22.
[52] European Commission, *Communication from the Commission: Review of the Lamfalussy process – Strengthening supervisory convergence*, Brussels, 2007, p. 6-13; CESR, 2004, *op. cit.*, p. 18-22; Securities Expert Group, 2004, *op. cit.*, p. 17.
[53] Art. 5(1), 1(5(4)), 3 of the ESMA Regulation.
[54] Ibid., art. 1(5).
[55] Ibid., art. 10-15.
[56] Ibid., art. 16.
[57] Ibid., art. 19.
[58] Ibid., art. 18.
[59] Ibid., art. 17.
[60] Ibid., Preamble, point 5; Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies, Chapter II.
[61] ESMA Regulation, art. 29, 31.

conduct peer reviews,[62] (ix) analyze and monitor processes in the field of cross-sector and cross border operations of large financial groups, with continuous assessment of systemic risk in the framework of colleges of supervisors,[63] (x) collect and analyze market developments for potential systemic risk,[64] (xi) protect consumers[65] and few other (e.g. international relations).[66]

As presented above, ESMA's tasks are numerous and include significant new powers. On the one hand, revision of ESMA Regulation calls for even more power to be designated to ESMA. European Commission observed that there is "*some room for targeted possible extensions"*(European Commission, 2014, p. 4)[67]. This includes areas of: (i) consumer/investor protection (Shareholders Rights and Takeover Bids directives), (ii) shadow banking and (iii) implementation of International Financial Reporting Standards (IFRS).[68]

On the other hand, the most significant and controversial powers have not yet been exercised by ESMA during first three and half years of its operational existence (breach of the EU law, emergency situations, binding mediations).[69] ESMA has instead made use of non-binding mediation powers and moral suasion (European Commission, 2014, p. 7) [70]. Partial explanation is that Board of Supervisors (BoS), composed of heads of NRAs, has been reluctant to make recommendations to NRAs or individual decisions to financial institutions.[71] Other explanations given by stakeholders include "*dissuasive effect of the relevant powers*" and haziness of the scope and triggers in the ESMA Regulation.[72]

Governance structure seems to be the weakest link of ESMA's independence. Board of Supervisors was criticized in independent analyses by almost all parties (including the members of the BoS themselves) for favoring national interest at the expense of overall EU interest which they are obliged under art 42 of the ESMA Regulation.[73] More specifically, debates and outcomes were influenced significantly by the major NRAs and the European Commission, while some initiatives and actions proposed by the Chairperson were not supported by the BoS[74]. Different interests of the strong Member States had been present in the regulatory arena, having traditionally the UK on one side and the Franco-German alliance on the other (e.g.

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[62] Ibid., art. 30,
[63] Ibid., art. 21-24.
[64] Ibid., art. 32, 35.
[65] Ibid., art. 9.
[66] Ibid., art. 33, 34.
[67] European Commission, *Report from the Commission to the European Parliament and the Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)*, COM (2014) 509, Brussels, August 2014, p. 4.
[68] Ibid; The European Parliament, *Resolution of 11 March 2014 with recommendations to the Commission on the European System of Financial Supervision (ESFS) Review*, 2013/2166(INL)), Strasbourg, March 2014, point 1, Annex.
[69] Art. 17-19 of the ESMA Regulation.
[70] European Commission, *Report from the Commission,* 2014, p. 7.
[71] European Commission, *Commission Staff Working Document Accompanying the document: Report from the Commission to the European Parliament and the Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)*, SWD (2014) 261, Brussels, August 2014, p. 12.
[72] Ibid., p. 13.
[73] Ibid., p. 12-13; IMF, *Country Report No. 13/65, European Union: Publication of Financial Sector Assessment Program Documentation – Technical Note on Issues in Transparency and Accountability*, 2013, p. 11; The European Parliament, 2014, *op. cit.*, para. AU.
[74] Mazars, 2013, p. 34.

AIFMD, EMIR); with the UK's position being impaired in the post-crisis regulatory design[75].

The relationship with the European Commission is presently similar to the teacher – pupil relation and could possible be burdensome for ESMA's operational independence. The Commission outlines ESMA's work program, regulatory priority list, budgetary and administrative process, and consumes most of ESMA's operational time and energy[76]. Consequently, it's not surprising that 83% of stakeholder perceive ESMA as "not-independent" in relation to the Commission[77]. The European Parliament raised a concern and need to asses the European Commission's robust influence over ESAs and ways to enhance their autonomy.[78] However, things might change in direction of more secession in the future due to the new ECJ ruling regarding the ESA's executive powers.[79]

Few other factors contributed to the "so-so" rating, e.g. the Peer Review operational methodology. Peer reviews goal is to enhance supervisory convergence, however in practice it went down to NRAs reviewing each other and adopting such reviews instead of conducting independent assessment of their regulatory and supervisory frameworks[80]. ESMA's work on building common supervisory culture and consistent supervisory practices has been evaluated as limited in impact[81]. The Securities and Markets Stakeholders Group (SMSG)[82], designed to help facilitate consultations with stakeholders in areas relevant to ESMA's scope of work, seems to have limited impact as well. Beside high operational costs, SMSG's meetings with the BoS were characterized as unproductive, although ESAs and other stakeholders perceive them as an asset and suggest strengthening their role in the future[83].

The Board of Appeal (BoA) was established as a counterbalance measure for new sets of powers assigned to ESAs. It's a joint body of all three ESAs comprised of independent professionals to allow possibility for natural and legal persons to appeal against ESA's decisions and get feedback in a timely manner.[84] This is another old idea brought out of formalin. In 2004 the Securities Expert Group, comprised mostly of private sector representatives, suggested establishment of the European ombudsman for market participants, to enable them to complain about NRA's implementation or supervisory decisions that are not in line with the EU legislation[85]. To this day, four appeals have been raised against decisions of EBA and ESMA. One appeal against decision of ESMA with regard to CRA registration was dismissed and another appeal concerning alleged breach of the EU law by the Luxembourg NRA

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[75] Ferran, E., *Crisis-driven regulatory reform: where in the world is the EU going?*, in Ferran, E., Moloney, N., Hill, J. and Coffee, J., *The Regulatory Aftermath of the Global Financial Crisis*, Cambridge University Press, 2012, p. 29-54.

[76] Mazars, 2013, p. 47-48.

[77] Ibid., p. 143.

[78] The European Parliament, 2014, *op. cit.*, Annex.

[79] The Case C-270/12 *United Kingdom v Parliament and Council*, see further on.

[80] Mazars, 2013, p. 100-101.

[81] Ibid., p. 96-102.

[82] SMSG was established under art. 37 of ESMA Regulation, representing ESMA's key stakeholders: financial market participants, financial institution employees, SMEs, consumers, academics and users of financial services. In the Review of ESAs activities, criticism was made with regard to unbalanced representation of different interest groups. In European Commission, *Report from the Commission,* 2014, p. 10.

[83] Ibid.; Mazars, 2013, p. 34-35.

[84] Art. 60 of the ESMA Regulation.

[85] Securities Expert Group, 2004, *op. cit.*, p. 18.

was declared inadmissible.[86] The stakeholders found the structure of the BoA satisfactory,[87] however they required more clarity as for the possibility of challenging guidelines and recommendations within the BoA.[88]

ESMA's staff shows high level of operational efficiency and productivity: contributing to the EU single rulebook, more then ninety drafts of technical standards submitted to the Commission, six peer-reviews, guidelines, data analyses, four investor warnings,[89] direct supervisory of twenty-two CRAs and six trade repositories as off recently, constructive stakeholders dialogue, international relations, etc.[90] Over the years, ESMA's number of staff has almost tripled from 56 in 2011 to 153 in 2014,[91] still there seems to be human resource deficit in comparison to the workload.[92] Also, there is a plea for bigger role and influence of ESMA's staff and its Chairperson,[93] most likely in order to navigate the course towards more supranational orientation and more independence.

Since its establishment, ESMA's budget has almost doubled from € 16,96 mil in 2011[94] to € 33,2 mil in 2014.[95] Presently, it comes from three sources: Member States NRA's budgets (50%), EU budget (35%) and levies on financial market participants (supervisory fees, 15%).[96] ESMA calls for a budget increase and changes in a structure of budget contributors, in favor of Member States NRAs, due to their budget constrains.[97] Increasing EMSA's budget at the expense of NRAs would in practical terms lead to vicious circle of decreasing supervisory quality at national level with eventually negative spill-over effect at the supranational level. The European Parliament is supportive of such proposal,[98] while the Commission put forward an idea of "ideally" abolishing EU and NRAs contributions altogether.[99] This means that the private sector might have to bear additional costs up to app. € 28 mil[100]. However, this might lead to a problem of regulatory capture of ESMA by the regulated party, i.e. the private sector.[101] Then again, ESMA presently seems to be under certain influence of the Member States.
Ferran further emphasized the gap in sizes of the NRA's and ESA's budgets with regards to ESAs (dis)ability to exercise given supervisory powers.[102] For example, in

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[86] See: http://www.esma.europa.eu/page/board-appeal.
[87] European Commission, *Commission Staff Working Document Accompanying,* 2014, p. 22.
[88] European Commission, *Report from the Commission,* 2014, p. 5-6.
[89] However, with limited public awareness, see ibid., p. 8.
[90] ESMA, Annual Reports: 2011, 2012 & 2013, http://www.esma.europa.eu/page/annual-and-half-yearly-reports; Moloney, N., *Resetting the location of regulatory and supervisory control over EU financial markets: Lessons from five years on*, International and Comparative Law Quarterly, 62(4), 2013, p. 960; European Commission, *Report from the Commission,* 2014.
[91] ESMA, *Facts and Figures*, Annex to the Statement by Steven Maijoor, Chair of ESMA to the ECON hearing, 23 September 2014, p. 7.
[92] European Commission, *Report from the Commission,* 2014, p. 5.
[93] Ibid., p. 5, 12-13; The European Parliament, 2014, *op. cit.*, Annex.
[94] ESMA, *Annual Report 2012*, p. 71.
[95] ESMA, *Budget for 2014*, http://www.esma.europa.eu/system/files/2014-140_esma_budget_2014.pdf
[96] ESMA, *Annual Report 2012*, p. 71.
[97] ESMA, *Statement by Steven Maijoor, Chair European Securities and Markets Authority*, ECON Committee, European Parliament, 23 September, 2014, p. 2-3.
[98] The European Parliament, 2014, *op. cit.*, para. BI, point 3.
[99] European Commission, *Report from the Commission,* 2014, p. 11.
[100] This figure is very rough, because some NRAs are already being funded by the private sector.
[101] Stigler, 1971, *op. cit.*
[102] Ferran, *Understanding the new institutional architecture*, p. 136-137.

2013 German NRA BaFin employed 2.398 people and had a budget of € 190,7 mil,[103] while the British financial regulator FCA had a budget of £ 528,2 mil (app. € 666,2 mil).[104] In comparison to € 72,9 mil,[105] which is a 2013 budget for all three ESAs, NRAs have multiple-sized budgets as well as long term know how and experience in direct supervisory activities. In practice, ESAs are disabled to supervise implementation of the EU law in the member States.[106] Due to human and financial resources restrains, further expansion of ESMA's direct supervisory powers will most likely be very gradual.[107]

The recent ESMA judgment by the European Court of Justice (ECJ) has given ESAs new space for autonomous actions.[108] The UK challenged the power of ESMA to ban short selling,[109] arguing that ESMA was given wide-ranging discretionary power that were contrary to the EU law and especially the *Meroni* doctrine. The ECJ ruled that powers of ESMA are compliant with the *Meroni* doctrine, i.e. given executive powers were precisely delineated, subject to judicial review and did not grant large measure of discretionary power.[110]

Some saw the ECJ judgment as a political decision, a big loss for the City's business and a great defeat of UK's longstanding legal arguments to keep under control centralization of powers at the EU level.[111] Others find it realistic and pragmatic turn of events considering current macroeconomic circumstances: *"At a time of continuing economic crisis, judicial intrusion into a carefully crafted European system designed to control systemic risk within financial markets, would surely have represented a victory of law over common sense, or a judicial disregard for the vital need to ensure continuing financial stability within Europe."*[112]

In addition to the January defeat, in April 2014 the UK lost another case at the ECJ concerning securities markets and the tax issues. The UK challenged, more as a precautionary measure, introduction of the Financial Transaction Tax (FTT) by eleven Member States, arguing it will produce additional costs for the non-participating Member States.[113] The ECJ has, *inter alia*, found that extra costs for non-participating Member States are impossible to examine before the implementation of the FTT as result of enchased co-operation by some Member States.[114] The LIBOR scandal had

[103] BaFin supervises whole financial sector: banking, insurance and securities sector. In BaFin, *Annual Report 2013*, p. 191-194.
[104] FSA became FCA – Financial Conduct Authority on April 1, 2014. FSA, *Annual Report 2012/2013*, p. 89-90.
[105] Mazars, 2013, p. 53.
[106] The European Parliament, 2014, *op. cit.*, para. BB.
[107] See also, Moloney, 2013, *op. cit.*, p. 963-965.
[108] The Case C-270/12.
[109] Art. 28 of the Regulation (EU) No. 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (OJ 2012 L 86).
[110] The ECJ pointed that exercise of ESMA's power to control „short-selling" was circumscribed by various conditions: if there is a threat to financial stability and/or functioning and integrity of financial markets, if the NRAs didn't (adequately) respond to the threat, ESMA's measures may not create risk of regulatory arbitrage or reduce liquidity (disproportionate to the benefits of the measure), ESMA must consult European Systemic Risk Board and other relevant bodies and review its measures at least every 3 moths. In Judgment of the Court, C-270/12, January 22, 2014, points 46-50.
[111] A. Baker in Financial Times, *European Court rejects UK challenge against EU short-selling ban*, 22 January 2014, (online: ft.com).
[112] Everson, M., Vos, E., *European Agencies: What about the Institutional Balance*, Maastricht Working Papers, Faculty of Law, 2014, p. 12.
[113] The Case C-209/13 *United Kingdom v Council*, point 16.
[114] Ibid., point 38.

already weakened UK's negotiation position at the EU table and the Commission took advantage of the situation for its financial reform agenda.[115]

This situation implies more integration for the Eurozone and possibly more "Continental-like" securities regulation at the EU level. However, it also adds fuel to the fire of already tense relationship between London and Brussels over "to Brexit or not to Brexit" question. The City is not only the UK's financial services centre, but also Europe's largest and most important financial hub. Its financial infrastructure, know how and business culture would be impossible to copy paste in another European city. Also, it would create competing sides within Europe instead of co-operating partners. After all, the whole FSAP reform was based on promoting economic growth through enhancing financial development in the EU. In other words the goal was to improve competitiveness and integration of the European financial markets by promoting competition and "City-like system". Beside certain negative side effects of the FSAP process,[116] the reform would have continued its "market-oriented" path hadn't it been for the financial crisis.

The EU policy architects still emphasize the importance for businesses to be able to access capital in diversified financial systems. New term - "Capital Markets Union" has been introduced by the new EC President, Mr. Juncker for the next Commission's mandate.[117] It stands for more integrated capital markets, i.e. an attractive place for investors that will provide benefits to real economy sector by cutting the cost of raising capital and dependence on the bank funding.[118] In other words acknowledging the benefits of the market oriented system.

The ideal scenario would be to allow for two systems to spontaneously converge, the process that was taking place during 1990s and early 2000 through financial globalization and technological innovations in the period of relatively stable macroeconomic growth. However, taking into consideration that regulatory and supervisory mechanisms are presently very influential, the market forces will take some time to regain its status and become once again the engine for changes and growth.

5. ESMA - a role model for financial sector governance? Concluding remarks.

In the post-crisis environment a more centralized approach to decision-making characterizes governance in the financial sector. As the rapidly increasing workload of regulatory reform in the EU expanded the scope and complexity of policy activities, EU regulations and supranational competences have also widened. This in turn has created the need to delegate part of EU's policy functions to new entities. Providing expert knowledge and technical support insulated from national political pressures, these entities bear different denominations, such as: authorities, boards, mechanisms or *agencies* in general. Agencies are a favorable organizational form that can be insulated from national political pressures, and committed to the common, EU objectives (i.e. the Single Market project and financial integration). This conceptual

[115] Moloney, 2013, *op. cit.*, p. 956.
[116] See e.g. CESR, 2009, *op. cit.*
[117] Juncker, J.C., *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change. Political Guidelines for the Next European Commission*, Opening Statement in the European Parliament, Strasbourg, July 2014, p. 7.
[118] European Commission (2015) *Green Paper: Building a Capital Markets Union*, COM(2015) 63 final, Brussels.

stance, paired with the centralization imperative in EU's regulatory paradigm post-crisis, explains why the use of agencies has proliferated in the financial sector. Nowadays agencies are one of the main expert actors involved in policy creation and implementation in the financial sector. Agency governance seems to be the way forward in re-conceptualizing EU's mode of governance in the financial sector, and the main framework for its institutional re-design.

In this respect the European Supervisory Authorities constitute a culmination in agency powers in the context of financial sector governance. Their establishment presents a radical shift in the manner the financial sector will be "policed" in times to come. Due to the nature of compliance ESAs *soft law* regulations require they exert a real impact on addressees' behavior and directly condition the financial market. From a governance perspective these authorities connect the national (decentralized) level with the supranational (centralized) levels, which is not a novelty in EU regulatory arrangements (e.g. the Lamfalussy network-based Level 3 committees). Even though their institutional structure is not innovative the ESAs are a tangible confirmation of a peculiar wave progressing in the financial sector, namely that of *agencification*.

If regulatory governance and *agencification* in the EU go hand in hand, much will depend from their credibility. But it is not easy to secure participation and involvement in the regulatory process, especially in EU's complex system of regulatory governance where interests of multiple stakeholders have to be observed. Accountability and legitimacy of agency governance are thus key challenges identified by literature and consequently confirmed in practice. In fact, in 2013 the European Parliament's Committee on Economic and Monetary Affairs reviewed the ESAs-led governance system. Judging by ESAs activities and performance, the general opinion is that ESAs were successful in establishing efficient organizations and delivering against a demanding work program, especially in the area of the Single EU rulebook and supervisory convergence and coordination.[119] The same review identified areas for improvements; transparency of the regulatory process should be enhanced, there should be greater attention to consumer/investor protection related issues, and relationships within the stakeholder group should be more balanced, to name a few. But the EP's assessment put forward an unexpected indictment; namely from all three ESAs ESMA was the one that scored the worst regarding independence.

ESMA was created as a hard-core European regulatory agency assigned with numerous tasks complemented by re-vamped policy capacities (in comparison to its predecessor, the CESR). Moreover, the revision of ESMA Regulation and signals from the European Commission leave the door open for "targeted extensions" of such powers. At the same time, governance structure seems to be the weakest link of ESMA's independence, with its Board of Supervisors often criticized for favoring national interests and for regulatory capture. In addition, its decision-making structure and provisions governing the relationship with EU and Member State interlocutors were deemed problematic. In particular the relationship with the European Commission has to be redefined and become less burdensome for ESMA's operational independence.

The fact that its independence is still a work in progress presents one of the main obstacles for ESMA to fulfill its role model potential with respect to regulatory

[119] The European Commission, Mazars, and The European Parliament.

governance in the financial sector. In this sense it is crucial that the Board of Supervisors is re-directed away from the national interests and more towards EU interests, while the budget financing structure needs to be carefully crafted in order to evade capture traps. In this perspective, a promising sign of ESMA acting more independently in the future comes in the form of recent ECJ judgments regarding ESAs executive powers. For the time being, ESMA is still perceived as a toddler in the eyes of the grown up EU institutions and other stakeholders. But kids grow up so fast.