



ARTICLES

THE LAW OF THE ECONOMIC AND MONETARY UNION: COMPLEMENTING, ADAPTING OR TRANSFORMING THE EU LEGAL ORDER?

edited by Fernando Losada and Klaus Tuori

THE DELEGATION OF POWERS TO EU AGENCIES AFTER THE FINANCIAL CRISIS

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ABSTRACT: The financial crisis has set new challenges for European integration, including the revision of priorities, principles and mechanisms of micro-prudential supervision of financial markets. Amongst the significant institutional reforms, the intensification of controls on financial markets has been pursued through the establishment of the European Supervisory Authorities in the financial markets (ESAs). This *Article* aims to analyse the role that these Authorities have been playing in shaping the EU legal order after the financial crisis. As a result of the EMU-related regulation aimed at enhancing EU financial stability after the crisis, the ESAs institutionalise administrative cooperation in micro-prudential supervision. The combination of agencification and crisis management is not new to the development of European integration nor specific to the case of financial markets. Nevertheless, the ESAs represent a peculiar regulatory experience, which share many characteristics of EU agencies, yet move towards an embryonic model of independent regulators. Compared to other EU agencies, in fact, they enjoy wider powers and a much more autonomous status from the Commission. They have acquired highly relevant competences that enhance their role in the internal market regulation. In addition, the CJEU engaged in a partial revision of the interpretative boundaries of the Meroni doctrine concerning the non-delegation of regulatory powers on agencies, allowing the ESAs to exercise some substantive regulatory prerogatives. This *Article* investigates how these competences affect the EU model of legality, showing to what extent the delegation of powers has changed as a result of the crisis.

KEYWORDS: European Supervisory Authorities in the financial markets – delegation – crisis – Meroni doctrine – rulemaking – soft law.

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I. INTRODUCTION

The financial crisis has set new challenges for European integration, including the revision of priorities, principles and mechanisms of micro-prudential supervision of financial markets. By creating “real and serious risks” to financial stability and market integrity, the crisis showed the need to restore “a stable and reliable financial system” as “an absolute prerequisite to preserving trust and coherence in the internal market (...) in the field of financial services”.¹ These regulatory goals have been pursued through institutional reforms in the governance of financial markets. Amongst the most significant institutional reforms, the group of experts led by de Larosière proposed to enhance EU micro-prudential supervision in the financial markets through the establishment of three supranational authorities leading control and harmonisation: the so-called European Supervisory Authorities in the financial markets (ESAs).² The three authorities in question are the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA). They respectively cover the regulation of banking, securities and markets, and insurance and pensions with the aim of ensuring a consistent and coherent mechanism of financial supervision at the EU level. This *Article* aims to explore what role these authorities have been playing in shaping EU legal order after the financial crisis.

The establishment of the ESAs, in fact, represents a key change in the operation of European financial markets, showing unprecedented developments in the allocation of executive powers beyond EU institutions. They substituted the previous cooperation through committees of national supervisors – under the so-called Lamfalussy process³ – with supranational agencies leading supervision and harmonisation of financial markets. Because of the crisis, the stabilisation of micro-prudential supervision in the European Monetary Union (EMU) could not be achieved any longer with the loose coordination of national regulators⁴ and the move from comitology to the agency model has been a key change to

¹ See recital 7 of the Regulation (EU) 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision n. 716/2009/EC and repealing Commission Decision 2009/78/EC; recital 6 of the Regulation (EU) 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision n. 716/2009/EC and repealing Commission Decision 2009/79/EC; and recital 7 of the Regulation (EU) 1095/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision n. 716/2009/EC and repealing Commission Decision 2009/77/EC.

² The High Level Group on Financial Supervision in the EU chaired, Report (25 February 2009) ec.europa.eu.

³ Committee of Wise Men on the Regulation of European Securities Markets, Report (15 February 2001) ESMA www.esma.europa.eu. See P Weisemann, *European Agencies and Risk Governance in EU Financial Market Law* (Routledge 2016) 86, 95.

⁴ M Božina Beroš, *Agencies in European Banking: A Critical Perspective* (Palgrave MacMillan 2018) 19, 23-24 and 47-49.

strengthen the effectiveness of enforcement. In a nutshell, the agencification process upgraded the functioning of micro-prudential supervision, enhancing the uniformity and consistency of financial regulation. The system of committees providing non-binding advice on technical matters to the Commission did not demonstrate operational powers to commit the Member States to enforce effective information sharing and exchange of best supervisory practices.⁵ The institutionalisation of cooperation through agencies made the exercise of enforcement powers more autonomous from individual national regulators as well as from the Commission.⁶ The ESAs became a useful tool in times of crisis, as they contributed to enhancing the credibility of the regulatory system.⁷ Although the establishment of EU agencies as a means for crisis management is not new for the development of European integration,⁸ the establishment of the ESAs affected the very model of EU regulatory agencies and their enforcement tasks. They brought the so-called *agencification* process to the next level, by developing new distinctive features in the field of financial market regulation. The crisis-led reform accelerated the conferral of additional powers on the ESAs compared to the powers generally allocated to other EU agencies, including the Single Resolution Board under the Banking Union. The crisis scenario drove the political momentum for the stronger empowerment of the ESAs: it changed the ordinary structures of institutional interests and created those unpredictable conditions for engaging in significant (institutional and regulatory) reforms aimed at restoring the credibility of the Union.⁹

The critical momentum supported the creation of a specific model of supervisory authorities, which represent a hybrid organisational model that moves towards an embryonic independence from the Commission, yet share many characteristics of EU agencies.¹⁰ In particular, they have been bestowed with quasi-regulatory powers that have the

⁵ See N Moloney, *EU Securities and Financial Markets Regulation* (Oxford University Press 2014) 875-878 and 955-956.

⁶ S Lavrijssen and A Ottow, 'Independent Supervisory Authorities: A Fragile Concept' (2012) LIEI 419, 438-440; S Lavrijssen and L Hancher, 'Networks on Track: From European Regulatory Networks to European Regulatory "Network Agencies"' (2009) LIEI 23, 53-54.

⁷ See J Pelkmans, 'Subsidiarity Between Law and Economics' (Bruges Research Papers in Law 1/2005).

⁸ A significant precedent can be found in the establishment of the European Food Safety Authority (EFSA), which aimed at rebuilding consumer confidence after the spread of BSE disease in Europe. See E Vos, 'EU Food Safety Regulation in the Aftermath of the BSE Crisis' (2000) *Journal of Consumer Policy* 227; D Byrne, 'The Genesis of EFSA and the First 10 Years of EU Food Law' in A Alemanno and S Gabbi (eds), *Foundations of EU Law and Policy: Ten Years of the European Food Safety Authority* (Routledge 2014) 17.

⁹ See M Simoncini, *Administrative Integration Beyond the Non-Delegation Doctrine: A Study on EU Agencies* (Hart Publishing 2018) 51. On the establishment of EU agencies as a means to enhance the credibility of EU policies, see G Majone, 'The Credibility Crisis of Community Regulation' (2000) *JComMarSt* 273, 289; S Krapohl, 'Credible Commitment in Non-Independent Regulatory Agencies: a Comparative Analysis of the European Agencies for Pharmaceuticals and Foodstuffs' (2004) *ELJ* 518, 523; M Busuioac, *European Agencies: Law and Practices of Accountability* (Oxford University Press 2013) 25-27.

¹⁰ See E Chiti, 'European Agencies' Rulemaking: Powers, Procedures and Assessment' (2013) *ELJ* 93, 94; C Franchini, 'Le fasi e i caratteri del processo evolutivo dell'organizzazione amministrativa europea' (2017) *Rivista italiana di diritto pubblico comunitario* 375, 383.

potential to develop the EU administrative action beyond the sector specific case of financial regulation. Their powers cover subsidiary and direct supervision as well as the participation in the delegated rulemaking of the Commission and the issue of guidelines and recommendations aimed at harmonising enforcement practices.¹¹ Notwithstanding their formal legal force, all these powers proactively contribute to regulation.

Against this backdrop, the issue of the delegation of powers to the ESAs is key to understanding the role of the ESAs in the micro-prudential supervision of financial markets, but it is also crucial to figure out whether and how the EU model of legality might have changed after the crisis. In other words, behind the case of the ESAs and their specific policy domain, the legality for administrative action and the justification of administrative powers is at stake.

The ESAs operate to adjust the regulatory behaviour of the Member States and the conducts of private parties to the public interest protected under EU law and regulation.¹² However, their intervention in the national jurisdiction and in the private sphere is not pursued through the traditional instruments at the disposal of the national administrations, but through a set of softer enforcement instruments which span from standardisation practices to some selected adjudication of powers.

This raises the question of the extent to which EU agencies can exercise regulatory powers within the EU legal framework. The answer to this question concerns not only the ESAs but potentially all EU agencies, where the same kind of powers would be conferred on them. The establishment of the ESAs hence raised significant questions about the whole functioning and organisation of the EU administrative space, and particularly about the nature, scope and legitimacy of EU executive powers.

This *Article* thus engages in the search of the main changes that the model of the ESAs generates for the EU legal order. The *Article* is organised as follows. Firstly, the powers of the ESAs are critically discussed. Section II analyses the issue of delegation of powers to EU agencies, showing how the Court of Justice (CJEU) in the so-called *ESMA short-selling* case changed the traditional interpretation of the limits to delegation. Section III discusses the quasi-regulatory powers of the ESAs and how they shape financial markets' regulation, pointing out how the ESAs play a key regulatory role beyond and despite the non-delegation doctrine. Specific attention is paid to the participation of the ESAs in the executive rulemaking of the Commission (section III.1) and to the autonomous adoption of soft law by the ESAs (section III.2).

¹¹ For an extended analysis of these powers see M Simoncini, 'Legal Boundaries of European Supervisory Authorities (ESAs) in the Financial Markets. Tensions in the Development of True Regulatory Agencies' (2015) *Yearbook of European Law* 319, 323-328; M Simoncini, *Administrative Integration Beyond the Non-Delegation Doctrine* cit. 66-73.

¹² On the notion of regulation see A La Spina and G Majone, *Lo Stato regolatore* (Il Mulino 2000) 24-28, who emphasise that regulation means pursuing the relevant public interest through conditional rules that modify private alternatives. The regulatory activity therefore consists of the definition and the implementation of conditional rules.

Against this backdrop, section IV analyses how all these powers changed the legal framework, promoting administrative integration by EU agencies in the post-crisis scenario. Section V concludes and emphasises the general implications that the growth of ESAs in the field of financial regulation has for the development of EU administrative law.

II. THE ISSUE OF DELEGATION UNDER THE SYSTEM OF THE TREATIES

Administrative powers require justification to be compatible with the principles of representative democracy and of legality. While the compatibility with the democratic principle can be achieved only indirectly through accountability instruments, compliance with the principle of legality is ensured by setting explicit limits on administrative action.

The proliferation of agencies represents a key challenge for the enforcement of these principles in the EU. In particular, the development of the so-called EU regulatory agencies has been problematic, as they “are required to be actively involved in the executive function by enacting instruments which help to regulate a specific sector”.¹³ Unlike EU executive agencies, they do not simply outsource functions of the Commission while remaining under its supervision and responsibility.¹⁴ EU regulatory agencies delocalise some authority from the Commission and act autonomously in sector-specific fields. They essentially infuse the regulatory process with some technical expertise, which is expected to neutralise regulatory conflicts and mediate the interests at stake.¹⁵ As a result, there is a relevant issue as to the compatibility of their action with the system of the Treaties.

The principles developed by the CJEU in the *Meroni*¹⁶ and *Romano*¹⁷ cases illustrate the test to preserve legality as set in the Treaties and exclude any undemocratic conferral of regulatory tasks on bodies that have no democratic legitimation or a solid legal basis in the Treaties. In a nutshell, through the so-called Meroni doctrine, the CJEU applied the non-delegation doctrine to the domain of EU agencies.

Non-delegation is the theory according to which constitutional bodies cannot delegate their constitutionally protected powers to other bodies, abdicating their public function. In EU law, the case law of the CJEU developed this doctrine through the principle of institutional balance, aimed at ensuring the balance amongst public powers in the EU legal order: in the absence of the principle of separation of powers – as it exists in individual Member States – this principle allowed the distinction of institutional powers as conferred by the

¹³ See Communication COM(2002) 718 from the Commission of 11 December 2002 The operating framework for the European Regulatory Agencies 4.

¹⁴ See Council Regulation (EC) 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes.

¹⁵ See M Simoncini, *Administrative Regulation Beyond the Non-Delegation Doctrine* cit. 49-50.

¹⁶ Joined cases 9/56 and 10/56 *Meroni v High Authority* ECLI:EU:C:1958:7.

¹⁷ Case C-98/80 *Romano* ECLI:EU:C:1981:104.

Treaties. As a result, the non-delegation doctrine concerns all the EU institutions and ensures that no institution interferes in the exercise of powers by other institutions. On the one hand, in order not to seize undue powers, secondary law adopted by the competent EU institutions cannot amend or change the decision-making procedures established in the Treaties. On the other hand, in order not to abdicate their mandate, the conferred EU institutions should not transfer their competence on policy choices to other entities.¹⁸

When applying this doctrine to the powers of EU agencies, the CJEU clarified the criteria that shall guide any lawful delegation. Two complementary limits apply to the scope of EU agencies' action. Firstly, EU agencies' action cannot interfere with the powers that are lawfully allocated to EU institutions under the Treaties. Secondly, EU institutions shall not transfer their responsibility onto EU agencies, because this would impinge on the equilibrium of powers designed in the Treaties and, as a consequence, on the delegation made by the Member States to EU institutions according to the principle of conferral.

The Meroni doctrine thus holds that delegation cannot concern "discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy", because it "brings about an actual transfer of responsibility".¹⁹ Delegation shall thus ensure that only "clearly defined executive powers" retained by EU institutions are allocated to EU agencies explicitly and only if necessary for the implementation of an administrative task.²⁰ In other words, delegation shall ensure compliance with the principles of conferral, legal certainty and proportionality.²¹ In addition, administrative and judicial controls shall apply to ensure the reviewability of the administrative action.²² In *Romano*, the CJEU emphasised that under the existing conditions for administrative and judicial controls, EU agencies could only provide recommendatory acts, not generally binding on national authorities.²³

To preserve the rule of the Treaties and avoid any uncontrolled proliferation of administrative functions, the Meroni doctrine has legally frozen the development of rule-making powers by EU agencies. Under the EU polity, EU agencies only took the role of specialised, technical advisors to EU institutions and national authorities. Their cooperative role facilitated the harmonisation of best practices, but they could not impinge on

¹⁸ See M Simoncini, *Administrative Regulation Beyond the Non-Delegation Doctrine* cit. 19-25.

¹⁹ *Meroni v High Authority* cit. 173.

²⁰ *Ibid.* 171-173.

²¹ On the relevance of the principle of proportionality in delegation, see T Tridimas, 'Financial Supervision and Agency Power: Reflections on ESMA' in N Nic Shuibhne and LW Gormley (eds) *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford University Press 2012) 55, 60. On the "*effet utile*" of the establishment of an agency for the pursuit of the objectives provided in the legal basis on which it is founded see also K Lenaerts, 'Regulating the Regulatory Process: "Delegation of Powers" in the European Community' (1993) ELR 42.

²² *Meroni v High Authority* cit. 171-173.

²³ *Romano* cit. para. 20.

the Member States' regulatory autonomy. The pragmatic involvement of EU agencies in the internal market regulation, however, has progressively stretched the factual implementation of the constitutional principle of non-delegation.

The diffusion of EU agencies and the need for their specialised tasks to enhance internal market integration have pragmatically eroded the theoretical rigidity of the principle and EU agencies entered the domain of regulatory powers by the back door.²⁴ This occurred through a set of substantive and formal circumstances that enhanced the role of EU agencies and their regulatory impact in different sectors. From a substantive standpoint, EU legislation has required EU agencies to adopt some complex technical assessments that cannot be easily bypassed or ignored by national regulators. From a formal standpoint, EU legislation has set some legal constraints to disregard EU agencies' recommendations and opinions, by requiring EU institutions and the Member States to give reasons for their deviation and to bear the costs of non-compliance with EU agencies' evaluations.

The tension between the constitutional constraints set in the consolidated Meroni doctrine and the institutional capacity of EU agencies to contribute to shaping sector-specific regulation reached a potential breaking point with the extended powers of the ESAs. Not by chance after sixty years of stillness, the CJEU was asked to return to its *Meroni* and *Romano* rulings, and decided to revisit them in the light of the changed framework of EU law under the Lisbon Treaty. In the *ESMA short-selling* case, the Court admitted that ESMA's complex technical assessments in the supervision of the short-selling market enjoy a circumscribed margin of discretion, which is compatible with the system of the Treaties insofar as legislation channels these powers and the Treaties expressly (yet, indirectly) ensure the judicial review of EU agencies' powers.²⁵

This latest development of the Meroni doctrine shows that the original concerns over the justification and control of EU agencies' acts are still relevant, and only the different legal framework of the Treaties allowed the interpretative "mellowing" of the consolidated Meroni doctrine.²⁶ Compared to the European Coal and Steel Community (ECSC), the Lisbon Treaty strongly enhanced the democratic legitimacy of EU institutions. In addition, the Lisbon Treaty included EU agencies within the actors that can legitimately exercise some (administrative) powers within the framework of Treaties. On these grounds, the CJEU could engage in a partial revision of the interpretative boundaries of the Meroni doctrine, allowing the ESAs to participate in the exercise of some substantive regulatory prerogatives. The definition of constitutional limits to administrative delegation rooted in

²⁴ See M Simoncini, 'The Erosion of the Meroni Doctrine: The Case of the European Aviation Safety Agency' (2015) EPL 309.

²⁵ Case C-270/12 *United Kingdom v Parliament and Council* ECLI:EU:C:2014:18 paras 44-45 and 79-80.

²⁶ J Pelkmans and M Simoncini, 'Mellowing Meroni: How ESMA Can Help Build the Single Market' (CEPS Commentary 1/2014).

Meroni and *Romano* is still regarded as good law, but the constitutional compatibility has been entrenched in the changed constitutional system provided by the Lisbon Treaty.

In other words, in the *ESMA short-selling* case, the CJEU identified a series of updated subjective and objective criteria, which framed the capacity of ESMA to temporarily prohibit or restrict certain financial activities of short selling that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union.²⁷ Firstly, as the Treaties now identify EU agencies as actors in the EU polity, CJEU inferred a subjective qualification of ESMA as “a European Union entity, created by EU legislature”.²⁸ This subjective criterion is a remarkable starting point for the delegation of administrative powers and sets a clear-cut difference with both the *Meroni* case – where the Brussels’ agencies in question were bodies governed by Belgian private law and were not envisaged in the Treaty establishing the Coal and Steel Community – and the *Romano* case, where the Administrative Commission on Social Security for Migrant Workers was not envisaged nor its acts challengeable in courts under the European Economic Community Treaty. Although the effects of the subjective criterion remain implicit in the CJEU’s reasoning, the qualified identity of EU agencies as agents of the EU polity appears to be a distinctive feature for the constitutional compatibility of delegation with the principle of institutional balance emerging in the Treaties.²⁹

In addition, objective criteria make delegation compatible with the Treaties. ESMA’s power fits within the “clearly defined executive powers” that can be delegated, insofar as ESMA’s margin of discretion does not exceed “the bounds of the regulatory framework established by the ESMA Regulation” and it “is circumscribed by various conditions and criteria”,³⁰ such as the existence of a concrete risk to the financial stability and the lack of national intervention, or the possibility to adopt only temporary and precise measures that do not create further risks in the financial markets. Additional administrative limits also emerge from the adoption of such measures in cooperation with EU bodies and national authorities.³¹ The CJEU construed the compatibility of some discretion with the non-delegation doctrine based on its anchoring in a series of legal and institutional conditions that shall frame and direct administrative powers. The ruling clearly shows that the emergence of a democratically legitimated legislature is key to ensuring control over the exercise of administrative powers. This put the principle of legality at the core of administrative action, being its necessary premise and setting the boundaries for such action.

The different institutional framework and the existence of legislative and administrative guarantees on the exercise of such power entrench administrative powers and sustain

²⁷ Art. 28 of the Regulation (EU) 236/2012 of the European Parliament and the Council of 14 March 2012 on short selling and certain aspects of credit default swaps.

²⁸ *United Kingdom v Parliament and Council* cit. para. 43.

²⁹ M Simoncini, *Administrative Integration Beyond the Non-Delegation Doctrine* cit. 36 and 43-44.

³⁰ *United Kingdom v Parliament and Council* cit. paras 44-45.

³¹ *Ibid.* para. 50.

a much more sophisticated interpretation of the Meroni doctrine. When applying the criteria for lawful delegation to ESMA, the CJEU upheld their validity, but did not detect any shift of responsibility in the conferred power. The *ESMA short-selling* case intended to reconcile the democratic concerns on the delegation of powers to administrative bodies with the recognition that nowadays administrative action by specialised bodies is necessary to discharge public functions. Hence, “delegation constitutes an inevitable aspect of modern administrative law, as those who in constitutional terms are nominally entrusted with the exercise of a particular public function are often not in a position, for a variety of reasons, to discharge their responsibilities fully without supplementary action by others”.³²

The 2019 reform of the ESAs not only accepted the interpretation of the CJEU, but it also extended the power of the ESAs under art. 9(5) of the founding Regulations to “temporarily prohibit or restrict the marketing, distribution or sale of certain financial products, instruments or activities that have the potential to cause significant financial damage to customers or consumer”.³³ When providing a wider definition of the financial services that can be temporarily prohibited or restricted, this amendment included another substantive situation in its scope of application; that is, the protection of consumers, which under the reform becomes another relevant competence of the ESAs.

The validity of the CJEU’s approach to delegation has also been indirectly confirmed by the German Constitutional Court in a recent case on the compatibility of the institutional system of the Banking Union with the German Constitution and its democratic principle as protected under art. 38 *Grundgesetz* (GG).³⁴ The German Constitutional Court considered that although administrative actors do not directly respond to the democratic principle as such, they can be compatible with the legal system designed in the TFEU.³⁵ In particular, the stretch of the principle of people’s sovereignty is justified by “factual reasons”, which are the need to enhance the effectiveness of the supervision and the need to protect the SSM and SRM from undue political influence.

³² HCH Hofmann, GC Rowe and AH Türk, *Administrative Law and Policy of the European Union* (Oxford University Press 2011) 222-223.

³³ See art 9(5) of the Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) n. 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) n. 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) n. 1095/2010, Regulation (EU) n. 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds.

³⁴ German Federal Constitutional Court judgment of 30 July 2019 2 BvR 1685/14; 2 BvR 2631/14.

³⁵ *Ibid.* para. 138.

III. RULE-SHAPING BY EU AGENCIES IN THE FINANCIAL MARKETS

The *ESMA short-selling* case solved the issue of delegation by proving that under the Treaties, the ESAs can be considered accountable bodies that pursue leading administrative functions aimed at the stability and harmonisation of financial markets and since 2019 also consumer protection. Yet, formal delegation does not exhaust the reach of the ESAs' administrative action. Alongside the revision of the explicit limits to formal delegation, the development of quasi-regulatory powers demonstrates how the growth of administrative action by the ESAs contributes to changing the EU model of legality. More specifically, the ESAs have critical *rule-shaping* powers that emerge (i) in their strategic participation in the executive rulemaking of the Commission, which alter the system designed under arts 290 and 291 TFEU and (ii) in the autonomous adoption of soft law measures, which substantively enhance the harmonisation and the stability of financial markets. As the following sub-sections illustrate, the way the ESAs perform this rule-shaping function is peculiar to them and represents one of their distinctive marks compared to EU agencies operating in different sectors.

III.1. PARTICIPATION IN THE EXECUTIVE RULEMAKING OF THE COMMISSION

The ESAs assist the European Commission in the draft of regulatory technical standards under art. 290 TFEU and implementing technical standards under art. 291 TFEU.³⁶ These executive rulemaking acts aim to establish single rulebooks harmonising prudential rules for financial markets. As Busuioc emphasised, this is an exceptional procedure which changes the procedure for the adoption of delegated acts by the Commission as envisaged in the Treaties.³⁷

The ESAs, in fact, have the initiative of the rulemaking process and only in exceptional circumstances may the Commission adopt technical standards without a draft from the relevant Authority.³⁸ To counter-balance the enhanced role of the ESAs, the 2019 reform also strengthened the role of the European Parliament and the Council in the procedure, by ensuring that they are constantly kept informed on the negotiation between the Commission and the relevant ESA.³⁹ If the Commission decides not to endorse a draft regulatory technical standard or to endorse it in part or with amendments, it shall give reasons and send back the draft to the competent authority.⁴⁰ The

³⁶ Arts 10-14 of the Regulation (EU) 1093/2010 cit., of the Regulation 1094/2010 cit. and of the Regulation 1095/2010 cit. and art. 15 of the Regulation 1093/2010 cit., of the Regulation 1094/2010 cit. and of the Regulation 1095/2010 cit.

³⁷ M Busuioc, 'Rule-making by the European Financial Supervisory Authorities: Walking a Tight Rope' (2013) ELJ 111, 116-117.

³⁸ Arts 10(1) and (3) and 15(1) and (3) of the Regulation (EU) 1093/2010 cit., of the Regulation 1094/2010 cit. and of the Regulation 1095/2010 cit.

³⁹ *Ibid.* art. 10(1) and (2).

⁴⁰ *Ibid.* recitals 23 and 24.

competent authority may amend and then resubmit the draft as a formal opinion to the Commission and the Commission may adopt the amendments considered consistent with its remarks or reject the technical standard.

The Commission may amend draft regulatory technical standards “only in very restricted and extraordinary circumstances, since the authority is the actor in close contact with and knowing best the daily functioning of financial markets”; otherwise it should “rely, as a rule,” on them because of the technical expertise of the competent ESA.⁴¹ This means that technical standards shall not involve strategic decisions or policy choices, but only technical issues.⁴² As recital 23 emphasises, amendments should concern incompatibility with *i*) EU law, *ii*) the proportionality principle and *iii*) fundamental principles of the internal market for financial services as reflected in the acquis of Union financial services legislation.⁴³ This shall ensure that ESAs’ drafts are consistent with the principle of legality, but also compatible with substantive EU financial law. This means that the Commission is entitled to control the legitimacy of ESAs’ drafts as well as their merit.

In addition, in the case of non-endorsement or amendment of draft regulatory technical standards, “where appropriate”, a kind of conciliation procedure may take place before the competent committee of the European Parliament or of the Council: one of these institutions may invite the responsible Commissioner, together with the chairperson of the authority, “to present and explain their differences” in an “ad hoc meeting”.⁴⁴ By elevating the discussion from the executive to the legislative branch, conciliation aims to preserve the centrality of the ESAs despite their formal status of EU agencies in comparison to the Commission.⁴⁵ At the same time, this procedure highlights the role of the legislative branch, which can decide to take the lead – through its competent committees – and oversee the executive rulemaking process.

This means that even though formally the ESAs do not have the final decision-making power and the Commission still plays an active role in the procedure, in practice EU legislation aims to confer on the ESAs the “factual ownership of the procedure”.⁴⁶ The consultative power of EU agencies to advise the Commission is taken to the next level: legal

⁴¹ *Ibid.* See also P Schammo, ‘The European Securities and Markets Authority: Lifting the Veil on the Allocation of Powers’ (2011) CMLRev 1879, 1883.

⁴² As pointed out by AG Jääskinen in the withdrawn case on the cap on bankers’ bonuses, the impossibility to take policy decisions confirms the limits set by the Meroni doctrine, but does not prevent sector-specific legislation from extending the EBA’s powers beyond the limits of art. 10 of the Regulation (EU) 1093/2010. See case C-507/13 *United Kingdom v Parliament and Council* ECLI:EU:C:2014:2394, opinion of AG Jääskinen, para 58.

⁴³ Recital 23 of the Regulation (EU) 1093/2010 cit., of the Regulation 1094/2010 cit. and of the Regulation 1095/2010 cit.

⁴⁴ *Ibid.* art. 14(2).

⁴⁵ See M Simoncini, *Administrative Integration Beyond the Non-Delegation Doctrine* cit. 71-72.

⁴⁶ *Ibid.* 80. See also P Weisemann, *European Agencies and Risk Governance* cit. 126-127, who particularly described the power of the ESAs in the procedure as “higher than the committees’ opinions in the advisory procedure and lower than the committees’ opinions in the examination procedure”.

requirements binding the Commission's dissent shape the executive rulemaking process so to put the ESAs in a privileged position in the definition of the rules. This is definitely specific to the case of the ESAs as key players in the supervision of financial markets.

III.2. HARMONISATION THROUGH SOFT LAW

In line with the *Romano* ruling, the ESAs can adopt guidelines and recommendations that do not have legally binding force. However, these acts still produce indirect legal effects through the effective combination of some legal requirements and reputational driving mechanisms. These acts that generally go under the label of soft law aim at establishing some rules of conduct that work as rebuttable presumptions of compliance with the relevant EU legislation.⁴⁷ These acts shall remain within the boundaries established by the relevant legislation, but they cannot merely refer or replicate such legislation.⁴⁸ They need to explain and figure out how the enforcement of the law can be effectively fulfilled. By acting independently, the ESAs thus issue their soft law acts to the competent national authorities and financial institutions with the aim of establishing consistent, efficient and effective supervisory practices and ensuring the common, uniform and consistent application of EU law.⁴⁹ Implementation of soft law is pursued in the absence of legally binding force, but other legal requirements and incentives should push the recipients to comply with the rules of conduct. Compliance is, in fact, fundamental for the establishment of a single rulebook about supervisory convergent practices in the EU financial markets and non-compliance should therefore be limited and possibly avoided in light of the supervisory convergence goal.

The ESAs pursue the goal of compliance through the so-called "comply or explain" mechanism, which requires the recipients who do not wish to comply to give the reasons for their non-compliance. This mechanism creates a double constraint. Firstly, it establishes a legal obligation to motivate non-compliance. However, the duty to give reasons cannot be used to pursue further legal action as traditionally happens, but it triggers a reputational mechanism that aims to isolate the rebels by exposing them to the "naming and shaming" on an international level, which may only be supplemented on a case-by-case basis by the publication of the reasons for non-compliance.⁵⁰ As Chiti emphasised, no coercive measure

⁴⁷ On the notion of soft law see F Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) ModLRev 32; F Snyder, 'Soft Law and Institutional Practice in the European Community' in S Martin (ed), *The Construction of Europe: Essays in Honour of Emile Noël* (Kluwer 1994) 197, 197-198; L Senden, *Soft Law in European Community Law* (Hart Publishing 2004) 112.

⁴⁸ Art. 16(1) and (2)(a) of the Regulation 1093/2010 cit., of the Regulation 1094/2010 cit. and of the Regulation 1095/2010 cit.

⁴⁹ *Ibid.* art. 16.

⁵⁰ See M Simoncini, *Administrative Integration Beyond the Non-Delegation Doctrine* cit. 72-73.

sanctions non-compliance and the institutional dialogue between the ESAs and the disagreeing national authorities is not legally structured.⁵¹ The ESAs check and direct the regulatory conducts of national authorities and the economic behaviour of sector operators through soft law powers, which rely on the trust in the ESAs as expert bodies and on the costs of non-compliance to ensure their effectiveness. However, as van Gestel and van Golen observed, “the threat that the EU legislature will impose binding measures in case of continued non-compliance” is “the big stick behind the door”.⁵² The ESAs shall in fact report to the European Parliament, the Council, the European Commission, the Court of Auditors and the European Economic and Social Committee on supervisory convergence and shall explain how they intend to ensure compliance. This obligation, however, has been formally relaxed in the 2019 reform, which is now less demanding on the content of the annual report on the implementation of the issued guidelines and recommendations.⁵³ Conversely, the 2017 Commission’s proposal of reform required to give reasons for the adoption of soft law, including summarising the feedback from public consultations.⁵⁴ Nevertheless, these sets of powers show the central role that the ESAs play in the regulation of the financial sector. Although the non-delegation principle does not allow the ESAs to exercise full rulemaking powers, they have been conferred specific rule-shaping powers, where the scope goes beyond the traditional feature of the Commission’s delegated powers and beyond the legally binding character of administrative action. This is due to the circumstances of economic integration and the crisis context that accelerated the need for the recognition of specialised administrative actors in the harmonisation of the sector. By enhancing the centrality of the ESAs in the search of financial stability, market integrity and, more recently, consumer protection, these rule-shaping powers innovate the traditional spectrum of EU

⁵¹ See E Chiti, ‘In the Aftermath of the Crisis – The EU Administrative System Between Impediments and Momentum’ (2015) CYELS 311, 325-326.

⁵² R van Gestel and T van Golen, ‘Enforcement by the New European Supervisory Agencies: Quis Custodiet Ipsos Custodes?’ in K Purnhagen and O Rott (eds), *Varieties of European Economic Law and Regulation. Liber Amicorum for Hans Micklitz* (Springer 2014) 757, 766-767.

⁵³ Art. 16(4) of the Regulation 1093/2010/EU cit., of the Regulation 1094/2010 cit. and of the Regulation 1095/2010 cit.

⁵⁴ Arts 1(7)(c), 2(7)(c) and 3(7)(c) of the Proposal for a Regulation COM(2017) 536 of European Commission of 20 September 2017, Amending Regulation (EU) n. 1093/2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) n. 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) n. 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority); Regulation (EU) n. 345/2013 on European venture capital funds; Regulation (EU) n. 346/2013 on European social entrepreneurship funds; Regulation (EU) n. 600/2014 on markets in financial instruments; Regulation (EU) 2015/760 on European long-term investment funds; Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds; and Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market.

agencies' administrative powers, sidestepping to some extent the formal issue of delegation. As Weisemann effectively pointed out, this regulatory approach still needs to be interpreted: it can either be seen as an "entirely new" approach to regulation based on "persuasion and information", or as "a new (soft) look" approach to command-and-control, or even as "something in between".⁵⁵ The search of an effective characterisation of this approach can disclose wider scenarios about the potential and the limits that shall apply to soft law.

IV. LEGALITY AND DELEGATION AFTER THE FINANCIAL CRISIS

The powers of the ESAs significantly intend to enhance administrative action in the field of financial regulation. The judicial revision of the Meroni doctrine together with the legislative design of significant rule-shaping powers have affected the principle of legality, raising relevant questions concerning the role of EU agencies and the guarantees for their action.

The financial crisis accelerated trends that were already present in EU agencies' action. Two issues emerged in particular. Firstly, as regards formal delegation under the Meroni doctrine, after the *ESMA short-selling* case EU agencies can legitimately make complex technical assessments and adopt decisions that involve some margin of discretion. This case extended the powers of EU agencies if subordinated to EU legislation and controlled through accountability instruments. Secondly, as informal delegation is concerned, EU agencies may perform a critical rule-shaping role, which cannot be captured by hierarchical command structures.

The quasi-regulatory powers of the ESAs put them at the centre of the regulatory process. Yet, this reform occurred in the absence of a coherent theoretical framework for administrative powers. Like other EU agencies, the ESAs were asked to operate under an unfinished administrative law system. The nature, the scope and the legitimacy of ESAs' powers do not find a strong conceptualisation under EU administrative law.⁵⁶ Their case raises a wider question concerning the justification of administrative powers with regulatory impact and their tenability under the principle of legality and the democratic principle. A few problematic issues emerge.

Firstly, with regard to the delegation of powers under the Meroni doctrine, the problem is that EU law has not strongly conceptualised the notion of discretion that EU agencies can exercise. Unlike national administrative laws, EU law has considered EU agencies as technical instruments for the implementation of policies. Traditionally they aimed to infuse scientific information in the regulatory process, but their supposed neutrality is a "fallacy".⁵⁷ However, this approach hid their regulatory vocation and trapped the development of EU administrative law in the dichotomy between political powers to make policy choices and neutral technical powers to implement such policies. By qualifying the lawful enforcement

⁵⁵ P Weisemann, *European Agencies and Risk Governance* cit. 148.

⁵⁶ See E Chiti, 'Is EU Administrative Law Failing in Some of Its Crucial Tasks?' (2016) EJL 576.

⁵⁷ See P Weisemann, *European Agencies and Risk Governance* cit. 11-16.

by EU agencies as technical in nature, the Meroni doctrine neutralised any aspects of discretion that may be involved in any administrative action. As I extensively argued elsewhere, however, this approach created false expectations about the substantive reach of EU agencies' powers.⁵⁸ Both practice and the findings of *ESMA short-selling* case, instead, demonstrate that a grey area exists between implementation and policy-making, where technical options are not free from some consideration of the interests at stake, even if only to identify the best technical solution. This is especially peculiar to complex technical assessments, which may require the evaluation of facts and interests in light of the objectives, priorities and criteria set in the relevant legislation as well as in light of the specific expertise.⁵⁹ Although this is a general issue for expert administrative action under EU law, the wider *rule-shaping* powers conferred on the ESAs made the problem so explicit and relevant that the CJEU could not ignore it anymore in its application of the Meroni doctrine.

The existence of such margin of choice is going to become even more relevant under the 2019 reform of the ESAs. The amended art. 8 of the founding regulations in fact expands their tasks – including consumer protection – and requires taking into account technological innovation, environmental, social and governance factors in the implementation of such tasks.⁶⁰ This means that the ESAs' action should marginally balance different public and private interests. The legal qualification of the boundaries applicable to such margin of choice hence becomes key to identifying the legitimate balance among the different and possibly conflicting variables.

Under national administrative laws, notwithstanding relevant variations, the active capability of public administrations to make choices bounded by the law is generally recognised as administrative discretion.⁶¹ Under EU law, instead, the CJEU has mainly identified in discretion the limit to judicial review.⁶² Where some discretion is recognised, only the application of the proportionality test with different intensity has allowed the CJEU to control the legitimate exercise of discretion. As Mendes has pointed out, this “negative” approach does not sufficiently emphasise how value judgments enshrined in legal norms

⁵⁸ M Simoncini, *Administrative Integration Beyond the Non-Delegation Doctrine* cit. 99-107.

⁵⁹ Case T-187/06 *Schröder v CPVO* ECLI:EU:T:2008:511 para. 73, confirmed on appeal in case C-38/09 P *Schröder v CPVO* ECLI:EU:C:2010:196; joined cases T-133/08, T-134/08, T-177/08 and T-242/09 *Schröder v OCVV - Hansson (LEMON SYMPHONY)* ECLI:EU:T:2012:430 para. 154, as confirmed on appeal in case C-546/12 P *Schröder v CPVO* ECLI:EU:C:2015:332 para. 56; case T-102/13 *Heli-Flight v EASA* ECLI:EU:T:2014:1064 para. 74; case C-61/15 P *Heli-Flight v EASA* ECLI:EU:C:2016:59 paras 101-102.

⁶⁰ Art. 8 of the Regulation 1093/2010 cit., of the Regulation 1094/2010 cit. and of the Regulation 1095/2010 cit.

⁶¹ See M Simoncini, *Administrative Integration Beyond the Non-Delegation Doctrine* cit. 94-95.

⁶² R Caranta, 'On Discretion' in S Prechal and B van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press 2008) 185; see also J Mendes, 'Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU' (2017) *ModLRev* 443, 461; J Mendes, 'Law and Administrative Discretion in the EU: Value of Comparative Perspective' (April 2016) Yale Law School www.law.yale.edu 19-21.

should guide and limit discretion “beyond the judicial paradigm” and it prevents placing the relation between discretion and law at the core of EU law.⁶³ This has also prevented EU administrative law from characterising the specific nature of administrative discretion and to effectively circumscribe the scope of EU agencies’ powers. The result is that the distinction between legislative and administrative acts is not structurally founded on the limitation of administrative action through the principle of legality, but on the allegedly factual dichotomy between political and technical issues. If this dichotomy was supposed to clarify responsibilities between the legislative and the administrative branches, it instead blurred them.⁶⁴ Conversely, the introduction of a normative characterisation of the discretion that administrations can exercise would allow the recognition that EU agencies’ action does not need to be neutral to interests to be legitimate, but it rather needs to comply with the principle of legality.

In the *ESMA short-selling* case, the CJEU positively identified the margin of discretion conferred on ESMA by the relevant legislation, but it failed to characterise it as administrative discretion, which can be understood as the margin of appreciation of possible options in light of the legal rule that needs to be implemented.⁶⁵ The difficulty to embrace the conceptual categorisation of EU agencies’ powers brought to the definition of some pragmatic criteria checking the accountability of ESMA’s action.

Despite the lack of theoretically informed categories, the ruling designed an open system of executive powers at the EU level. Advocate General Jääskinen recognised that ESMA’s powers represent “a midway solution between vesting implementing authority in either the Commission or the Council, on the one hand, or leaving it to the Member States, on the other”.⁶⁶ EU agencies’ powers gained an autonomous space of intervention beyond the delegated powers of the Commission under arts 290 and 291 TFEU. The Court bluntly excluded the encroachment of these Agency’s powers with the Commission’s delegated powers.⁶⁷ Yet, the Court did not engage in an explanation of the distinctive scope of all these powers compared to the powers of the Commission, but simply affirmed them. This may not come as a surprise, given the same difficulty of the CJEU to distinguish between delegated and implementing acts of the Commission itself.⁶⁸

⁶³ See J Mendes, ‘Bounded Discretion in EU Law’ cit. 461-463; J Mendes, ‘Law and Administrative Discretion in the EU’ cit. 24-26.

⁶⁴ M Simoncini, *Administrative Integration Beyond the Non-Delegation Doctrine* cit. 93.

⁶⁵ *Ibid.* 94.

⁶⁶ Case C-270/12 *United Kingdom v Parliament and Council* ECLI:EU:C:2013:562, opinion of AG Jääskinen, cit. para. 86. This development of agencies “as an intermediate approach between the extremes of *administration communautaire directe* and *administration communautaire indirecte*” was already recognised by K Lenaerts, ‘Regulating the Regulatory Process’ cit. 46.

⁶⁷ *United Kingdom v Parliament and Council* cit. paras 83-86.

⁶⁸ Among others, see P Craig, ‘Delegated Acts, Implementing Acts and the New Comitology Regulation’ (2011) ELR 671; CF Bergström and D Ritleng (eds), *Rulemaking by the European Commission: The New System for Delegation of Powers* (Oxford University Press 2016).

As Robert Schütze pointed out, “the judicial minimalism on the legislative choice between arts 290 and 291 is to be regretted”.⁶⁹ The same may apply to the case of EU agencies, because the search of accountability criteria made by the CJEU does not create an autonomous test for the legitimacy of EU agencies’ powers, yet it can effectively influence future legislative choices about the allocation of powers to EU agencies beyond their specific regulatory domains. In the absence of clear cut provisions in the Treaties concerning executive powers and in the even more problematic absence of a solid political consensus about the nature, the scope and the legitimacy of administrative powers, any judicial interpretation will be an attempt to balance institutional competences and their powers as effectively as possible.

Another relevant issue concerns the rule-shaping powers of the ESAs. They were in fact framed within this unfinished administrative law system and contributed to diversifying both the institutional sources of authority and their acts. In practice, they helped to enforce financial regulation by trusting experts with a specialist grasp on sector-specific problems. In the law, however, this informal approach generates problems of legal certainty about the source of authority and the legal effects of the acts. Soft law helped to avoid the *Romano* constraint of the non-binding force of EU agencies’ acts, whereas it did not affect the effectiveness of acts. Trust mechanisms do not need to rely on legally binding force, but they make the implementation of the regulatory framework more sophisticated and composite.

The level playing field informally created through the soft law makes the definition of the rules of conduct extremely relevant as their content is factually able to affect the national competent authorities as well as private operators. This means that the procedure for the adoption of soft law matters, because who participates and when can determine the content of the rules of conduct. Hence, the formalisation of the rules for the adoption of soft law becomes a necessary condition for their legitimacy. However, the 2019 reform of the ESAs did not embrace the reinforcement of procedural guarantees envisaged by the 2017 Commission’s proposal for the adoption of guidelines and introduced only minimal changes to the 2010 framework.

For instance, the 2019 reform maintained the appropriateness requirement for the launch of open public consultation and the consultation of the stakeholders group established in every authority but introduced a duty to give reasons for the lack of such consultations.⁷⁰ Conversely, the Commission’s proposal pointed towards making these consultations the rule “save in exceptional circumstances”.⁷¹ In addition, the 2019 reform allowed any natural or legal person to send reasoned advice to the Commission if that person is of the opinion that the Authority has exceeded its competence when issuing

⁶⁹ R Schütze, *European Union Law* (Cambridge University Press 2015) 320.

⁷⁰ Art. 16(2) of the Regulation 1093/2010 cit., of the Regulation 1094/2010 cit. and of the Regulation 1095/2010 cit.

⁷¹ Arts 1(7)(b), 2(7)(b) and 3(7)(b) of the Proposal for a Regulation COM(2017) 536 cit.

guidelines and opinions, provided that the action is of direct and individual concern to that person.⁷² The Commission's proposal, instead, specifically recognised the initiative of the two thirds of the members of the stakeholder group to send a reasoned advice to the Commission if they believe that the Authority has exceeded its competence by issuing certain guidelines or recommendations. In that case, the Commission should have heard justification from the Authority and then assessed the breach of competence. Where the breach was identified, the Commission might have adopted an implementing decision requiring the authority to withdraw the guidelines or recommendations concerned.⁷³

Although the 2019 reform made only marginal changes in the controls over the adoption of soft law, these few examples demonstrate that the gap between the softness of the rules and their regulatory impact can effectively be filled out procedurally, through the definition of requirements and legal guarantees that ensure legitimacy and accountability.

V. ADMINISTRATIVE INTEGRATION BEYOND THE ESAS

The financial crisis made the ESAs key actors in the pursuit of internal market integration and stability. Their establishment and functioning contributed to accelerating nuanced changes in the EU legal order. Three main tendencies can be identified: the expansion of delegation, the intensification of soft law and the widened relevance of EU agencies in the implementation of policies. All these issues represent trends that were already present in the EU legal order, but in the financial sector they were reinforced and legally accepted.

After the *ESMA short-selling* case, in fact, delegation has come to legitimately include some margins of discretion that do not reach the status of political discretion, which still cannot be delegated. This is implicitly leading towards the abandonment of the rigid characterisation of technical powers as neutral, discretion-free powers. In addition, uniform supervision of financial markets throughout the EU has been pursued through the development of soft rules of conduct. The structural relevance of their effects disregards their non-binding legal character. Yet, law is progressively searching for legal guarantees and requirements in the use of these informal tools to ensure the legitimacy of their effect and the accountability of their source of authority.

The system of the ESAs also acquired key relevance in the definition of the Commission's delegated acts, changing the mechanism for their adoption as defined in the Treaties. As seen, the ESAs play a leading role in the adoption of the Commission's regulatory technical standards and implementing technical standards. They limit and guide the decision-making of the Commission, playing an irreplaceable role in the adoption of these rules.

These tendencies show that EU executive powers are growing in both their reach and the actors that perform them. Financial markets have emerged as a significant field for their

⁷² Art. 60(a) of the Regulation 1093/2010 cit., of the Regulation 1094/2010 cit. and of the Regulation 1095/2010 cit.

⁷³ Arts 1(7)(d), 2(7)(d) and 3(7)(d) of the Proposal for a Regulation COM(2017) 536 cit.

enforcement because the enrichment of EU administrative tasks derives from the need to ensure uniform market conditions. In other words, the crisis played a key role in fostering the need for stability and integrity of financial markets that functionally requires control on the whole functioning of the relevant market. This regulatory goal has been achieved through the establishment of specialised administrations which can effectively supervise financial markets because of their expertise: the ESAs. Although their powers remain limited, the crisis accelerated the recognition that they need to operate autonomously from the Commission and the national authorities to deliver results. The crisis thus led to the recognition that multiple administrations are necessary to govern financial markets.

The dynamics occurring in the financial sector, however, can apply beyond sector-specificities. Another crisis in another sector or the spill-over of regulatory instruments across sectors may transplant the changes that occurred in the financial sectors in other fields. The emerging legal mechanisms emphasise the centrality of administrative law in the governance of EU integration. Yet, the Treaties do not regulate these administrative developments and provide only a few minimum rules about the entrenchment of administrative action by EU agencies. This means that legal guarantees and legal requirements need to be searched in the relevant legislation.

The 2019 reform of the ESAs pointed in this direction. The growth of administrative responsibilities and tasks, in fact, require stronger accountability and control mechanisms of the ESAs. Beyond sector-specific rules, however, the adoption of a general law on the administrative proceedings would help ensure a general framework for a fair and impartial administrative action and provide the standards of administrative action. By setting clear thresholds to make administrative tasks compatible with the EU legal order, such reform would strengthen the EU model of legality.

