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Supervisory Cooperation in the Single Market for Financial Services: United in Diversity?

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ARTICLE

SUPERVISORY COOPERATION IN THE SINGLE MARKET FOR FINANCIAL SERVICES: UNITED IN DIVERSITY?

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ABSTRACT

The post-crisis financial services regulatory overhaul, and, particularly, the creation of the European System of Financial Supervision (ESFS) and the Banking Union mechanisms, has increased the complexity of the EU financial supervisory architecture. In this new system, financial supervision is carried out by a network of interconnected financial supervisors, with different mandates and subject to various accountability structures, operating at both the Member State and EU levels and bound by a regime of cooperation duties. An efficient cooperation among and within the various levels of this complex supervisory architecture is critical for the good functioning of the EU financial system. This Article identifies and analyzes key supervisory cooperation challenges in the single market for financial services, and assesses whether the EU legal and regulatory frameworks effectively address them. The Article argues that, despite the advancement of EU financial services integration and supervisory convergence that the post-crisis regulatory overhaul has brought, there are important legal and regulatory obstacles to an efficient supervisory cooperation in the European Union; these source, primarily, from the following: first, the lack of clarity and precision of the EU regime on supervisory cooperation duties; second, the limited applicability of the ESFS's mediation mechanisms to supervisory cooperation disputes; and, third, the tensions between

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transnational mandates of financial supervision and national accountability structures and mandates. The Article also examines the threats that Brexit and the EU political crisis pose to EU financial integration and supervisory cooperation.

Keywords: financial supervision, supervisory cooperation, European System of Financial Supervision, Banking Union, Brexit

I. INTRODUCTION

In the European Union, supervisory responsibilities concerning financial markets, institutions and the financial system are fragmented among a number of competent supervisory authorities ("CSAs") at both the Member State and EU levels.[1] Owing to the cross-border

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1. For an overview of the EU financial regulatory and supervisory architecture as well as its main actors *see generally,* House of Lords European Union Committee (UK), The Post-Crisis EU Financial Regulatory Framework: Do the Pieces Fit?, 5th Report of Session 2014-15, HL 103 (2015); FINANCIAL REGULATION AND SUPERVISION: A POST-CRISIS ANALYSIS (Eddy Wymeersch et al. eds., 2012). There is no single definition of CSAs but, generally, this concept comprises "entities of a public nature with officially recognized authority to carry out regulation and supervision of the financial sector–financial institutions, markets, and products–

nature and implications of EU financial sector activities,[2] when CSAs perform supervisory functions they often need to cooperate with and assist each other; for example, the home CSA of a financial entity may need information about the latter that can only be obtained through cooperation of a host CSA in a Member State where such entity is providing financial services.[3]

An efficient financial supervisory cooperation framework is essential for the good functioning of the single market for financial services and, more generally, for fostering financial integration in the European Union.[4] Without adequate supervisory cooperation, CSAs may be unable to properly exercise their supervisory and enforcement responsibilities, and to guarantee core targets of financial supervision, such as the soundness of the financial markets, the stability of the financial system and consumer protection.[5] Also, suboptimal levels of cooperation between CSAs increase the risk of an inconsistent application of EU law across the Member States,[6] and supervisory arbitrage.[7]

Before the global financial crisis, the rules and procedures on supervisory cooperation in the European Union were, primarily,

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in a given jurisdiction." PABLO IGLESIAS-RODRÍGUEZ, THE ACCOUNTABILITY OF FINANCIAL REGULATORS: A EUROPEAN AND INTERNATIONAL PERSPECTIVE 5 (2014).

2. Despite the negative effects of the global financial crisis on international financial flows, intra-EU capital flows are of major importance to the EU economy; for example, in the year 2015, intra-EU Foreign Direct Investment inflows amounted to EURO 365 billion. *See* Commission, Commission Staff Working Document on the Movement of Capital and the Freedom of Payments, SWD (2017) 94 final, at 14.

3. For examples of procedures applicable to supervisory cooperation requests in the European Union *see, e.g.,* Commission Implementing Regulation (EU) 2017/980 of 7 June 2017 laying down implementing technical standards with regard to standard forms, templates and procedures for cooperation in supervisory activities, for on-site verifications, and investigations and exchange of information between competent authorities in accordance with Directive 2014/65/EU of the European Parliament and of the Council, 2017 O.J. L 148/3.

4. *See, e.g.*, Commission, Green Paper on Financial Services Policy (2005 - 2010), COM (2005) 177, at 10 [hereinafter Green Paper]; EUROPEAN CENTRAL BANK, FINANCIAL INTEGRATION IN EUROPE 39-43 (2007).

5. *See, e.g.*, Eric J. Pan, *Challenge of International Cooperation and Institutional Design in Financial Supervision: Beyond Transgovernmental Networks*, 11 CHI. J. INT'L. L. 243, 246 (2010).

6. *See, e.g.*, Takis Tridimas, *EU Financial Regulation: From Harmonization to the Birth of EU Federal Financial Law*, *in* THE EUROPEAN UNION LEGAL ORDER AFTER LISBON 120 (Patrick Birkinshaw & Mike Varney eds., 2010).

7. Christopher P. Buttigieg, *Governance of Securities Regulation and Supervision: Quo Vadis Europa?*, 21 COLUM. J. EUR. L. 411, 425 (2015).

Member State-based, and their scope was very narrow, excluding, for instance, macro-prudential oversight.[8] Financial supervisory responsibilities were distributed among Member State CSAs with different structures, targets, mandates, and powers.[9] The role of the European Union in the organization and coordination of supervisory cooperation was very limited.[10] Although EU financial sector laws acknowledged certain supervisory cooperation duties,[11] cooperation was essentially articulated on the basis of non-binding agreements, and CSAs from the Member States enjoyed ample margins of discretion in deciding whether or not to cooperate with each other in particular instances.[12] This resulted in inconsistent approaches to supervisory cooperation across the European Union.[13]

The crisis exposed the failures of such a nationally-based system of financial supervision and supervisory cooperation.[14] The financial services regulatory overhaul that followed, and, particularly, the creation of the European System of Financial Supervision ("ESFS")

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8. *See, e.g.,* Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Reformed Financial Sector for Europe, COM (2014) 279 final, at 4.

9. *See generally*, Eddy Wymeersch, *The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors*, 8 EUR. BUS. ORG. L. REV 237 (2007).

10. For example, the Lamfalussy Committees–which are explained in Section IV.B below–played a role in the promotion of supervisory cooperation and convergence in the European Union; however, they had limited powers and authority. *See* Eilis Ferran, *Understanding the New Institutional Architecture of EU Financial Market Supervision*, *in* Wymeersch, *supra* note 1, at 118.

11. *See, e.g.*, Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, recital 39, 2003 O.J. L 345/64; Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, art. 56, 2004 O.J. L 145/1.

12. *See, e.g.*, FRANKLIN ALLEN ET AL., CROSS-BORDER BANKING IN EUROPE: IMPLICATIONS FOR FINANCIAL STABILITY AND MACROECONOMIC POLICIES 5 (2011); Jianping Zhou, *Institutional Setup for the Single Market and Economic and Monetary Union, in* FROM FRAGMENTATION TO FINANCIAL INTEGRATION IN EUROPE 46 (Charles Enoch et al. eds., 2014).

13. *See, e.g.*, Huw Jones, *UK bank lobby urges better watchdog cooperation*, REUTERS (Sept. 28, 2007), https://uk.reuters.com/article/uk-britain-banks-regulator/mps-to-grill-uk-watchdog-over-scrapping-of-banking-culture-review-idUKKBN0UL0YS20160107 [https://perma.cc/22DQ-7V5P] (archived Mar. 5, 2018).

14. THE COMMITTEE OF WISE MEN, FINAL REPORT OF THE COMMITTEE OF WISE MEN ON THE REGULATION OF EUROPEAN SECURITIES MARKETS 69, 75 (2001).

and the Banking Union mechanisms did introduce major changes to the EU financial supervision architecture, including in matters pertaining to supervisory cooperation.[15] In this new architecture, there has been a transfer of supervisory responsibilities to the EU level; for instance, EU institutions–such as the European Central Bank ("ECB")–and bodies–such as the European Supervisory Authorities ("ESAs")–are entrusted with direct supervision of certain areas of the financial system,[16] and they also play a key role in the development of rules on supervisory cooperation, [17] the creation of a common supervisory culture,[18] and mediation between CSAs.[19]

However, at the same time, the reforms of the EU financial supervisory system have significantly increased the complexity of the supervisory patchwork, which is composed of a network of interconnected CSAs with different mandates and subject to various accountability structures, operating at both the Member State and EU levels and bound by a system of cooperation duties. This raises the question of the role and limitations of EU law in dealing with such complexity and guaranteeing an efficient supervisory cooperation framework where CSAs are willing and able to cooperate with each other. This Article analyzes the supervisory cooperation challenges brought about by the complex and multi-level nature of the post-crisis EU financial supervision architecture, and assesses whether these challenges can be and are effectively addressed by the EU legal and regulatory frameworks. In order to do so, the remainder of this Article proceeds as follows.

Part II offers a concept and taxonomy of supervisory cooperation that takes stock of the EU multi-level and transnational supervisory relationships; this is followed by an examination of the determinants of the incentives and ability of CSAs to cooperate in Part III. Part IV charts and assesses the evolution of the supervisory cooperation

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15. *See infra,* Part IV.

16. For an analysis of the use and implications of such direct supervisory powers *see, e.g.*, Elizabeth Howell, *The Evolution of ESMA and Direct Supervision: are there Implications for EU Supervisory Governance?,* 54 COMMON MKT. L. REV. 1027 (2017).

17. *See, e.g.*, Niamh Moloney, *Supervision in the Wake of the Financial Crisis*, *in* Wymeersch, *supra* note 1, at 101-02.

18. The ESAs play a key role in the promotion of supervisory convergence –for examples of actions in this area, *see, e.g.,* EUROPEAN SECURITIES AND MARKETS AUTHORITY, SUPERVISORY CONVERGENCE: WORK PROGRAMME 2016 (2016).

19. *See infra,* Part VI.

regime in the European Union, from the early days of the single market for financial services until the present; this Part explains the transformation of supervisory cooperation relationships resulting from the creation of the ESFS and the Banking Union. Part V examines the limits of and exceptions to supervisory cooperation duties embraced by the EU constitutional and legal frameworks and evaluates whether the process of EU financial integration and the increasing harmonization of financial rules have narrowed the discretion of CSAs from the Member States to withhold cooperation from other fellow CSAs. Part VI studies the main mechanisms offered by the post-crisis EU financial supervision architecture to address cooperation disputes between CSAs, their scope, applicability and potential impact on the incentives of CSAs to cooperate. Part VII considers the nature of the mandates of CSAs within the ESFS and the Banking Union and analyzes the potential tensions arising from the coexistence of transnational (EU-wide) and national (Member State) mandates of supervisory cooperation and of accountability relationships. Part VIII offers some insights with respect to the threats to EU financial integration and supervisory cooperation posed by Brexit and the prospect of a multi-speed EU. Part IX summarizes the main findings of this Article and concludes.

II. THE CONCEPT OF SUPERVISORY COOPERATION AND ITS APPLICATION TO EU FINANCIAL SUPERVISION: A WORKING DEFINITION AND TAXONOMY

Cooperation is a relationship in which one or more parties collaborate and/or assist each other in the performance of certain tasks.[20] In the field of financial supervision, cooperation refers, primarily, to the assistance provided among CSAs of the same or different jurisdictions, with respect to supervisory matters, namely licensing and authorization of financial entities, supervision *stricto sensu*, sanctioning, and crisis management.[21]

20. The Cambridge Dictionary defines cooperation as: "the act of working together with someone or doing what they ask you". *Cooperation*, CAMBRIDGE DICTIONARY (2d ed. 2007).

21. Rosa Lastra, *Financial Institutions and Accountability Mechanisms*, *in* BUILDING RESPONSIVE AND RESPONSIBLE FINANCIAL REGULATORS IN THE AFTERMATH OF THE GLOBAL FINANCIAL CRISIS 34 (Iglesias-Rodríguez ed., 2015). CSAs perform both regulatory and supervisory roles and, although cooperation may refer to any of these functions, this Article focuses on the supervisory dimension of cooperation.

The existence of and need for supervisory cooperation stems from two main factors. First, supervisory responsibilities are fragmented among CSAs along *inter alia* functional,[22] sectoral[23] and jurisdictional dimensions.[24] Second, the nature and implications of the activities of supervised financial entities often cut across one or more supervisory dimensions; as a result, those activities may be subject to oversight by various CSAs;[25] it follows that, when CSAs carry out supervisory functions, they may often need to cooperate with each other. A supervisory cooperation procedure involves two key actors, namely a requesting CSA and a requested CSA.[26] A requesting CSA will trigger a supervisory cooperation procedure when it needs cooperation by a requested CSA; this will normally relate to instances where, in order to exercise its supervisory functions, a requesting CSA must access information that can only be obtained through the

22 . For instance, in jurisdictions that follow the twin-peaks model of financial supervision, also known as supervision by objectives, different CSAs are in charge of different objectives of financial supervision; this normally results in a CSA being responsible for prudential supervision and another CSA carrying out conduct of business supervision, of all sectors and entities in a given jurisdiction. *See* Wymeersch, *supra* note 9, at 258; GROUP OF THIRTY, THE STRUCTURE OF FINANCIAL SUPERVISION: APPROACHES AND CHALLENGES IN A GLOBAL MARKETPLACE 13-14 (2008).

23. In the three-pillar/institutional model, the supervision –both prudential and conduct of business– of banking, insurance and securities entities is carried out by different CSAs. In this model, which is, for example, used in Spain, it is the activity and legal status of an entity that determines the CSA that will supervise it. *See* Wymeersch, *supra* note 9, at 250-51; and, Group of Thirty, *supra* note 22, at 24.

24. An example of a multi-level jurisdictional financial supervision architecture is the ESFS in the European Union, where supervisory tasks are shared among EU bodies –e.g. the ESAs– and CSAs from the Member States. *See generally*, Eddy Wymeersch, *The Institutional Reforms of the European Financial Supervisory System, an Interim Report* (Ghent Univ. Fin. Law Inst. Working Paper No. 2010-01, 2010).

25 . For example, ABN AMRO Bank N.V, a large Dutch banking institution, is supervised by two Dutch CSAs, i.e. the Dutch Central Bank (De Nederlandsche Bank) –the prudential supervisor–and the Netherlands Authority for the Financial Markets (Autoriteit Financiële Markten)–the conduct of business supervisor–, as well as by one EU level CSA, namely the ECB. *See Regulators*, ABN AMRO (Jan. 13, 2018, 9:19 PM), https://www.abnamro.com/en/about-abnamro/our-company/corporate-governance/regulators/index.html [https://perma.cc/K3PJ-4W5T] (archived Mar. 20, 2018).

26. This is the terminology used by, *inter alia,* the European Securities and Markets Authority Multilateral Memorandum of Understanding on Cooperation Arrangements and Exchange of Information (ESMA/2014/608), art. 1 [hereinafter ESMA MMoU], and the International Organization of Securities Commissions Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (2012), arts. 2-3 [hereinafter IOSCO MMoU].

intervention of a requested CSA.[27] In this respect, a request may pursue, either the performance of actions by a requested CSA, aimed at acquiring and/or transmitting the relevant information, or the granting of an authorization to a requesting CSA to directly perform those actions–on its own, or jointly with the requested CSA; for example, a requesting CSA may make a request targeted at either gaining access to the offices of a financial entity in the jurisdiction of a requested CSA, with the purpose of conducting a joint on-site inspection with the requested CSA, or, alternatively, it may request that a requested CSA carries out such an inspection on its behalf.[28] Whereas supervisory cooperation often involves an *ex-ante ad hoc* request of assistance by a CSA, it may also be provided spontaneously by another CSA; supervisory cooperation agreements do, indeed, tend to embrace and encourage unsolicited assistance among CSAs.[29]

National cooperation takes place between CSAs from the same jurisdiction; in the United Kingdom, two CSAs, namely the Prudential Regulation Authority ("PRA")–in charge of authorization and prudential supervision of financial firms–and the Financial Conduct Authority ("FCA")–entrusted with conduct of business supervision of financial firms–[30] have signed a Memorandum of Understanding ("MoU") that sets out mechanisms of cooperation, for example, through the exchange of information between both CSAs.[31] Likewise, CSAs engage in forms of multijurisdictional cooperation at the international level. International cooperation is particularly relevant in relation to the supervision of entities operating on a cross-border basis–for example, incorporated in a Member State but with branches and/or subsidiaries in other Member States or outside the

27. For instance, a requested CSA may hold records of transactions executed in its jurisdiction by a financial entity that is being investigated by the requesting CSA.

28. *See, e.g.*, ESMA MMoU, *supra* note 26, art. 6.

29. For example, the IOSCO MMoU stipulates that: "Each Authority will make all reasonable efforts to provide, without prior request, the other Authorities with any information that it considers is likely to be of assistance to those other Authorities in securing compliance with Laws and Regulations applicable in their jurisdiction." IOSCO MMoU, *supra* note 26, art. 13.

30. For a critical analysis of the creation and rationale of the PRA and the FCA, see Eilis Ferran, *The Break-up of the Financial Services Authority,* 31 OXFORD J. LEGAL STUD. 455 (2011).

31. Memorandum of Understanding Between the Financial Conduct Authority and the Bank of England, Including the Prudential Regulation Authority (Apr. 2013).

European Union.[32] In the European Union, there is a coexistence of forms of national cooperation, i.e. between the CSAs of each Member State, or between EU level CSAs,[33] and of supranational cooperation, i.e. between the EU CSAs and the Member State CSAs.

Without adequate cooperation arrangements and procedures in place, CSAs may be unable to properly monitor and discipline firms under their supervisory remit; this may, in turn, result in costs being borne by investors and consumers of financial services.[34] As regards systemic considerations, the global financial crisis evidenced that lack of or insufficient cooperation in prevention as well as resolution stages may also hinder the stability of the financial system.[35] An efficient supervisory cooperation framework is therefore essential for the accomplishment of key targets of financial supervision, such as the sound functioning of the financial markets, the protection of consumers of financial services and, ultimately, financial stability.[36] In the European Union, supervisory cooperation has been acknowledged as a condition of financial integration;[37] consequently, as the process of construction of the EU single market for financial services advanced, policy-makers have been devoting greater degrees of attention to how to enhance cooperation between CSAs within the European Union.[38]

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32. Efficient supervisory cooperation has, indeed, been identified as a critical factor for the smooth operation of the EU single passport for financial services. *See, e.g*., Committee of European Securities Regulators, Protocol on the Supervision of Branches under MiFID (CESR/07-672b), at 2.

33. Such as the ESAs.

34. The inadequate cooperation between the Financial Services Authority (FSA) –a former CSA in the UK–and the Bank of England with respect to Northern Rock –a banking institution–, contributed to the latter's collapse. *See, e.g.*, House of Commons Treasury Committee (UK), The Run on the Rock, 5th Report of Session 2007-08, HC 56-I (2008), at 156-60; Dirk Schoenmaker, *Financial Supervision in the EU, in* HANDBOOK OF SAFEGUARDING GLOBAL FINANCIAL STABILITY: POLITICAL, SOCIAL, CULTURAL, AND ECONOMIC THEORIES AND MODELS 363 (Gerard Caprio ed., 2012).

35. An example was the insufficient cooperation between CSAs from Belgium, Luxembourg and the Netherlands with respect to Fortis' liquidity crisis in the year 2008. *See, e.g.*, DIRK SCHOENMAKER, GOVERNANCE OF INTERNATIONAL BANKING: THE FINANCIAL TRILEMMA 79-81 (2013).

36. *See, e.g.*, TECHNICAL COMMITTEE OF THE INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, PRINCIPLES REGARDING CROSS-BORDER SUPERVISORY COOPERATION: FINAL REPORT 7-9 (2010)

37. *See, e.g.,* Green Paper, *supra* note 4, at 10.

38. For example, the Report of the High-Level Group on Financial Supervision in the EU (the de Larosiére Report), published in the year 2009 as a response to the global financial

Depending on the hierarchy of the CSAs involved in a given supervisory cooperation procedure, it is possible to define instances of horizontal or vertical cooperation. Horizontal cooperation refers to cooperation between CSAs from the same or different jurisdictions, operating at the same hierarchical level, or with different hierarchical standing, but with respect to matters in which they have equal authority or in relation to which supervisory authority is allocated symmetrically; an example of this type of cooperation would be that between a prudential CSA and a conduct of business CSA of the same jurisdiction in relation to the activities of a financial entity under the supervisory umbrella of both supervisors ; in the Netherlands , the Autoriteit Financiële Markten ("AFM") and De Nederlandsche Bank ("DNB")–respectively entrusted with conduct of business supervision and prudential supervision of both financial institutions and pension providers–articulate their cooperation through agreements that embrace, *inter alia,* the exchange of information and supervisory dialogues between both CSAs.[39] Vertical cooperation involves CSAs from the same or different jurisdictions, operating at different hierarchical levels or with the same hierarchical standing but with respect to matters in which they have uneven authority; an example of such a vertical cooperation relationship would be a supranational CSA with exclusive competence on a given supervisory matter that requests information to a national CSA–bound by cooperation duties towards the supranational CSA–in relation to such matter; for instance, in the Single Supervisory Mechanism ("SSM") of the Banking Union, the ECB is entrusted with the direct prudential supervision of significant credit institutions in the Member States that participate in the SSM,[40] and the CSAs from those Member States are

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crisis, proposed several measures aimed at improving supervisory cooperation in the European Union; the de Larosiére Report will be further explained in Section IV.C below. THE HIGH-LEVEL GROUP ON FINANCIAL SUPERVISION IN THE EU, REPORT (2009), http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf [https://perma.cc/J23R-MXBN] (archived Mar. 5, 2018) [hereinafter de Larosiére Report].

39. *See, e.g.*, DNB, Covenant between Stichting Autoriteit Financiële Markten and De Nederlandsche Bank N.V., https://www.dnb.nl/binaries/Convenant%20AFM%20en%20DNB%20%20Wta%20Wft%20Pw%20en%20Wvb_tcm46-156471.pdf [https://perma.cc/246X-UCXK] (last visited Mar. 5, 2018).

40. Council Regulation (EU) No. 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, art. 4.1, 2013 O.J. L 287/63 [hereinafter SSM Regulation].

bound by cooperation duties vis-à-vis the ECB in relation to the latter's exercise of such a direct competence.[41]

Cooperation may be requested and provided on the basis of informal or formal mechanisms. The former include forms of cooperation that do not abide by a particular set of pre-determined rules; an example is an informal conversation between the heads of two CSAs where they exchange views and/or information about a given financial entity or supervisory process.[42] Formal mechanisms comprise instruments of cooperation that follow pre-determined *ad hoc* rules–binding or otherwise–applicable to a supervisory cooperation relationship. Among the formal mechanisms, there is a distinction between binding and non-binding mechanisms. Whereas supervisory cooperation has traditionally been and still is largely articulated through non-binding instruments, such as MoUs,[43] financial regulatory frameworks tend to acknowledge cooperation duties that require CSAs to assist each other.[44] As will be shown throughout this Article, in the European Union, the post-crisis overhaul has strengthened the binding dimension of supervisory cooperation through, among others, the expansion of supervisory cooperation duties to which CSAs are subject.

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41. SSM Regulation, *supra* note 40, art. 6.2. On the issue of competence sharing between the ECB and CSAs in the SSM, *see* Christos Gortsos, *Competence Sharing Between the ECB and the National Competent Supervisory Authorities Within the Single Supervisory Mechanism (SSM)*, 16 EUR. BUS. ORG. L. REV. 401 (2015).

42. Informal mechanisms of supervisory cooperation, such as exchanges of letters between CSAs, played an important role in the early stages of development of the EU single market for financial services. *See, e.g.*, Susanne Bergsträsser, *Cooperation between Supervisors*, *in* EUROPEAN SECURITIES MARKETS: THE INVESTMENT SERVICES DIRECTIVE AND BEYOND 380 (Guido Ferrarini ed.,1998).

43. MoUs are written, non-binding, bilateral or multilateral agreements that set rules regarding exchange of information and cooperation between CSAs of the same or different jurisdictions; the IOSCO has developed various standards regarding the content of MoUs –*see* TECHNICAL COMMITTEE OF THE INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, PRINCIPLES FOR MEMORANDA OF UNDERSTANDING (1991).

44. *See, e.g.*, Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/77/EC, art. 2.3, 2010 O.J. L 331/84.

III. THE DETERMINANTS OF SUPERVISORY COOPERATION: THE INCENTIVES AND ABILITY OF CSAS TO COOPERATE

Despite the key instrumental role of supervisory cooperation for the good functioning of financial markets and in advancing financial integration, CSAs is the European Union have often failed to efficiently cooperate with each other. In the opinion of the High-Level Group on Financial Supervision in the European Union, the pre-global financial crisis supervisory setting was characterized by a "Lack of frankness and cooperation between supervisors"[45] that had detrimental effects on the quality and promptness of the responses to the financial meltdown: "As the crisis developed, in too many instances supervisors in Member States were not prepared to discuss with appropriate frankness and at an early stage the vulnerabilities of financial institutions which they supervised. Information flow among supervisors was far from being optimal, especially in the build-up phase of the crisis. This has led to an erosion of mutual confidence among supervisors."[46]

Suboptimal supervisory cooperation may adopt three main forms. The first is lack of cooperation; this may happen, for instance, when a CSA plainly rejects a request of cooperation. The second form of suboptimal cooperation consists of incomplete cooperation, an example being the provision of partial or insufficient information to a fellow CSA. Third, there are instances of delayed cooperation.[47] Understanding the reasons why CSAs may engage in forms of suboptimal cooperation is essential to assess whether and how EU law adequately addresses this problem. Suboptimal levels of supervisory cooperation can be traced to two core general causes, namely lack of willingness and lack of ability of CSAs to cooperate.

On the one side, a CSA–e.g. a requested CSA from a Member State– may lack willingness to cooperate, notably when the perceived costs of cooperating with another CSA–e.g. a requesting CSA from

45. De Larosiére Report, *supra* note 38, at 41.

46. *Id*.

47. With regard to supervision of banking institutions, see Katia D'Hulster, *Cross Border Banking Supervision Incentive Conflicts in Supervisory Information Sharing between Home and Host Supervisors*, 12 (World Bank Policy Research Working Paper No. 5871, 2011) ("At an institutional level, the home supervisor may not report, or may misreport or delay reporting supervisory information to the host supervisor, resulting in issues with regard to timeliness and relevance of information shared in a college.").

another Member State– are higher than the benefits. The provision of supervisory cooperation may, in the first place, result in costs for supervised entities, financial markets and the financial system in the jurisdiction of the CSA providing cooperation; for example, the delivery of information about a supervised entity by a requested CSA –e.g. a host supervisor–may lead to sanctions being imposed on such entity by the requesting CSA–e.g. the home supervisor. In a supervisory cooperation relationship the incentives of CSAs may be misaligned, notably, when the economic and systemic relevance of a supervised entity is different in the jurisdictions of the requested CSA and of the requesting CSA, and, consequently, the actions resulting from the provision of cooperation, such as the imposition of sanctions to the supervised entity, have an asymmetrical impact in those jurisdictions; for instance, in the early stages of the global financial crisis, CSAs from various Member States adopted protectionist supervisory approaches characterized by lack of cooperation in crisis management, as well as ring-fencing practices aimed at prioritizing the interests of their own financial institutions.[48] Henceforth, the significance of a supervised entity in relation to which supervisory cooperation is sought, as well as the potential impact of the provision of such cooperation in the financial system under the supervisory remit of a requested CSA, are key factors that will determine the latter's incentives to cooperate.[49] In addition, supervisory cooperation is an intrinsically costly activity that requires the mobilization of time and other resources, whose cost will also be considered by a CSA when assessing the value of cooperation in a particular supervisory

48. Nicolas Véron, *Banking Nationalism and the European Crisis*: *Oral remarks prepared for a speech on the changing European financial system, given in Istanbul on 27 June 2013 at a symposium of the European Private Equity and Venture Capital Association (EVCA)* (Oct. 19, 2013), http://bruegel.org/2013/10/banking-nationalism-and-the-european-crisis/ [https://perma.cc/9VBC-J4TU] (archived Mar. 5, 2018); Dirk Schoenmaker, *Banking supervision and Resolution: The European Dimension*, 6 L. & FIN. MKT. REV. 52, 53 (2012). On the misalignment of incentives between home and host supervisors, *see generally,* Katharina Pistor, *Host's Dilemma: Rethinking EU Banking Regulation in Light of the Global Crisis* (European Corporate Governance Institute (ECGI) Finance Working Paper No. 286, 2010), http://www.ecgi.global/sites/default/files/working_papers/documents/SSRN-id1631940.pdf [https://perma.cc/AR5G-N7W3] (archived Mar. 5, 2018).

49. D'Hulster, *supra* note 47 (offering a detailed account of the impact of the economic and systemic significance of supervised banking entities on the incentives of home and host supervisors to cooperate).

context.[50] However, lack of cooperation may also have negative effects for a CSA withholding it. Notably, it may hinder supervisory relationships with the CSA requesting or expecting cooperation. This may, in turn, result in future costs for an uncooperative CSA–for example if a CSA that has been denied cooperation behaves reciprocally and refuses to provide cooperation in the future. Likewise, a non-cooperative CSA may be subject to various forms of accountability when, by not cooperating, it is deemed as having acted against its duties and mandates.[51]

On the other side, a CSA may face scenarios where it may be willing to cooperate but is not able to do so. There may be two primary reasons for this. The first is the presence of resource constrains that hinder the ability of a CSA to meaningfully cooperate, if at all.[52] The second relates to legal and regulatory constrains that may preclude a CSA from offering cooperation. Legal and regulatory constraints may fall within three main categories. First, rules regarding supervisory cooperation may be absent or incomplete; this would include cases in which the rules concerning the procedure for supervisory cooperation are too vague and do not offer a precise answer on how cooperation is to be organized in a particular supervisory setting. Second, the legal framework in which a CSA operates may embrace exceptions to the duty to cooperate that allow and/or require a CSA to withhold cooperation in certain instances.[53] Third, there may be cases in which there is a conflict between the mandate of a CSA and compliance of the latter with a given request of cooperation.[54]

The EU regime of supervisory cooperation in the financial field has experienced major transformations throughout the various stages of development of the EU single market for financial services. The successive reforms of such a regime have aimed at, *inter alia*, fostering the incentives and ability of CSAs to cooperate as well as financial integration. The next Part examines the evolution of the EU

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50. *See, e.g.*, Richard J. Herring, *Conflicts between Home & Host Country Prudential Supervisors*, *in* INTERNATIONAL FINANCIAL INSTABILITY: GLOBAL BANKING AND NATIONAL REGULATION 212 (Douglas D. Evanoff et al. eds., 2007).

51. *But see* D'Hulster, *supra* note 47, at 6 (noting that the accountability of CSAs for lack of cooperation with foreign counterparts is very limited).

52. *See, e.g.*, Herring, *supra* note 50, at 212.

53. *See infra,* Part V.

54. *See infra,* Part VII.

regime on supervisory cooperation from the early days to the present; it also addresses the reforms encompassed by the European System of Financial Supervision and the Banking Union, which have radically transformed the supervisory cooperation architecture in the European Union.

IV. EU FINANCIAL SUPERVISORY COOPERATION IN PERSPECTIVE: FROM THE EARLY BEGINNINGS TO THE POST-GLOBAL FINANCIAL CRISIS REGULATORY OVERHAUL

The evolution of the system of financial supervisory cooperation in the European Union is linked to developments in EU financial regulation as well as in the institutional architecture of EU financial services supervision. This Part distinguishes three main periods of development of the EU regime of financial supervisory cooperation, and analyzes the nature and instruments of supervisory cooperation in each of them. It also assesses whether and the extent to which different forms of cooperation address the challenges relating to the ability and willingness of CSAs from different Member States to assist each other.

A. EU Financial Supervisory Cooperation in the Early Days

In the initial stages of construction of the EU single market for financial services, which can be traced to the Treaty of Rome and which received additional momentum in the year 1986 with the adoption of the Single European Act,[55] cooperation was primarily horizontal. This was, to a great extent, due to the decentralized nature of the EU financial regulatory and supervisory architecture, which was largely built through directives and based on the principles of

55. The Treaty of Rome embraced the notions of free movement of capital and services as well as freedom of establishment; the Single European Act instituted a series of changes aimed at, among others, completing the internal market. For an overview of the process of creation of an internal market for financial services, *see* Sydney J. Key, *Financial Integration in the European Community*, 5, 11-12 (Board of Governors of the Federal Reserve System International Finance Discussion Paper No. 349, 1989); *see also* Caroline Bradley, *1992: The Case of Financial Services,* 12 NW. J. INT'L L. & BUS. 124, 141 (1991); Manning Gilbert Warren III, *The European Union's Investment Services Directive*, 15 U. PA. J. INT'L L. 181, 182 (1994).

minimum harmonization[56] and mutual recognition as well as a combination of home country control and host country supervision.[57] In such framework, there was an exclusive delegation of regulatory and supervisory functions in the financial services field to CSAs of the Member States, with no EU level independent authorities performing or even coordinating those functions.

Second, cooperation was essentially two-sided and based on separate bilateral agreements subscribed between CSAs of the different Member States. This system somehow filled the lack of EU level *ad hoc* formal instruments embracing and providing a common multilateral framework for assistance among CSAs. As a consequence, the system of cooperation was fragmented and asymmetrical, largely dependent on the specific–non-harmonized–content of bilateral agreements.[58]

Third, cooperation was rather informal. This does not mean that it was voluntary. On the contrary, EU laws in the financial realm have, long since, recognized the binding character of cooperation among CSAs.[59] However, those very same laws provided neither an institutional framework nor precise substantive and procedural rules on whose basis a system of mutual assistance among CSAs could be built. EU Member States opted for implementing a system of cooperation based on instruments that gave them substantial

56. Under the minimum harmonization approach, EU financial laws provided core common standards, giving, at the same time, room for some regulatory competition among the EU Member States. *See* EILIS FERRAN, BUILDING AN EU SECURITIES MARKET 54 (2004).

57. *See* Commission, Completing the Internal Market: White Paper from the Commission to the European Council, COM (85) 310 final, at 27-28 (June 1985); TOBIAS C. HOSCHKA, CROSS-BORDER ENTRY IN EUROPEAN RETAIL FINANCIAL SERVICES 42-43 (1993). Under this system, firms were authorized and subject to prudential regulation and supervision by CSAs in their home Member State, and entitled to offer services in other (host) Member States, which carried out ancillary regulation and supervision. *See* E. Waide Warner, *"Mutual Recognition" and Crossborder Financial Services in the European Community*, 55 L. & CONTEMP. PROBS. 7, 8 (1992).

58. *See id.* For examples of these types of agreements see, for instance, the list of bilateral cooperation agreements between the Spanish securities supervisor (the Comisión Nacional del Mercado de Valores ("CNMV")) and other Member State CSAs, *see (MOUs) International Agreements*, https://www.cnmv.es/portal/legislacion/MOUS.aspx [https://perma.cc/Y5PT-9XF2] (last visited Mar. 5, 2018).

59. *See, e.g.,* Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, art. 10, 1989 O.J. L 334/30 (stipulating that: "the competent authorities in the Member States shall cooperate with each other whenever necessary for the purpose of carrying out their duties…").

flexibility and discretion; two of such instruments were particularly salient: informal exchanges and Memoranda of Understanding ("MoUs").

Informal exchanges of information constitute the most basic and earliest form of cooperation among CSAs, and their use preceded the first directives in the field of financial services.[60] In addition, this mechanism was pre-eminent and, to a large degree, exclusive, before cooperation was institutionalized through *ad hoc* formal instruments. In practice, informal exchanges take place through meetings and conversations among heads or senior staff of CSAs. They may also adopt the form of goodwill sharing of documents. Informal exchanges are not bound by given procedural rules specifying whether and how information is to be disclosed and exchanged.[61]

MoUs are formal but non-binding agreements aimed at providing a general framework for cooperation between the signatory CSAs. MoUs address aspects such as the scope of assistance and the procedures applicable to a request of cooperation, as well as the modes in which such cooperation is to be provided by the requested CSA or the uses that the requesting CSA can make of the information received. MoUs were the first instruments to set up common substantive and procedural norms of supervisory cooperation. In the early stages of the EU internal market for financial services MoUs were bilateral.

In this period, financial firms and actors tended to operate, primarily, on a national basis and their cross-border activities were rather limited. This was, in part, due to the presence of barriers for cross-border financial activities and capital flows.[62] Whereas the Single European Act and the resulting legislative measures in the financial sector, such as the Capital Liberalization Directive,[63] the

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60. References to this early form of cooperation are provided by Jean-Luc Lépine, *A Response to Fedders "Waiver by Conduct",* 6 J. COMP. BUS. & CAP. MKT. L. 319 (1984).

61. They are, however, subject to compliance with the legal and regulatory frameworks in the jurisdictions of the CSAs involved.

62. *See* Jean Dermine, *European Banking Integration, Ten Years After*, 6-7 (Insead Working Paper No. 95/92/FIN, 1995).

63. Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, 1988 O.J. L 178/5.

Second Banking Directive[64] or the Investment Services Directive,[65] all helped to remove some of the obstacles to cross-border financial activities–notably, the introduction of a system of single passports enabled financial market actors to move across jurisdictions more easily–,[66] several barriers to cross-border capital flows persisted in the European Union.[67] These barriers were detrimental to the creation of a strong cooperation culture among CSAs. In addition, the very nature of the main instruments of cooperation also posed some barriers to effective cooperation; in this respect, both MoUs and informal exchanges of information were not binding and, hence, they did not impose formal obligations on CSAs. Moreover, as will be explained in Part V, relevant EU legislation and MoUs executed between CSAs, incorporated a series of waivers from the duty to cooperate that allowed CSAs to withhold cooperation under certain conditions. Lastly, the lack of common substantive and procedural EU rules addressing cooperation arrangements led to a very fragmented system[68] with high degrees of uncertainty as regards the rights and duties of CSAs in cooperation relationships.

B. The Lamfalussy Architecture: Towards the Europeanization of Financial Supervisory Cooperation

In the late 1990s CSAs of the Member States adopted various institutional initiatives that led to a strengthening of the framework of supervisory cooperation in the European Union. A major development in this respect was the creation of the Forum of European Securities Commissions ("FESCO") by securities

64. Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, 1989 O.J. L 386/1.

65. Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, 1993 O.J. L 141/27.

66. The single passport essentially meant that a financial entity authorized to operate in a Member State was allowed to offer its services in other Member States without being subject to additional authorization requirements in the latter. *See* Innes Fraser & Paul Monimer-Lee, *The EC Single Market in Financial Services*, 3 BANK ENG. Q. BULL. 92 (1993).

67. *See* Emiliano Grossman & Patrick Leblond, *Financial Regulation in Europe: From the Battle of the Systems to a Jacobinist EU*, *in* CONSTRUCTING A POLICY-MAKING STATE?: POLICY DYNAMICS IN THE EU 197 (Jeremy Richardson ed., 2012).

68. Commission, Communication on Financial Services: Implementing the framework for financial markets: Action Plan, COM (1999) 232, at 13-14 [hereinafter Financial Services Action Plan ("FSAP")].

supervisors of the Member States, Norway and Iceland in 1997.[69] Unlike insurance and banking supervisors, which had, long since, had their own EU supervisory cooperation fora, namely, the Conference of Supervisory Authorities of the Member States of the European Union and the Groupe de Contact, respectively,[70] this was not the case in the securities field. FESCO filled this important gap by offering a space of debate and exchange of ideas among CSAs in charge of securities supervision.[71] Another critical development was the creation and adoption of the first formal, albeit non-binding, multilateral instruments of supervisory cooperation within the European Union. Notably, in the year 1997, the Conference of Supervisory Authorities published the "Siena Protocol"[72] and, two years later, FESCO adopted the *Multilateral Memorandum of Understanding on the Exchange of Information and Surveillance of Securities Activities* ("FESCO MoU").[73] These instruments provided, for the first time, common rules applicable to supervisory exchanges in the European Union; in doing so, they contributed, substantially, to the process of convergence in areas pertaining to supervisory cooperation.[74]

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69. *See* Susanne Bergsträsser, *Regulatory Implications of an Exchange Merger*, *in* CAPITAL MARKETS IN THE AGE OF THE EURO: CROSS-BORDER TRANSACTIONS, LISTED COMPANIES AND REGULATION 294 (Guido Ferrarini et al. eds., 2002).

70. The Conference of Insurance Supervisors was originally set up in the year 1958; it was composed of insurance CSAs from 15 EU Member States and three European Economic Area ("EEA") countries. The Groupe de Contact was established in the year 1972 by banking CSAs from EEA countries. *See* Karel Lannoo, *Supervising the European Financial System,* 17, 19 (Centre for European Policy Studies Policy Brief No. 21, 2002).

71. *Id.* at 9.

72. Protocol relating to the collaboration of the supervisory authorities of the Member States of the European Community in particular in the application of the Directives on life assurance and non-life insurance (DT/F/182/97). The Siena Protocol is a multilateral agreement of cooperation which addresses, *inter alia*, the responsibilities of home and host CSAs in supervisory processes. *See* Nina Moss, *The International Network of Financial Authorities*, *in* HANDBOOK OF CENTRAL BANKING AND FINANCIAL AUTHORITIES IN EUROPE: NEW ARCHITECTURES IN THE SUPERVISION OF FINANCIAL MARKETS 388 (Donato Masciandaro ed., 2005).

73. The FESCO MoU was adopted on January 26, 1999 and its aim was: "to establish a general framework for cooperation and consultation between the Authorities referred to hereinafter, in order to facilitate the fulfilling of their supervisory responsibilities." Multilateral Memorandum of Understanding on the Exchange of Information and Surveillance of Securities Activities (Jan. 26, 1999), art. 1 [hereinafter FESCO MoU].

74. *See* Ferran, *supra* note 56, at 47.

The Member State-nature of the first EU-wide supervisory cooperation arrangements was, to a great extent, the result of the reluctance of the Commission to develop EU level supervisory structures and mechanisms. For instance, in its Communication: *Financial Services: Building a framework for action*, while highlighting the importance of encouraging a closer coordination between CSAs [75] the Commission argued that: "structured co-operation between national supervisory bodies–rather than the creation of new EU level arrangements–can be sufficient to ensure financial stability".[76] Whereas the Commission's Financial Services Action Plan ("FSAP"), published in the year 1999,[77] acknowledged the feasibility of future proposals for an EU single securities supervisor, [78] it nevertheless advocated for the development of supervisory arrangements based on the existing multilateral Member State-driven structures,[79] rather than the creation of EU level ones. The idea of institutionalizing supervisory cooperation arrangements within *ad hoc* EU level structures was first proposed by the *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets* ("Lamfalussy Report"), published in the year 2001.[80] In this respect, the Lamfalussy Report proposed the creation of an EU Securities Regulators Committee ("ESRC"), which would take over the functions of FESCO but with an official EU status–as an advisory body to the Commission–and a broader mandate.[81] This recommendation materialized in the creation of the Committee of European Securities Regulators ("CESR") by the Commission in the

75. Commission, Communication on Financial Services: Building a framework for action, COM (1998) 625 final, at 5.

76. *Id*. at 2.

77. *See* FSAP, *supra* note 68.

78. *Id*. at 14.

79. Such as the Groupe de Contact, the Conference of Insurance Supervisors and FESCO. *Id*.

80. THE COMMITTEE OF WISE MEN, FINAL REPORT OF THE COMMITTEE OF WISE MEN ON THE REGULATION OF EUROPEAN SECURITIES MARKETS (Feb. 15, 2001) [hereinafter Lamfalussy Report]. Such a report was preceded by an initial report by the same group. *See* THE COMMITTEE OF WISE MEN, INITIAL REPORT OF THE COMMITTEE OF WISE MEN ON THE REGULATION OF EUROPEAN SECURITIES MARKETS (Nov. 9, 2000) [hereinafter Initial Lamfalussy Report]. The Lamfalussy Group operated under a mandate from the ECOFIN. *See id.* at 1, 70.

81. Lamfalussy Report, *supra* note 80, at 33-38.

year 2001.[82] This was followed by the establishment of its counterparts in the banking and insurance fields, namely the Committee of European Banking Supervisors ("CEBS") and the Committee of European Insurance and Occupational Pensions Supervisors ("CEIOPS"), respectively, in the year 2003.[83] The mandate of the Lamfalussy Committees was twofold. First, they were entrusted with the promotion of regulatory and supervisory consistency and convergence in the field of financial services in the European Union;[84] their tasks in this area included advising the Commission on policy issues as well as implementing measures, issuing non-binding guidelines, standards and recommendations targeted at furthering the uniform implementation and consistent application of EU financial laws by the Member States, and developing mechanisms aimed at fostering a consistent supervision and enforcement across the European Union.[85] Another core function of the Lamfalussy Committees was to enhance supervisory cooperation among CSAs;[86] their work in this field was extensive and included the development of guidelines on supervisory cooperation,[87] the creation of multilateral instruments of cooperation, such as

82. Commission Decision 2001/527/EC of 6 June 2001 establishing the Committee of European Securities Regulators, 2001 O.J. L 191/45.

83. Commission Decision 2004/5/EC of 5 November 2003 establishing the Committee of European Banking Supervisors, 2004 O.J. L 3/28; Commission Decision 2004/6/EC of 5 November 2003 establishing the Committee of European Insurance and Occupational Pensions Supervisors, 2004 O.J. L 3/30. The CESR, CEBS and CEIOPS will be collectively referred to as "Lamfalussy Committees".

84. *See, e.g.*, CESR, Charter of the Committee of European Securities Regulators (CESR/08-375d), art. 4 [hereinafter Charter of the CESR]; Commission Decision 2004/5/EC, *supra* note 83, art. 2.

85. Commission Decision 2001/527/EC, *supra* note 82, art. 2; Commission Decision 2004/5/EC, *supra* note 83, art. 2; Commission Decision 2004/6/EC, *supra* note 83, art. 2; Charter of the CESR, *supra* note 84, art. 4; CEBS, Charter of the Committee of European Banking Supervisors, art. 4 [hereinafter Charter of the CEBS]; and CEIOPS, Charter of the Committee of European Insurance and Occupational Pensions Supervisors, art. 4 [hereinafter Charter of the CEIOPS].

86. *See, e.g*, Commission Decision 2004/5/EC, *supra* note 83, art. 2; Commission Decision 2004/6/EC, *supra* note 83; Charter of the CESR, *supra* note 84, art. 4.4; Charter of the CEBS, *supra* note 85.

87. *See, e.g.*, CEBS, Guidelines for Co-operation Between Consolidating Supervisors and Host Supervisors (2006), https://www.eba.europa.eu/documents/10180/16094/GL09.pdf [https://perma.cc/WDJ9-BCGN] (archived Mar. 8, 2018).

MoUs,[88] as well as the operation of mechanisms of mediation between CSAs;[89] the latter gave the Lamfalussy Committees an important, albeit non-binding,[90] mediation role in the solution of supervisory cooperation disputes between CSAs. The Lamfalussy Committees also took a close interest in and encouraged the work of colleges of supervisors[91]–which CSAs had been establishing since the early 2000s–,[92] for example by developing common principles applicable to supervision within supervisory colleges, including in matters pertaining to supervisory cooperation.[93]

Whereas the supervisory architecture embraced by the Lamfalussy Committees did not entail a transfer of powers from the Member State level to the EU level,[94] it did however result in a greater centralization of (quasi) supervisory functions in the latter. Particularly, the Commission's recast of the decisions setting the CESR, the CEBS and the CEIOPS in the year 2009, broadened their remit so as to "strengthen their contributions to supervisory cooperation and convergence".[95] Cooperation largely remained,

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88. *See, e.g.*, CESR, Multilateral Memorandum of Understanding on the Exchange of Information and Surveillance of Securities Activities (CESR/05-335) [hereinafter CESR MoU].

89. *See, e.g.*, CEIOPS, Protocol on Mediation Mechanism between Insurance and Pensions Supervisors (2007).

90. *See, e.g.*, CEBS, Protocol of the CEBS Mediation Mechanism (2007), art. 5 ("Mediation outcomes shall not have any legal effect, be legally binding or be enforceable."), https://www.eba.europa.eu/documents/10180/16094/ProtocolonMediation20070925.pdf [https://perma.cc/V9HD-DMN2] (last visited Mar. 8, 2018).

91. These are collegiate structures carrying out supervision of specific market actors – such as banks–that operate on a cross-border basis; supervisory colleges are made of CSAs from the jurisdictions responsible for and participating in the supervision of those cross-border entities. *See* BASEL COMMITTEE ON BANKING SUPERVISION, PRINCIPLES FOR EFFECTIVE SUPERVISORY COLLEGES 1 (2014), https://www.bis.org/publ/bcbs287.pdf [https://perma.cc/5BMQ-5ANR] (archived Mar. 8, 2018).

92. *See, e.g.,* Memorandum of Understanding on the Coordination, Supervision and Oversight of the Euronext Group (Mar. 2001) (Signing parties included the Authority for the Financial Markets (the Netherlands), the Autorité des Marchés Financiers (France), the Banking Finance and Insurance Commission (Belgium), and the Comissão do Mercado de Valores Mobiliarios (Portugal)).

93. *See, e.g.*, CEBS and CEIOPS, Colleges of Supervisors – 10 Common Principles (CEIOPS-SEC-54/08), (CEBS 2008 124), IWCFC 08 32 (2009).

94. Rosa Lastra, *The Governance Structure for Financial Regulation and Supervision in Europe*, 10 COLUM. J. EUR. L. 49, 59 (2003).

95. *See* Commission Decision 2009/77/EC of 23 January 2009 establishing the Committee of European Securities Regulators, recital 6, 2009 O.J. L 25/18; Commission Decision 2009/78/EC of 23 January 2009 establishing the Committee of European Banking

nonetheless, a Member State matter, but with the European Union taking a much more active and formal role in the coordination of assistance among CSAs.

The FSAP proposed a series of legislative measures that–jointly with the introduction of the Euro–boosted the process of financial integration and cross-border flows in the European Union,[96] creating deeper interconnectedness between the financial systems of the Member States and increasing the need for supervisory cooperation among CSAs.[97] Despite this, such cooperation faced important barriers. The financial supervisory patchwork in the European Union was highly fragmented among CSAs with very different mandates, objectives and powers.[98] In addition, as referred above, the EU level supervisory arrangements encompassed by the Lamfalussy architecture were limited in scope and non-binding.

C. The Global Financial Crisis of 2008 and the Transformation of the EU Financial Supervisory Cooperation Architecture

The global financial crisis exposed important flaws of the pre-crisis financial architecture in the European Union, and the limitations of a nationally-based supervisory system; these were acknowledged by the Commission in its *Communication on European Financial Supervision* published in the early stages of the financial crisis: "Current supervisory arrangements proved incapable of preventing, managing and resolving the crisis. Nationally based supervisory models have lagged behind the integrated and interconnected reality of today's European financial markets, in which many financial firms operate across borders. The crisis exposed serious failings in the cooperation, coordination, consistency and trust between national supervisors."[99] The roots of the reform leading to the post-crisis EU

Supervisors, recital 6, 2009 O.J. L 25/23; Commission Decision 2009/79/EC of 23 January 2009 establishing the Committee of European Insurance and Occupational Pensions Supervisors, recital 6, 2009 O.J. L 25/28.

96. Elias Papaioannou, Sebnem Kalemli-Ozcan & Jose-Luis Peydró, *What is it good for? Absolutely for financial integration*, VOX (June 20, 2009), http://voxeu.org/article/euro-s-financial-integration-europe [https://perma.cc/YMQ3-DYQR] (archived Mar. 8, 2018).

97. CESR, Which Supervisory Tools for the EU Securities Markets? Preliminary Progress Report (04-333f), at 8 [hereinafter Himalaya Report].

98. Lamfalussy Report, *supra* note 80, at 15-16; Himalaya Report, *supra* note 97, at 18.

99. Commission, Communication from the Commission: European Financial Supervision, COM (2009) 252 final, at 2.

financial supervision architecture can be traced to the *Report of the High-Level Group on Financial Supervision in the EU* ("de Larosiére Report"), published in the year 2009.[100] The High-Level Group was set up in the year 2008 by the Commission, which entrusted it with the formulation of recommendations about supervisory arrangements aimed at increasing the efficiency, integration and sustainability of financial supervision in the European Union.[101] According to the de Larosiére Report, the weaknesses of the EU pre-crisis system of financial supervision[102] sourced from, *inter alia*, the lack of an EU macro-prudential supervisor,[103] the flaws and inefficiencies of the cooperation arrangements between CSAs at the Member State level,[104] as well as the limited resources and powers of the Lamfalussy Committees.[105] The de Larosiére High-Level Group made proposals for the creation of a decentralized, but integrated and coordinated structure of financial supervision that would comprise new EU level macro and micro-prudential financial supervisors as well as the CSAs of the Member States.[106] These proposals were supported by the Commission, the Parliament and the Council and resulted in the creation of a European System of Financial Supervision ("ESFS") in the year 2010.[107] The ESFS is a network made of three pillars, each with its own institutional structures of financial regulation and supervision that operate in a coordinated manner, in charge of supervising the EU financial system.[108]

The first pillar relates to EU-wide systemic risk supervision.[109] This is carried out by a European Systemic Risk Board ("ESRB"),[110] which performs macro-prudential oversight of the EU financial system, with the primary aim of preventing and mitigating systemic

100. *See* de Larosiére Report, *supra* note 38.

101. Commission Press Release, IP/08/1679 (Nov. 11, 2008).

102. De Larosiére Report, *supra* note 38, at 38-58.

103. *Id.* at 39-40.

104. *Id.* at 40-41.

105. *Id.* at 41-42.

106. *Id.* at 4, 46-48.

107. Council of the European Union Press Release, 16369/10, 18-19 (Nov. 17, 2010).

108. *See* Regulation (EU) No. 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, recital 14, art. 1.2, 2010 O.J. L 331/1 [hereinafter ESRB Regulation].

109. Commission, COM (2009) 252 final, *supra* note 99, at 3.

110. *See* ESRB Regulation, *supra* note 108.

risk,[111] issuing, where necessary, warnings and recommendations addressed to the European Union, its Member States, the European Supervisory Authorities ("ESAs"), or CSAs.[112]

The second pillar concerns micro-prudential regulation and supervision at the EU level.[113] This task is performed by three EU agencies, namely the European Supervisory Authorities ("ESAs").[114] The ESAs are organized along sectoral lines and comprise the European Banking Authority ("EBA"),[115] the European Insurance and Occupational Pensions Authority ("EIOPA"),[116] and the European Securities and Markets Authority ("ESMA").[117] The ESAs carry out important quasi-regulatory and supervisory functions.[118] On the rulemaking front, the ESAs develop guidelines and recommendations addressed to CSAs or financial market participants and targeted at, *inter alia,* promoting regulatory and supervisory convergence within the ESFS;[119] they also contribute to building a single rulebook for the EU financial markets through the creation of draft regulatory and implementing standards[120] that develop technical aspects of EU

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111. ESRB Regulation, *supra* note 108, art. 3.1.

112. *Id.* art. 16.2.

113. Commission, COM (2009) 252 final, *supra* note 99, at 3.

114. *See* Iglesias-Rodríguez, *supra* note 1, at 193-96. The ESAs were instituted by three Regulations –see *infra* notes 115, 116 and 117– which will be collectively referred to as "ESAs Regulations".

115. The EBA was instituted by Regulation. *See* Regulation (EU) No. 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/78/EC, 2010 O.J. L 331/12 [hereinafter EBA Regulation],

116. The EIOPA was instituted by Regulation. *See* Regulation (EU) No. 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 No. 716/2009/EC and repealing Commission Decision 2009/79/EC, 2010 O.J. L 331/48 [hereinafter EIOPA Regulation].

117. The ESMA was instituted by Regulation. *See* Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/77/EC, 2010 O.J. L 331/84 [hereinafter ESMA Regulation].

118. Eddy Wymeersch, *The European Financial Supervisory Authorities or ESAs*, *in* Wymeersch et al., *supra* note 1.

119. ESAs Regulations, *supra* note 114, art 16.1.

120. Whereas the ESAs are entrusted with the drafting of technical standards, these are submitted to the Commission for consideration and approval through Regulations or Decisions. ESAs Regulations, *supra* note 114, arts. 10.1, 10.4, 15.1, 15.4; Consolidated

financial sector laws.[121] On the supervisory side, the ESAs monitor and assess market developments as well as their potential impact on financial market participants, providing, where necessary, recommendations aimed at preventing or remedying risks and vulnerabilities.[122] They are also entrusted with the development of a common supervisory culture in the European Union through actions that range from participating in the creation of uniform supervisory standards to promoting cooperation between CSAs.[123] An important difference between the Lamfalussy Committees and the ESAs is that, unlike the former, the latter do have binding supervisory and enforcement powers. For example, in cases of disagreements between CSAs, the ESAs may settle the dispute through a binding decision requiring the CSAs concerned to adopt or refrain from certain actions.[124] Moreover, the ESAs may adopt temporary bans or restrictions on certain financial products or activities which pose a threat to the " . . . orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union . . . . "[125] In addition, the ESAs have been given direct supervisory powers with respect to certain areas of the financial system; this is the case of credit rating agencies and trade repositories, which are directly supervised by ESMA,[126] and, in relation to which, the latter may impose fines[127] or withdraw registration.[128] The second

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Version of the Treaty on the Functioning of the European Union, arts. 290-291, 2012 O.J. C 326/47.

121. *See*, *e.g.*, ESMA Regulation, *supra* note 117, recitals 5, 22; EBA Regulation, *supra* note 115, recitals 5, 22.

122. ESAs Regulations, *supra* note 114, art. 32.

123. *Id.* art 29.

124. *Id.* art. 19.

125. *Id.* art. 9.5. For instance, Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No. 648/2012, arts. 40-41, 2014 O.J. L 173/84 [hereinafter Markets in Financial Instruments Regulation ("MiFIR")], respectively enable the ESMA and the EBA to adopt such prohibitions or restrictions.

126. Regulation (EC) No. 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, Title III, 2009 O.J. L 302/1; Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, Title IV, 2012 O.J. L 201/1 [hereinafter European Market Infrastructure Regulation ("EMIR")].

127. With respect to credit rating agencies, *see* Commission Delegated Regulation (EU) No. 946/2012 of 12 July 2012 supplementing Regulation (EC) No. 1060/2009 of the European Parliament and of the Council with regard to rules of procedure on fines imposed to credit

pillar incorporates a forum of cooperation between the three ESAs, the Joint Committee, whose purpose is to ensure cross-sectoral consistency in regulation and supervision.[129]

The third pillar regards the day-to-day macro-prudential and micro-prudential regulation, supervision and enforcement activities relating to markets and institutions at the Member State level. This is assigned to the CSAs from each jurisdiction.[130] The ESFS attributes a central role to cooperation among its various levels. As will be further explained below, this is reflected in, among others, the configuration of a detailed regime of cooperation duties among the constituents of the ESFS.

The economic downturn that followed the financial crisis evidenced the close connections between banking crises and sovereign debt risk,[131] as well as the dangers of spill over effects resulting from the latter within the euro area.[132] The Commission responded by proposing a Banking Union that would provide a system of common supervision, deposit protection, crisis management and resolution of banks in the European Union.[133] This eventually materialized in the creation of a Single Supervisory Mechanism ("SSM") in the year 2013,[134] of a Single Resolution Mechanism

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rating agencies by the European Securities and Markets Authority, including rules on the right of defence and temporal provisions, 2012 O.J. L 282/23.

128. *See* EMIR, *supra* note 126, recital 74, art. 73.

129. ESAs Regulations, *supra* note 114, arts. 2.2(e), 54.

130. *See, e.g.*, ESMA Regulation, *supra* note 117, recital 9; ESAs Regulations, *supra* note 114, art. 2.2(f).

131. On the relationship between both, *see* Philip R. Lane, *The European Sovereign Debt Crisis*, 26 J. OF ECON. PERSPECTIVES 49, 59 (2012).

132. On this topic, *see* Roberto A. De Santis, *The Euro Area Sovereign Debt Crisis. Safe Haven, Credit Rating Agencies and the Spread of the Fever from Greece, Ireland and Portugal* (European Central Bank Working Paper No. 1419, 2012); Bertrand Candelon, Amadou N. Sy, & Rabah Arezki, *Sovereign Rating News and Financial Markets Spillovers: Evidence from the European Debt Crisis* (International Monetary Fund Working Paper No. 11/68, 2011).

133. Commission, Communication from the Commission to the European Parliament and the Council: A Roadmap towards a Banking Union, COM (2012) 510 final.

134. The SSM was instituted by Council Regulation (EU) No. 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, 2013 O.J. L 287/63 [hereinafter SSM Regulation] and Regulation (EU) No. 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No. 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No. 1024/2013, 2013 O.J. L 287/5.

("SRM") in the year 2014,[135] as well as in the formulation of proposals for a European Deposit Insurance Scheme ("EDIS") in the year 2015.[136] In the Banking Union, supervision is assigned to the SSM, which is a supervisory system made of the ECB and relevant CSAs of the Member States.[137] The SSM gives the ECB a pre-eminent role in the post-crisis EU financial architecture by entrusting it with the direct prudential supervision of significant credit institutions[138] in the Eurozone and in other Member States that decide to join the SSM.[139] CSAs remain responsible for the conduct of business supervision as well as the direct prudential supervision of less significant banks.[140]

Both the ESFS and the Banking Union represent a shift from a system of fully decentralized supervision, primarily conducted at the Member State level and organized through cooperation agreements between CSAs, towards a system of greater centralization of supervisory functions at the EU level, while remaining, nonetheless, a decentralized system with multiple supervisory actors. Such centralization has two main dimensions. First, in the new framework, there has been a transfer of direct supervisory responsibilities from the Member State to the EU level. For example, as indicated above, in the ESFS, the ESMA has direct supervision powers with respect to credit rating agencies and trade repositories. In the SSM, the ECB exercises direct prudential supervision of credit institutions throughout the European Union.[141] Second, in the post-crisis EU financial services architecture, EU entities, such as the ESAs, have

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135. The SRM was instituted by Regulation (EU) No. 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No. 1093/2010, 2014 O.J. L 225/1 [hereinafter SRM Regulation].

136. Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme, COM (2015) 586 final.

137. SSM Regulation, *supra* note 134, art. 2.

138. *Id.* art. 6.4 (Whether a credit institution is significant or not depends on a set of criteria related to: "(i) size; (ii) importance for the economy of the Union or any participating Member State; and (iii) significance of cross-border activities.").

139. *Id.* art. 4 (This includes the authorization and withdrawal of authorization of credit institutions).

140. CENTRE FOR EUROPEAN POLICY STUDIES, ECB BANKING SUPERVISION AND BEYOND 59 (2014).

141. SSM Regulation, *supra* note 134, recital 15.

assumed important responsibilities in the coordination of financial supervision EU-wide; an example are emergency situations in which there are developments that "may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union"; in those cases, the ESAs are entrusted with the facilitation and, even the coordination, of actions by CSAs of the Member States.[142] In addition, the ESFS confers on the ESAs the task of "…promoting and monitoring the efficient, effective and consistent functioning of the colleges of supervisors . . . ."[143]

The creation of the ESFS and the Banking Union, and the distribution of supervisory responsibilities within them to various actors along sectoral and functional lines have resulted in a multiplication of supervisory cooperation relationships. In the new setting, the performance of supervisory tasks by an authority operating in a given supervisory level–e.g. European Union or Member State–may require the cooperation of other authorities in the same or other levels. Moreover, certain supervisory actions are entrusted to various authorities. The post-crisis supervisory patchwork embraces three types of cooperation relationships. In the first place, supervisory cooperation applies to the relationship between the various pillars within both the ESFS and the Banking Union; for example, the initiation and coordination of stress tests to assess the resilience of financial market participants is jointly performed by and requires cooperation between the ESAs and the ESRB.[144] Likewise, in the SSM, the performance of tasks relating to consumer protection and anti-money laundering require cooperation between the ECB and Member State CSAs.[145] Second, there is a need for cooperation within each of the pillars of the ESFS and of the Banking Union; for example, the ESFS envisages cooperation between the ESAs in relation to, *inter alia,* financial conglomerates and cross-sectoral matters.[146] Third, supervisory cooperation also takes place between the ESFS and the Banking Union bodies, notably, with respect to

142. ESAs Regulations, *supra* note 114, art. 18.1.

143. EIOPA Regulation, *supra* note 116, recital 35; ESMA Regulation, *supra* note 117, recital 36; EBA Regulation, *supra* note 115, recital 36.

144. ESAs Regulations, *supra* note 114, art. 32.

145. SSM Regulation, *supra* note 134, recital 29.

146. ESAs Regulations, *supra* note 114, art. 54.2.

matters of joint interest, and institutions operating across sectors.[147] The change in the nature of supervisory relationships has led to a redefinition of the EU regime of supervisory cooperation duties. The latter includes forms of both horizontal and vertical cooperation.

On the one side, the general cooperation duties within the ESFS and the SSM encompass a notion of horizontal cooperation between their various constituent levels. With regard to the ESFS, the ESAs Regulations stipulate that: "In accordance with the principle of sincere cooperation under Article 4(3) of the Treaty on European Union, the parties to the ESFS shall cooperate with trust and full mutual respect, in particular in ensuring the flow of appropriate and reliable information between them."[148] The SSM Regulation also implements a model of horizontal cooperation, between the ECB and the Member State CSAs: "Both the ECB and national competent authorities shall be subject to a duty of cooperation in good faith, and an obligation to exchange information."[149]

In specific supervisory contexts, the relationship between different authorities is hierarchical and asymmetrical, giving rise to forms of vertical cooperation that embrace ascendancy of some supervisors over others. This is particularly the case in certain relationships between the EU supervisory authorities and the Member State CSAs. For example, the general duties pertaining to exchange of information in the ESFS require that the CSAs of the Member States provide the ESAs information relevant to their supervisory functions, without establishing a corresponding duty for the ESAs:

> At the request of the Authority [an ESA], the competent authorities of the Member States shall provide the Authority with all the necessary information to carry out the duties assigned to it… Upon a duly justified request from a competent authority of a Member State, the Authority may provide any information that is necessary to enable the competent authority to carry out its duties…[150]

The asymmetrical position of financial supervisors at the EU and Member State levels, respectively, is patent in areas where the former

147. *See, e.g.*, SSM Regulation, *supra* note 134, recital 31.
148. ESAs Regulations, *supra* note 114, art. 2.4.
149. SSM Regulation, *supra* note 134, art. 6.2.
150. *See*, *e.g.*, ESMA Regulation, *supra* note 117, art. 35; EIOPA Regulation, *supra* note 116, art. 35.

have direct supervisory powers; for example, in the SSM, the ECB may, in the exercise of its direct supervisory powers, issue instructions addressed to CSAs.[151]

Both the ESFS and the Banking Union largely internalize the process of regulatory coordination on matters pertaining to supervisory cooperation through the creation of institutional mechanisms of joint decision-making led by CSAs from the Member States. For instance, the ESAs' Boards of Supervisors, whose voting members are the heads of the Member State CSAs,[152] are the main decision-making bodies of the ESAs and their powers include the adoption of draft technical standards, guidelines and recommendations.[153] Likewise, in the SSM, the formulation of rulemaking and supervisory decisions is entrusted to a Supervisory Board[154] where most decision-making power rests in representatives of the Member State CSAs.[155] This Member State-based governance structure[156] facilitates the debate and exchange of ideas among national authorities on matters pertaining to financial regulation and supervision, as well as to supervisory cooperation rules and processes, and, consequently, may contribute to foster the legitimacy of the latter. On the one side, from an input-legitimacy viewpoint, the joint decision-making process enables the engagement of all the CSAs affected by and subject to EU-wide supervisory cooperation rules and

151. SSM Regulation, *supra* note 134, art. 6.3.

152. ESAs Regulations, *supra* note 114, art. 40.1(b).

153. *Id.* arts. 43.1-2.

154. SSM Regulation, *supra* note 134, art 26.1.

155. *Id.* (The Supervisory Board is composed of a Chair, a Vice-Chair, four representatives of the ECB and representatives of the CSAs in each participating Member State).

156. Within it, the ESAs have been delegated powers for the development of norms applicable to supervisory cooperation among CSAs at the Member State level. For instance, under Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, art. 80.4, 2014 O.J. L 173/349 [hereinafter MiFID II], the ESMA has been delegated the adoption of draft implementing technical standards on "standard forms, templates and procedures for competent authorities to cooperate in supervisory activities, on-site verifications, and investigations." *See also* ESMA, Final Report. Draft implementing technical standards under MiFID II (ESMA/2015/1858), at 29-30; ESMA, Draft Implementing Technical Standards on forms and procedures for cooperation between competent authorities under Regulation (EU) No. 596/2014 on market abuse (ESMA70-145-100) (developing a comprehensive framework of supervisory cooperation among the various CSAs and levels of the ESFS in the field of market abuse).

policies, in their creation; moreover, the adoption of decisions regarding supervisory cooperation rules and processes often requires qualified majority within the ESAs and the ECB,[157] and, hence, greater degrees of consensus among the Member State CSAs. On the other side, as regards output-legitimacy, the meetings of the Boards of Supervisors of the ESAs and of the Supervisory Board of the ECB operate as fora of transnational dialogue where CSAs can devise, together, supervisory cooperation policies tailored to their needs and expectations; this, in turn, may promote the acceptance of those policies among the CSAs concerned and further the effective functioning of financial sector supervisory cooperation in the European Union.

The post-crisis EU financial services supervision architecture examined in this Part represents a shift towards a model of greater centralization and coordination of financial supervision, with potential benefits for the convergence, consistency and legitimacy of supervisory cooperation rules and procedures.[158] However, contemporarily, the model of centralized decentralization embraced by the ESFS and the Banking Union has substantially increased the complexity of the EU financial supervisory patchwork, which is now composed of a number of CSAs operating at various functional and jurisdictional levels and bound by a heterogeneous system of supervisory cooperation duties. This raises the question of whether

157. For instance, the adoption of draft technical standards, guidelines and recommendations by the ESAs requires a qualified majority of the voting members of their Boards of Supervisors. *See* EBA, Decision adopting the Rules of Procedure of the European Banking Authority Board of Supervisors (EBA/DC/2011/001, Rev 4), art. 3.5; EIOPA, Decision adopting the Rules of Procedure of the European Insurance and Occupational Pensions Authority Board of Supervisors (EIOPA-BoS-11/002, Rev3), art. 4.2; ESMA, Decision adopting the Rules of Procedure of the European Securities and Markets Authority Board of Supervisors (ESMA/2012/BS/88, Rev3), art. 4.4. Also, in the SSM, the Supervisory Board takes decisions on draft regulations, which are used to develop important aspects of supervisory cooperation within the SSM – *see*, *e.g.*, Regulation (EU) No. 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities –, by qualified majority of its members – *see* ECB, Rules of Procedure of the Supervisory Board of the European Central Bank (2014), art. 6.5; SSM Regulation, *supra* note 134, art. 26.7 .

158. Indeed, stakeholders seem to acknowledge that the creation of the ESAs has generally improved cooperation between CSAs. *See* European Parliament, Review of the New European System of Financial Supervision, Part 1: The Work of the European Supervisory Authorities (EBA, EIOPA and ESMA) (IP/A/ECON/ST/2012-23), at 143.

and how EU law is able to deal with such complexity and guarantee the effective functioning of supervisory cooperation. In order to answer this question the next Parts of this Article examine and assess key legal, regulatory and institutional aspects of the post-crisis EU financial supervisory cooperation architecture, their impact on the ability and incentives of CSAs to cooperate with each other as well as their contribution to the process of development of a single market for financial services.

V. SUPERVISORY COOPERATION DUTIES AND THEIR LIMITS: THE ROLE OF MEMBER STATES' DISCRETION

Cooperation duties are not unconditional. From the outset, EU instruments have embraced limitations to the duty to cooperate which give CSAs certain degrees of discretion as regards the decision whether or not to cooperate in specific scenarios. The regime concerning waivers from supervisory cooperation has been particularly developed in the securities field, notably by the ESMA's *Multilateral Memorandum of Understanding on Cooperation Arrangements and Exchange of Information* ("ESMA MMoU"),[159] which contains detailed rules and procedures regarding cooperation among CSAs and between CSAs and the ESMA. According to the ESMA MMoU, there are three reasons that may justify a refusal to cooperate by a requested CSA.[160]

The first is that the request of cooperation falls outside the scope of the ESMA MMoU.[161] This would, however, be a highly unlikely scenario, first and foremost because the ESMA MMoU offers a rather comprehensive list of potential areas and modes of cooperation.[162] In addition, the wording of the ESMA MMoU leaves an open door to the inclusion of areas and forms of cooperation not expressly addressed by it; for instance, when referring to the subject-matter of cooperation, the ESMA MMoU stipulates that: "assistance *includes but is not limited to* matters relating to . . . ";[163] likewise, with respect to the forms of cooperation, the ESMA MMoU establishes that: "The

159. *See generally,* ESMA MMoU, *supra* note 26.
160. *Id.* art. 3.4.
161. *Id.* art. 3.4(a).
162. *See*, *e.g.*, *id.* arts. 3.2-3.
163. *Id.* art. 3.2.

scope of assistance available from the Requested Authority shall include, *inter alia* . . . "[164] In any event, a refusal to cooperate based on the above-mentioned justification, would only apply to requests of cooperation grounded on the ESMA MMoU. Therefore, a requested CSA may be entitled to withhold cooperation under the ESMA MMoU and, yet, be required to provide cooperation, if it is compelled to do so by EU or national laws.

The second reason that may warrant the withholding of cooperation by a requested CSA, according to the ESMA MMoU, is that the law of a Member State allows such a refusal to cooperate.[165] This is, however, restricted to requests that are not grounded on EU law–i.e. when the requesting authority is not invoking a cooperation duty set in an EU Directive and/or Regulation. The progressive process of harmonization of EU securities laws has broadened the catalogue of areas of financial regulation subject to EU law and, consequently, to EU law-based cooperation duties, reducing, in turn, the scope of Member State law-based waivers from cooperation.

Third, a refusal to cooperate may be founded upon an exception to the duty to cooperate acknowledged by EU law.[166] The EU legislator has not adopted a uniform approach to the treatment of these exceptions. As a result, the regime regarding the waivers from cooperation is a fragmented one and the scope of the CSAs' cooperation duties varies according to the specific EU law or instrument under which a request of cooperation is issued.

As will be shown in this Part, EU law waivers from supervisory cooperation pursue the protection of legitimate rights and interests that might be threatened by the actual provision of cooperation in particular cases. However, at the same time, those very same waivers give CSAs discretion as regards the interpretation of when and the extent to which such threats exist. Consequently, there is the potential risk of CSAs biasedly interpreting and invoking exceptions to the duty to cooperate in order to withhold cooperation in an opportunistic manner. This Part carries out a twofold analysis. First, it identifies the various exceptions to the duty to cooperate embraced by EU instruments and assesses the scope for their potential misuse. Second,

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164. *Id.* art. 3.3.
165. *Id.* art. 3.4(c).
166. *Id.* art. 3.4(b).

it examines the evolution of the legal treatment of those exceptions in order to answer an important question: has the process of integration of EU financial supervision led to a narrowing of the scope of the exceptions to the duty to cooperate and, consequently, to more limited degrees of discretion of the Member State CSAs in supervisory cooperation decisions?

A. Waivers from Supervisory Cooperation Grounded on the Interest of a Member State

A first category of waivers from the duty to cooperate refers to instances in which the provision of cooperation would have a negative effect on the protection of the interest –this concept broadly understood– of the Member State of the requested CSA. For example, some FSAP Directives–such as the Directive 2003/6/EC –Market Abuse Directive ("MAD")– [167] and the Directive 2004/39/EC – Markets in Financial Instruments Directive ("MiFID")– [168] allowed CSAs to withhold cooperation when the latter "might adversely affect the sovereignty, security or public policy of the State addressed".[169] The IOSCO MMoU also contemplates the possibility of a requested CSA denying cooperation "on grounds of public interest or essential national interest." [170] These public interest-related exceptions gave CSAs substantial freedom in the interpretation of their duty to cooperate and, ultimately, in the decision of whether or not to cooperate in a specific case, opening the door to potentially protectionist behaviors; for instance, a requested CSA could use public interest-related exceptions opportunistically, withholding the exchange of information about firms operating in critical sectors–e.g. energy, military–or with major relevance for the economy, even in cases in which cooperation would pose no actual threat to the sovereignty, security or public policy in the Member State of the

167. Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), 2003 O.J. L 96/16 [hereinafter MAD].

168. Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, 2004 O.J. L 145/1 [hereinafter MiFID].

169. MAD, *supra* note 167, art. 16.4; MiFID, *supra* note 168, art. 59.

170. IOSCO MMoU, *supra* note 26, art. 6(e)(iv).

requested CSA. EU laws have progressively limited the scope of waivers related to the protection of the interest of a Member State and, thus, the ability of CSAs to refuse cooperation on such grounds; for example, the Regulation No. 596/2014–Market Abuse Regulation ("MAR")–,[171] which repeals the MAD, removed the references to threats to the "sovereignty" and "public policy", and focused, instead, on cases in which the provision of cooperation "…could adversely affect the security of the Member State addressed, in particular the fight against terrorism and other serious crimes".[172] MiFID II, which partially recasts the MiFID, plainly eliminates any reference to waivers linked to the protection of the interest of a Member State.[173] Nonetheless, CSAs would still be entitled to deny cooperation in instances of threats to national security, as the latter is a Treaty-based exclusive competence of the EU Member States.[174]

B. Waivers from Supervisory Cooperation Grounded on the Principle of Ne Bis In Idem

A second category of waivers relates to instances of *res sub judice* and *res judicata,* and provides protection against double jeopardy through the principle of *ne bis in idem*. These anti-double jeopardy exceptions, which are common in EU laws and MoUs in the financial field, allow CSAs to withhold cooperation in two scenarios. First, when judicial proceedings have already been initiated with regard to the same actions and the same persons before the authorities of the Member State of the requested CSA.[175] Second, when final judgment has already been delivered in the Member State of the requested CSA with regard to the same persons and the same actions.[176] These waivers do, however, pose certain problems of interpretation that will be examined in the next paragraphs. As will be shown, the evolution of the legal treatment of the anti-double

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171. Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, 2014 O.J. L 173/1 [hereinafter MAR].

172. *Id.* art. 25.2(a).

173. MiFID II, *supra* note 156, art. 83.

174. Consolidated Version of the Treaty on European Union, 2012 O.J. C 326/13, art. 4.2.

175. *See, e.g.*, MiFID II, *supra* note 156, art. 83(a); MAR, *supra* note 171, art. 25.2(c).

176. *See, e.g.*, MiFID II, *supra* note 156, art. 83(b); MAR, *supra* note 171, art. 25.2(d).

jeopardy exceptions –from their initial wording in the FESCO and CESR MoUs to their current form– evidences that, overall, their scope has been progressively broadened, and, consequently, the ability of CSAs to refuse cooperation, increased.

The first question relates to the subject-matter jurisdictions covered by the anti-double jeopardy waivers. Whereas the FESCO and the CESR MoUs explicitly limited the *lis pendens* waivers to " . . . judicial proceedings for the imposition of criminal penalties . . . . "[177] the reference to "criminal penalties" is absent in most post-FSAP and post-crisis EU financial laws, which merely make reference to "judicial proceedings," without specifying any particular subject-matter. This raises the question of whether a refusal to cooperate might be grounded on the existence of judicial proceedings pertaining to matters beyond the criminal realm. Whereas the application of the principle of *ne bis in idem* has traditionally been limited to (national) criminal justice,[178] over the years, the case law of the Court of Justice of the European Union ("CJEU") has construed it as a (transnational) general principle of EU law, not necessarily limited to the criminal jurisdiction but, instead, extendable to other types of judicial processes with a punitive nature.[179] The omission of the reference to "criminal penalties" may suggest that anti-double jeopardy waivers embrace such EU law trend and extend to non-criminal jurisdictions – e.g. civil jurisdiction cases. The practical effect of this approach is that the ability of CSAs to withhold cooperation would be broadened.

A second issue regards to whether anti-double jeopardy waivers only apply to judicial proceedings/decisions or also include administrative actions–for example, when a requested CSA has already imposed a fine to a firm in relation to which the requesting CSA solicits information. According to both the FESCO MoU and the CESR MoU, administrative decisions were included in the anti-double jeopardy waivers. In this respect, the former read: " . . . where a non-appealable judicial or administrative sanction has already been

177. *See, e.g.*, FESCO MoU, *supra* note 73, art. 3.3; CESR MoU, *supra* note 88, art. 3.3.

178. *See* John A.E. Vervaele, *The Transnational Ne Bis In Idem Principle in the EU. Mutual Recognition and Equivalent Protection of Human Rights*, 1 UTRECHT L. REV. 100, 100 (2005).

179. *Id.* at 106; B. VAN BOCKEL, THE NE BIS IN IDEM PRINCIPLE IN EU LAW 223 (2010).

imposed . . . ",[180] and the latter referred to instances " . . . where final judgement has already been passed or administrative sanctions have already been applied . . . . "[181] In contrast, in force MoUs and EU laws in the financial field seem to only explicitly include judicial decisions.[182] Traditionally, EU law has adopted an ambiguous approach to the treatment of administrative sanctions in the context of *ne bis in idem*, often excluding administrative punitive decisions from a strict application of such principle, with the result that the same facts could result in sanctions at various jurisdictional levels.[183] Whereas some recent decisions of the CJEU encompass the notion that administrative punitive decisions would bar double prosecution,[184] certain post-crisis EU legislative developments seem to take a very different view. For instance, the MAR acknowledges the possibility of the same offence being subject to both criminal and administrative sanctions.[185] Recent case law of the European Court of Human Rights ("ECHR") has taken a much clearer stand, arguing that administrative enforcement and criminal prosecution for the same actions are incompatible. Of particular relevance for financial market practice, is the decision of the ECHR in *Grande Stevens and Others v. Italy*. Grande Stevens and other defendants who committed market manipulation were, first, fined administratively by the Italian securities supervisor–the *Commissione Nazionale per le Società e la Borsa* ("Consob")–[186] and, subsequently, subject to criminal proceedings for the same facts. The ECHR argued that this constitutes a breach of the principle of *ne bis in idem* embraced by Article 4 of Protocol 7 of the European Convention on Human Rights –regarding the right not to be tried or punished twice. In the framework of

180. FESCO MoU, *supra* note 73, art. 3.3.

181. CESR MoU, *supra* note 88, art. 3.3.

182. *See, e.g.*, MAR, *supra* note 171, art. 25.2(d).

183. Vervaele, *supra* note 178, at 107.

184. *See, e.g*., Bonda, Case C-489/10, [2012] E.C.R. I-0000. Juliette Lelieur, *Transnationalising Ne Bis In Idem: How the Rule of Ne Bis In Idem Reveals the Principle of Personal Legal Certainty*, 9 UTRECHT L. REV. 198, 207 (2013) (analyzing this question).

185. MAR, *supra* note 171, recital 72.

186. The ECHR did, nevertheless, consider the Consob's administrative sanctions as having a criminal nature. *See Grande Stevens and Others v. Italy,* App. Nos. 18640/10, 18647/10, 18663/10, 18668/10, 18698/10, Mar. 4, 2014 Judgment, at 16, 34 (Eur. Ct. H.R. 2014). For a comment of this case *see generally,* Marco Ventoruzzo, *Do Market Abuse Rules Violate Human Rights? The Grande Stevens v. Italy Case* (European Corporate Governance Institute (ECGI) Law Working Paper No. 269/2014, 2014).

cooperation between CSAs, it remains unclear what the scope of anti-double jeopardy waivers would be, in this respect. Even a full encompassment, by EU law and case law, of the applicability of the *ne bis in idem* principle to administrative sanctions, would not necessarily extend to cooperation duties of CSAs–but, rather, to their enforcement procedures. The silence of in force anti-double jeopardy waivers on this matter, jointly with their emphasis on "judicial" decisions, would indicate that the intention of the EU legislator was to exclude administrative sanctions from the scope of such waivers. This would, in turn, limit the ability of CSAs to decline cooperation. For instance, the fact that the requested authority had already imposed a fine with regard to the same persons and actions would not, *per se,* enable it to withhold cooperation.

A third important question refers to the extent to which anti-double jeopardy waivers also embrace instances in which the request of assistance is not aimed at bringing judicial proceedings or punitive administrative enforcement against a person involved in the actions to which the request of cooperation refers, for those very same actions–and/or may not result in those proceedings being brought in the jurisdiction of the requesting CSA. This would, for example, be the case of a request of cooperation about facts relating to and/or persons involved in a given securities laws violation, when such a request is merely instrumental to another supervisory or enforcement procedure relating to different actions and/or persons. The FESCO MoU offered a rather straightforward answer to this question by limiting the applicability of the anti-double jeopardy waivers to instances in which " . . . the provision of assistance might result in a judicial or administrative sanction being imposed… in the jurisdiction of the Requested Authority, in respect of the same actions and against the same persons."[187] A similar approach is found in the IOSCO MMoU, which permits the requested CSA to refuse cooperation " . . . unless the Requesting Authority can demonstrate that the relief or sanctions sought in any proceedings initiated by the Requesting Authority would not be of the same nature or duplicative of any relief or sanctions obtained in the jurisdiction of the Requested Authority."[188] This is, however, an aspect in relation to which contemporary EU

187. FESCO MoU, *supra* note 73, art. 3.3.
188. IOSCO MMoU, *supra* note 26, art. 6(e)(ii).

MoUs and legislation are silent, hence opening the door to rigid interpretations that could back the withholding of cooperation, just because a given request refers to the same actions and persons.

C. Waivers from Supervisory Cooperation Grounded on the Interest of a Competent Supervisory Authority

There is a third category of cooperation waivers aimed at protecting administrative investigation and enforcement activities in the jurisdiction of the requested CSA. Such type of waiver was introduced in the year 2014 by the MAR, which allows a requested CSA to deny cooperation when: "complying with the request is likely adversely to affect its own investigation, enforcement activities or, where applicable, a criminal investigation."[189] Although the reference to "its own investigation and enforcement activities" can be interpreted as referring to supervision regarding the same actions and persons to which the request of cooperation refers, the subsequent allusion to "a criminal investigation" seems to have a broader scope; for example, it may be interpreted as including criminal investigations by the requested CSA, relating to different persons and/or actions –or even, more generally, to criminal investigations conducted in the jurisdiction of the requested CSA by bodies different from the latter. To a certain extent, the MAR expands the cooperation waivers from the judicial to the, primarily administrative, non-judicial stage of an investigation and/or enforcement action, but with a more restricted character, i.e. only when the provision of cooperation has a likely negative effect on investigation and/or enforcement activities in the requested jurisdiction. From the point of view of the rights of the CSAs of different Member States involved in a given investigation, this waiver from cooperation poses some problems, because it implicitly attributes greater weight and primacy to an investigation and/or enforcement activity in the jurisdiction of the requested CSA–which is entitled to decline cooperation–than to an investigation and/or enforcement action in the jurisdiction of the requesting CSA, which may equally suffer negative effects if the requested CSA withholds cooperation on the grounds of the interest of its own investigations.

189. MAR, *supra* note 171, art. 25.2(b).

The analysis of the evolution of the content of the exceptions to the duty to cooperate from their early configuration in the FESCO and CESR MoUs to their current form –for example, in force EU Directives and Regulations– shows that, whereas the scope of some waivers has been narrowed, in certain instances it has been expanded and, consequently, the ability of CSAs to withhold cooperation increased. Indeed, despite the greater degrees of supervisory integration and centralization brought by the post-de Larosiére framework, the regime concerning supervisory cooperation exceptions still grants considerable discretion to the Member State CSAs. One of the risks of such regime lies in its lack of clarity and definition, opening the door to dissimilar interpretations across the Member States. More importantly, it may result in potential opportunistic behaviors by CSAs, which may justify the withholding of cooperation on the basis of biased readings of the exceptions to the duty to cooperate. Ultimately, disagreeing interpretations of the scope of the duties–and exceptions–to cooperate bring about the risk of increased supervisory dissent across the European Union. The next Part examines and assesses post-crisis regulatory developments that have instituted mechanisms of solution of disagreements among CSAs, including instances of supervisory cooperation disputes.

VI. THE ESFS, THE EMERGENCE OF THE ESAS AS SETTLERS OF SUPERVISORY COOPERATION DISPUTES, AND THE INCENTIVES OF CSAS TO COOPERATE

An important development brought about by the ESFS consisted of the institutionalization of a rather formal dispute settlement framework in which the ESAs are given extensive powers to resolve disagreements between CSAs. These powers are instrumental to the attainment of one of the key tasks of the ESAs, namely enhancing the consistent application of legally binding Union acts. [190] Such consistency may be hindered when, for example, CSAs have different views about whether and how they are expected to cooperate with each other or with the ESAs–as required by EU law.

The ESAs have been vested with various mechanisms, some general and others *ad hoc*, that can be used to address instances of lack of compliance with cooperation duties by CSAs. In contrast with

190. ESAs Regulations, *supra* note 114, art. 8.1(b).

the Lamfalussy Committees, some of these mechanisms embrace the use of binding powers by the ESAs. The allocation of dispute settlement powers to the ESAs raises various questions that are relevant to understand and assess the post-crisis transformation of supervisory cooperation in the European Union. A first question relates to the nature, scope and limitations of the ESAs' instruments of dispute settlement. The answer to this question is useful to respond to a second question, namely, whether and why these new mechanisms of dispute settlement may have an actual impact on the incentives of CSAs to cooperate. Third, by performing a quasi-judicial role in relation to CSAs, the ESAs are potentially subject to conflicts of interest that may affect their ability to solve disputes in an unbiased manner; it is, hence, important to understand the sources of such conflicts as well as the extent to which these are properly tackled by the EU regulatory and institutional frameworks. The next Sections explore these issues through an analysis of the nature, scope and potential effects of the ESAs' dispute settlement mechanisms, in respect of both the ESFS and the Banking Union.

A. The Mediation Mechanism of Article 19 of the ESAs Regulations: Scope and Limitations

The core mechanism of dispute settlement between CSAs is provided by Article 19 of the ESAs Regulations, whereby the ESAs may mediate between CSAs in cases "…where a competent authority disagrees about the procedure or content of an action or inaction of a competent authority…in cases specified in [legally binding Union acts] . . . . "[191] This provision embraces, *inter alia,* instances of cooperation disputes between CSAs, such as those arising when a requested CSA refuses to provide information to a requesting CSA. The reference to both 'content' and 'procedure' amplifies the reach of the ESAs' mediation powers to, not only cases in which a request of cooperation is rejected, but also instances in which a requesting CSA is not satisfied with the quality of the cooperation provided –e.g. if the requesting CSA deems the information provided by the requested CSA to be incomplete or inadequate. The mediation mechanism of Article 19 consists of a one-to-three step process, where progression

191. *Id.* art. 19.1.

to each consecutive step depends on whether a solution is reached or not in the previous.

In step one (conciliation), an ESA mediates between the CSAs in disagreement, assisting them in the reaching of a solution. The conciliation step may be initiated at the request of CSA(s) or on an ESA's own initiative–in the latter case, whenever the disagreement can be determined on the basis of objective criteria.[192] The role of an ESA at this stage is that of a mere facilitator of cooperation between the CSAs in dispute.[193] If the CSAs do not reach a solution within a time limit specified by the relevant ESA,[194] then the latter may decide to proceed to step two.

In step two (binding mediation), an ESA adopts a binding decision addressed to the CSAs in dispute that settles the disagreement, by requiring them to take specific action or refrain from it.[195] An example would be a decision whereby a requested CSA must provide certain information to a requesting CSA. Step two-decisions are binding and, therefore, CSAs are expected to comply with them. However, if they do not do so, then an ESA may proceed to step three.

In step three (direct binding decision), an ESA adopts an individual decision addressed to a financial market participant. Such decision requires it to take specific action or refrain from it.[196] This mechanism is aimed at guaranteeing that, when a CSA does not comply with a binding mediation decision, the market participants concerned follow courses of action that, somehow, overcome the failure of a CSA to observe an ESA's settlement.

The mediation process is led by Mediation Panels within each ESA.[197] These panels are appointed by the respective Boards of Supervisors and composed of the Chair of an ESA plus two members –six in the EBA–of its Board of Supervisors who neither represent the CSAs in disagreement nor have direct links with the latter or any

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192. *Id*.

193. A similar mechanism of non-binding mediation between CSAs is also envisaged by art. 31 of the ESAs Regulations.

194. ESAs Regulations, *supra* note 114, art. 19.2.

195. *Id.* art. 19.3.

196. *Id.* art. 19.4.

197. *Id.* art. 41.2.

interest in the dispute.[198] The decisions of a Mediation Panel with a proposed binding settlement are forwarded to the relevant Board of Supervisors for final adoption,[199] which generally requires simple majority of its members.[200]

The powers of the ESAs under Article 19 are much more extensive than those held by the Lamfalussy Committees. In the first place, the powers of the Lamfalussy Committees were not binding,[201] unlike those of the ESAs, which may settle a disagreement between CSAs through a binding decision. Second, the ESAs can, at their own discretion –where disagreements are objectively determinable–, step into a dispute and initiate a mediation process, whereas the Lamfalussy Committees were able to play a mediation role, only after a request from a CSA.[202] Despite the width of the powers granted to the ESAs under Article 19, there are some important limitations and interpretative problems regarding their application to instances of supervisory dissent.

First, the mechanism of Article 19 can only be applied when an EU legally binding act explicitly backs such use –and only for the purposes specified in it.[203] EU financial sector Directives and Regulations take different stances in this respect, some being more restrictive than others. For example, Article 82 of MiFID II embraces a far-reaching application of Article 19, enabling its use to address disagreements between CSAs "where a request relating to one of the following has been rejected or has not been acted upon within a reasonable time: (a) to carry out a supervisory activity, an on-the-spot verification, or an investigation, as provided for in Article 80; or (b) to exchange information as provided for in Article 81." In contrast, Article 23.4 of the Regulation No. 236/2012 ("Short Selling Regulation"),[204] provides for a more narrow application of Article 19,

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198. *Id.* art. 41.2.

199. *Id.* art. 41.3.

200. *Id.* art. 44.1.

201. *See, e.g.*, CESR, Protocol on Mediation Mechanism of the Committee of European Securities Regulators (CESR/06-286b), art. 5.

202. *See, e.g.*, *id.* art. 3.

203. *See* ESAs Regulations, *supra* note 114, art. 19.1; *see also* Wymeersch, *supra* note 118, at 266.

204. 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, 2012 O.J. L 86/1 [hereinafter Short Selling Regulation].

limiting its use to instances where "a competent authority disagrees with the action taken by another competent authority on a financial instrument traded on different venues regulated by different competent authorities . . . . "

Second, step two and step three of the mediation mechanism require the existence of a breach of EU law, which the mediation process aims to put to an end to. For example, as indicated above, when a requested CSA withholds information that a requesting authority has the right to access and which the requested CSA ought to provide–according to the general duty of cooperation between CSAs and/or concrete cooperation duties set in EU financial laws–, there would be a breach of EU law and the ESA concerned would, hence, be entitled to use a step two-binding decision to settle the disagreement–if the conciliatory phase failed. However, cooperation disputes founded on breaches of domestic laws establishing specific cooperation duties would be excluded from this mediation mechanism, as long as they do not imply a breach of EU law. Likewise, discretionary actions by Member State CSAs, based on explicit or implicit EU legislative delegations, are shielded from and cannot be superseded by ESAs' binding mediation decisions, as long as the exercise of such discretion is in compliance with EU law.[205]

In addition, the general applicability of step three-decisions to supervisory cooperation disputes is questionable. In this respect, section 3 of Article 19 of the ESAs Regulations stipulates that:

> . . . where a competent authority does not comply with the decision of the Authority, and thereby fails to ensure that a financial market participant complies with requirements directly applicable to it by virtue of the acts referred to in Article 1(2), the Authority may adopt an individual decision addressed to a financial market participant requiring the necessary action to comply with its obligations under Union law . . . .

Therefore, Article 19.3 seems to limit the applicability of direct binding decisions to instances in which lack of compliance of a CSA with an ESA's binding mediation decision also results in and/or implies lack of compliance of a market participant with EU law.[206]

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205. *See, e.g.*, EBA Regulation, *supra* note 115, recital 32.

206. Wymeersch highlights the limited applicability of direct binding decisions, to only directly applicable regulations. *See* Wymeersch, *supra* note 118, at 270.

This is, however, not necessarily the case in cooperation disputes. For instance, when a CSA does not abide by a binding decision of an ESA, it may be breaching EU law–for example, general cooperation duties– without this necessarily resulting in a consequential breach of EU law by a market participant. These limitations to the powers of the ESAs in the use of step two and step three-decisions are, indeed, consistent with the Meroni doctrine, according to which EU institutions cannot delegate discretionary powers that involve wide margins of discretion.[207]

Third, the safeguard clause of Article 38 of the ESAs Regulations, whereby step two-mediation decisions must not impinge on the fiscal responsibilities of the Member States, might also pose some limitations to the use of binding mediation by an ESA, notably in the context of resolution disputes.[208] If a Member State considers that there is such an impingement, it may trigger a procedure that involves the binding decision of the ESA being suspended, reconsidered by the latter, and whenever maintained, subject to scrutiny by the Council, which decides whether to uphold it or not.[209] Nevertheless, owing to the creation of the Single Resolution Mechanism and the transfer of resolution authority to the Single Resolution Board, the room for decisions of an ESA regarding resolution disputes with an impact on the fiscal responsibilities of the Member States is more reduced and so is the scope for invoking a breach of Article 38.

In addition to the procedure for the challenge of decisions of Article 38 of the ESAs Regulations, which is restricted to instances when an ESA's binding decision invades the fiscal responsibilities of a Member State, CSAs are entitled to challenge mediation decisions

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207. *Meroni v. High Authority,* Case 9/56, [1957-58] E.C.R. 133. On the different views about the scope of discretion of the ESAs in the use of Art. 19, *see* NIAMH MOLONEY, EU SECURITIES AND FINANCIAL MARKETS REGULATION 980 (3d ed. 2014).

208. IMF, EUROPEAN UNION: PUBLICATION OF FINANCIAL SECTOR ASSESSMENT PROGRAM DOCUMENTATION - TECHNICAL NOTE ON PROGRESS WITH BANK RESTRUCTURING AND RESOLUTION IN EUROPE, COUNTRY REPORT 13/67, 15 (2013); House of Lords EU Economic and Financial Affairs Sub-Committee (UK), Correspondence with Ministers, Letter from the Rt. Hon. Greg Clark MP to the Chairman (June 7, 2013), http://www.parliament.uk/documents/lords-committees/eu-sub-com-a/CWM/cwm2013-14/CwMsubA9May13-30Nov13-.pdf [https://perma.cc/663J-NQ65] (archived Mar. 8, 2018).

209. ESAs Regulations, *supra* note 114, art. 38.

adopted by the ESAs before the ESAs' Board of Appeal,[210] and, eventually, before the CJEU;[211] this remedy could for instance be used when a CSA deems an ESA's decision arbitrary or adopted without following applicable statutory procedural requirements.

A potential additional limitation of the mediation mechanism of Article 19 relates to the nature of the organs in charge of adopting binding decisions. The voting power within both the Mediation Panels and the Boards of Supervisors –which are in charge of proposing and adopting binding decisions, respectively– is primarily concentrated in representatives of CSAs;[212] it is unclear the extent to which these may be able to vote impartially, merely on the facts of the dispute at stake in a given case. The political economy of voting in binding mediation processes may be influenced by factors such as the relationships and mutual interests between the voting members of a Board of Supervisors and the CSAs in dispute; this may in turn create distortions, especially when voting procedures are not secret.[213] For example, a member of a Board of Supervisors may be reluctant to cast a vote against the interest of a certain CSA in a particular cooperation dispute for fear of negative repercussions in the cooperation relationships with that CSA in the future. In September 2017 the Commission presented a legislative proposal that, if adopted by the EU legislature, would shift decision-making power in the mediation mechanism from the ESAs' Boards of Supervisors to new bodies of the ESAs, namely the Executive Boards, made of independent full-

210. *Id.* art. 60.1. This is a joint body of the ESAs composed of six members and six alternates with high repute and proven experience in financial services and who are not employed by national or Union institutions involved in the activities of the ESAs –*see id.* art. 58.2.

211. *Id.* art. 61.1.

212. In the Mediation Panels, the voting members are the Chairpersons and the representatives from CSAs –*see id.* art. 41.2. In the Boards of Supervisors, the voting members are the representatives of CSAs –*see id.* art. 44.1.

213. The standard voting procedure in the Boards of Supervisors of the ESAs seems to be the show of hands vote, but the Rules of Procedure of the Boards of Supervisors also acknowledge the possibility of secret voting for certain matters –*see, e.g.*, EBA, Decision adopting the Rules of Procedure of the European Banking Authority Board of Supervisors (EBA/DC/2011/001, Rev 4), art. 7.5 –, and/or upon request of some of its members –*see, e.g.*, EIOPA, Decision adopting the Rules of Procedure of the European Insurance and Occupational Pensions Authority Board of Supervisors (EIOPA-BoS-11/002, Rev3), art. 4.7.

time members –so as to address, *inter alia*, potential conflicts of interest as those above-referred.[214]

1. Does the Mediation Mechanism of Article 19 of the ESAs Regulations Have an Impact on the Incentives of CSAs to Cooperate?

A relevant question relating to Article 19's mediation mechanism is whether and how it may impact supervisory cooperation between CSAs and deter them from undue lack of cooperation. In order to answer this question it is first important to understand the costs resulting from the application of the mediation mechanism–especially when it escalates to step two. Binding mediation may result in costs for both the requesting and requested CSAs.

On the one side, a binding mediation of an ESA overturning a non-cooperation decision of a requested CSA may result in certain costs for the latter. In the first place, the binding decision will have

214. *See* Commission, Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EU) No. 1093/2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No. 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) No. 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority); Regulation (EU) No. 345/2013 on European venture capital funds; Regulation (EU) No. 346/2013 on European social entrepreneurship funds; Regulation (EU) No. 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, COM (2017) 536 final, at 20, 22, 23 and 68 [hereinafter Commission Proposal on the Review of the ESAs]; *see also* Commission, Commission Staff Working Document. Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No. 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No. 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No. 345/2013 on European venture capital funds, Regulation (EU) No. 346/2013 on European social entrepreneurship funds, Regulation (EU) No. 600/2014 on markets in financial instruments, Regulation (EU) 2015/760 on European long-term investment funds, Regulation (EU) 2016/2011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, 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, SWD(2017) 308 final, at 46-7 [hereinafter Impact Assessment on the Commission Proposal on the Review of the ESAs].

the immediate result of compelling the CSA concerned to perform an action–e.g the forwarding of information to the requesting CSA– that it likely deems prejudicial to its own interests and/or the interests of actors that it is bound to protect, such as investors or consumers of financial services in its jurisdiction. Second, a binding mediation may limit the discretion of a CSA in deciding whether to cooperate or not in the future, because its decisions in that regard will be largely bound by what an ESA has ruled in prior binding mediation procedures. In this respect, the binding mediation constitutes a quasi-regulatory tool through which the ESAs can shape the behavior of CSAs, by signaling the preferences of the former about the extent and scope of cooperation that the latter are expected to provide in similar instances as those being subject to a mediation process. It follows that a CSA whose decision not to cooperate in a particular case has been overturned by an ESA, may, in the future, adjust its supervisory behavior to the expectations of such ESA–even when those supervisory courses of action are contrary to the policy views and preferences of the CSA concerned–, in order to avoid the threat of binding mediation processes being initiated. Third, owing to the fact that binding mediation decisions must be approved by the Boards of Supervisors of the ESAs,[215] and that, consequently, the nature and scope of the disagreements are made known to fellow CSAs within an ESA,[216] the reputation of the CSAs whose non-cooperative actions are upturned, vis-à-vis other CSAs, may be hindered–especially whenever an ESA justifies its binding decision on an alleged lack of consistency and/or reasonableness of the requested CSA's behavior. Because binding mediation may bring about important costs for a requested CSA, the latter will tailor its behavior to the assessment of the likeliness of an ESA's mediation process being initiated, either at the demand of the requesting CSA or on an ESA's own initiative. Likewise, the threat of binding mediation may contribute to deter a

215. ESAs Regulations, *supra* note 114, arts. 19.3, 44.1.

216. The proposal for a binding mediation decision that a Mediation Panel submits to a Board of Supervisors for approval in the binding mediation stage must include, among others: the identity of the CSAs involved in the dispute; the opinion of the Mediation Panel on how to settle the disagreement, as well as the reasons on which it is based; and, if appropriate, the deadline by which the CSAs addressed by the decision should take action or refrain from it. The proposed decision must also be accompanied by materials indicating the views of the CSAs concerned about the proposed settlement –*see, e.g.*, ESMA, Decision of the Board of Supervisors. Rules of procedure of the Mediation Panel (ESMA/2012/BS/86), arts. 7.6-7.

requested CSA from arbitrary or inconsistent non-cooperation decisions that could potentially trigger the mediation process–or, if the latter is initiated, to revise its decision in the conciliatory phase.

On the other side, a decision adopted by an ESA in the context of a binding mediation may also create costs for the requesting CSA. By submitting a dispute to an ESA for mediation, the requesting authority is, in fact, shifting decisional power away from the requested CSA to the relevant ESA. Hence, the mere request of an ESA's intervention through mediation may harm the trust of the requested authority in the requesting authority, impairing the relationships between them.[217] This may, in turn, affect the quality of future cooperation; for instance, a requested CSA may be more reluctant to voluntarily disclose unsolicited information that could, nonetheless, be useful for the requesting CSA. A requesting CSA will apply for an ESA's mediation if the potential costs resulting from such a request are lower than the potential benefits of the provision of cooperation stemming from an ESA's mediation. This will, most likely, be limited to very relevant supervisory procedures–e.g. with a major impact on the markets and actors in the jurisdiction of the requesting CSA– and where the probability of an ESA's decision upholding the requesting CSA's demands vis-à-vis the requested CSA are high–e.g. if and when the grounds for lack of cooperation by the requested CSA are weak.

The data regarding the use of mediation by the ESAs would support the hypothesis of Article 19's deterrent effect. For instance, since the ESAs became operative, only the EBA applied the mediation process of Article 19; this happened in two occasions, both in the year 2014, and, in both cases, the disagreement was settled in step one of the process, that is, in the conciliation phase.[218] In its Annual Report of the year 2015, the EBA did, indeed, highlight its pre-eminently informal role in the settlement of disagreements between CSAs: "Although there have been several cases of disagreements between CAs, during 2015 the EBA has not been approached with a request to provide its assistance in one of these formal procedures on mediation. Nonetheless, the EBA played an

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217. *See, e.g.*, Eilis Ferran, *The Existential Search of the European Banking Authority*, 17 EUR. BUS. ORG. L. REV. 285, 307 (2016).

218. EBA, ANNUAL REPORT 2014, 56 (2015).

important role in providing its assistance to settle disagreements between CAs in an informal way".[219] The Commission's review of the ESFS acknowledged the potentially dissuasive effect of the binding mediation mechanism, recognizing, at the same time, the "lack of clarity" of the ESAs Regulations with respect to the scope of binding mediation, suggesting that this may be addressed in future reforms of the ESAs Regulations.[220]

2. The Single Supervisory Mechanism, the Single Resolution Mechanism and the Role of the EBA as a Mediator Between the Banking Union EU Level Supervisory Structures and Member State CSAs

The creation of the SSM and the SRM and the allocation of direct supervisory responsibilities within these structures to the ECB and the SRB, respectively, have led to a reconfiguration of the supervisory relationships within the EU financial supervision architecture. Under the SSM and the SRM, both the ECB and the SRB are bound by cooperation duties vis-à-vis CSAs and the EBA as well as between each other. Supervisory cooperation is given a central role within the SSM: "It is essential for the smooth functioning of the SSM that there is full cooperation between the ECB and NCAs and that they exchange all the information that may have an impact on their respective tasks . . . "[221] Likewise, the SRM Regulation embraces close supervisory cooperation of the SRB with the EBA– and, where appropriate, also with the ESRB, the ESMA, the EIOPA and other supervisory authorities in the ESFS–, the ECB and other

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219. EBA, ANNUAL REPORT 2015, 83 (2016). In the early stages of development of the EBA, its Chairperson –Andrea Enria– described the EBA's binding mediation "more as a nuclear deterrent than an actual power." –House of Lords (UK), Unrevised transcript of evidence taken before the Select Committee on the European Union; Economic and Financial Affairs and International Trade (Sub-Committee A). Inquiry on EU Financial Supervisory Framework (May 3, 2011), at 3.

220. Commission, Report from the Commission to the European Parliament and the Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS), COM (2014) 509 final, at 7.

221. Regulation (EU) No. 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (ECB/2014/17), recital 11, 2014 O.J. L 141/1 [hereinafter SSM Framework Regulation].

supervisory authorities within the SSM, as well as with resolution authorities.[222]

Under the EBA Regulation, both the ECB and the SRB are deemed CSAs and, hence, subject to the EBA's supervisory remit.[223] The regulatory framework acknowledges the applicability of the EBA's mediation mechanism to supervisory cooperation disputes involving the ECB and the SRB. As regards the ECB, the EBA's *Rules of Procedure for the Settlement of Disagreements between Competent Authorities*, stipulate that: "In view of the supervisory tasks conferred on the ECB by Regulation (EU) No 1024/2013, the EBA should be able to carry out its tasks also in relation to the ECB in the same manner as in relation to the other competent authorities."[224] Also, the SRM Regulation recognizes that, for the purposes of the Directive 2014/59/EU –Bank Recovery and Resolution Directive ("BRRD")–, the SRB is bound by the EBA's mediation decisions.[225]

The scope of applicability of the mediation mechanism is more limited in respect of the SRB than the ECB. This is because, according to the EBA Regulation, the SRB will be considered a CSA –and, hence, subject to the EBA's mediation processes and decisions– only when and if it is not exercising discretionary powers or making policy choices.[226] Owing to the fact that supervision and resolution tasks generally embrace the exercise of margins of discretion, the potential role of the EBA as a settler of disagreements involving the SRB will be very narrow.[227]

The efficient functioning of the principal-agent institutional design, on which both the SSM and the SRM are based,[228] requires a smooth interaction between EU level CSAs–namely, the ECB and the

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222. SRM Regulation, *supra* note 135, recital 89.

223. EBA Regulation, *supra* note 115, arts. 4.2(i), (iv).

224. EBA, Decision adopting the Rules of Procedure for the settlement of disagreements between competent authorities (EBA/DC/2014/091, Rev 1), recital 4.

225. SRM Regulation, *supra* note 135, art. 5.2.

226. EBA Regulation, *supra* note 115, art. 4.2(iv).

227. On the limitations to the EBA's binding mediation powers resulting from the 'discretionary powers' exception, *see* Niamh Moloney, *European Banking Union: assessing its risks and resilience*, 51 COMMON MKT. L. REV. 1609, 1669 (2014).

228. For an application of the principal-agent model to the analysis of the SSM, *see* Jakub Gren, David Howarth, & Lucia Quaglia, *Supranational Banking Supervision in Europe: The Construction of a Credible Watchdog,* 53 J. COMMON MKT. STUD. 181 (2015).

SRB– on the one side, and the Member State CSAs on the other. For instance, in the SSM, the ECB largely relies on CSAs for the enforcement of prudential regulation[229] and, in the SRM, the SRB delegates the execution of resolution schemes to national resolution authorities.[230] In addition, the SSM and the SRM are mutually dependent and require a close cooperation between the ECB and the SRB in tasks such as the development of recovery and resolution plans.[231] For reasons similar to those explained above with regard to the ESFS, the activation of the mediation mechanism could lead to costs for both requesting and requested CSAs within the SSM and the SRM. Therefore, it would most likely be relied upon only as a last resort mechanism in exceptional circumstances.

B. Disagreements Between the ESAs and CSAs: the ESAs as Interested Parties and Judges

As has been explained in the preceding Parts, the ESFS encompasses a series of supervisory cooperation duties between the ESAs and CSAs, raising the possibility of disagreements about the rationale, grounds, extent and scope of those duties in concrete supervisory scenarios. Although the ESAs Regulations do not offer *ad hoc* mechanisms of settlement of cooperation disputes between the ESAs and CSAs, they, nevertheless, embrace instruments that can be used for such purpose. An example is Article 17 of the ESAs Regulations, which institutes a three-level procedure to address breaches of EU law by CSAs. In the first stage, an ESA is empowered to investigate alleged breaches of EU law by a CSA and to issue recommendations directed to the latter with indications on the steps to take so as to remedy such breaches.[232] If the CSA concerned fails to comply with the recommendation, then there is a second stage where the Commission may issue a formal opinion, requiring the CSA to

229. T.H. Tröger, *A political economy perspective on common supervision in the Eurozone: Observations on some strengths and weaknesses of the SSM*, *in* FINANCIAL REGULATION: A TRANSATLANTIC PERSPECTIVE 177 (Faia et al. eds., 2015).

230. E. Wymeersch, *Banking Union; Aspects of the Single Supervisory Mechanism and the Single Resolution Mechanism compared,* 5 (ECGI Law Working Paper No. 290/2015, 2015).

231. E. Angelopoulou, *Resolution Planning from a Supervisors Perspective*, FinSAC Workshop (Vienna, Apr. 24, 2015), at 12-13.

232. ESAs Regulations, *supra* note 114, arts. 17.1-3.

take action to comply with EU law.[233] Lastly, if the CSA fails to observe the Commission's opinion, then the process may move to a third stage where an ESA is vested with the power to issue an individual binding decision directly addressed to a financial institution, in order to remedy the lack of compliance with EU law.[234]

Whereas the mechanism envisaged by Article 17 of the ESAs Regulations is primarily aimed at tackling instances in which a CSA fails to ensure that supervised entities comply with EU financial sector laws,[235] its scope of applicability is broad, as it may be used by an ESA "Where a competent authority has not applied the acts referred to in Article 1(2), or has applied them in a way which appears to be a breach of Union law . . . . "[236] On the one side, this would include cases where a CSA fails to comply with cooperation duties vis-à-vis other CSAs but where there is no apparent express disagreement between the CSAs concerned and the mechanism of Article 19 is not deployed.[237] On the other side, it could also comprise instances in which a CSA breaches cooperation duties set in EU acts vis-à-vis the ESAs. As regards the latter, the cooperation mandates instituted by EU financial sector laws are rather all-encompassing; for example, according to the Short Selling Regulation: "The competent authorities shall cooperate with ESMA for the purposes of this Regulation…The competent authorities shall provide, without delay, ESMA with all the information necessary to carry out its duties".[238] As a result, the ESAs may enjoy substantial discretion in the actual determination of the extent and scope of the supervisory cooperation duties of CSAs towards them.

The application of Article 17 of the ESAs Regulations to supervisory cooperation disputes between an ESA and a CSA would raise the question of the ability of the former to exercise independent judgment because, in those instances, an ESA would be acting, both as one of the parties to the dispute and as a judge. This would pose

233. *Id.* art. 17.4.

234. *Id.* art. 17.6.

235. *Id.* art. 17.1.

236. *Id*.

237. The Chairperson of an ESA may determine, on a case-by-case basis, that mediation is more suitable for dealing with an alleged breach of EU law –*see, e.g.*, EBA, Decision adopting Rules of Procedure for Investigation of Breach of Union Law (EBA/DC/2014/100), Annex 2.

238. Short Selling Regulation, *supra* note 204, art. 36.

some legitimacy concerns, especially in light of the extensive powers conferred on the ESAs throughout the various stages of the procedure of Article 17. In this respect, an ESA has full control of the first stage of the procedure, as it has the power to initiate an investigation on its own initiative and also to issue a recommendation.[239] In addition, in the second stage, the Commission's opinion "Shall take into account the Authority's recommendation".[240] Furthermore, in the third stage, an ESA is vested with binding powers to put an end to a breach of EU law through an individual decision.[241]

Despite the *prima facie* extensive reach of the powers of the ESAs under Article 17, these are also subject to important limitations. In the first place, the scope of an ESA's direct binding decision for breaches of EU law is restricted to instances in which lack of compliance of a CSA with the Commission's formal opinion also results in and/or implies lack of compliance of a market participant with EU law[242]–which, as has been explained in relation to the mediation procedure in Section VI.A may not always be the case in instances of supervisory disagreement. Additionally, the power of an ESA to issue a direct binding decision under Article 17 is subject to strict conditionality–e.g. actual or potential distortion to competition or the functioning or integrity of the financial system, and direct applicability of the relevant EU law to the financial institution to which the binding decision is addressed.[243] These conditions largely restrict the use of Article 17 in supervisory cooperation disputes between an ESA and a CSA. Furthermore, a decision of an ESA based on Article 17 may be challenged by a CSA before the Board of Appeal of the ESAs[244] and, ultimately, before the CJEU;[245] consequently, this reduces the potential of an ESA's prejudiced use of Article 17. The Commission Proposal on the Review of the ESAs also embraces a shift of decision-making power in relation to Article 17, from the ESAs' Boards of Supervisors to the ESAs' Executive

239. ESAs Regulations, *supra* note 114, arts. 17.2-3.
240. *Id.* art. 17.4.
241. *Id.* art. 17.6.
242. *Id*.
243. *Id*.
244. ESAs Regulations, *supra* note 114, art. 60.
245. *Id.* art. 61.

Boards, with a view to, among others, reducing the scope of national interferences in decisions pertaining to breaches of EU law.[246]

VII. THE TENSIONS BETWEEN THE DUTY TO COOPERATE AND THE ABILITY TO COOPERATE: MULTI-LEVEL SUPERVISORY POWERS, LEGAL MANDATES, AND ACCOUNTABILITY

As has been explained throughout the previous Parts, the constitutional, legal and regulatory frameworks at both the European Union and Member State levels institute, in different degrees, cooperation duties between CSAs. Compliance with those cooperation duties requires an adequate empowerment of the supervisory authorities, which, for instance, enables them to fulfill a given request of cooperation from a counterpart. When and if a CSA does not have adequate powers to cooperate, the effective provision of cooperation may be hindered. The fragmented nature of the European supervisory framework, where supervisory powers are widespread among several CSAs operating at different levels, may trigger some tensions between cooperation duties, on the one side, and the ability of CSAs to provide cooperation, on the other. Such tensions owe to two primary reasons.

First, CSAs across the European Union diverge substantially in their structures and powers. Over the years, each Member State has developed its own financial supervisory architecture based on local preferences, experiences, and needs.[247] This has resulted in a somewhat byzantine scheme that combines, not only various financial supervisory models–such as the three-pillar, the single supervisor[248] or the twin-peaks–, but also distinctive and, often, dissimilar domestic approaches to the CSAs' supervisory powers. Moreover, Member States frequently shift from one model to another, notably, as a result of crises or scandals in the financial realm and to consequential concerns about the effectiveness of institutional financial supervisory

246. *See* Commission Proposal on the Review of the ESAs, *supra* note 214, at 20, 22, 23, 68. *See also* Impact Assessment on the Commission Proposal on the Review of the ESAs, *supra* note 214, at 46-7.

247. *See, e.g.*, ECB, RECENT DEVELOPMENTS IN SUPERVISORY STRUCTURES IN THE EU MEMBER STATES (2007-10) 1 (2010).

248. In this model, also known as the integrated approach, a single CSA is entrusted with both the prudential and conduct of business supervision of all financial sectors and entities in a given jurisdiction. Group of Thirty, *supra* note 22, at 13-14.

frameworks.[249] This has led to a complex and heterogeneous supervisory picture. Although the global financial crisis has brought about limited institutional convergence towards the twin-peaks model,[250] there still are major divergences in the structures and powers of CSAs across Member States.[251] Second, financial supervision involves carrying out actions subject to substantive and procedural requirements of various areas of the law, such as general administrative law and data protection rules, which also vary significantly across the Member States.

The diversity of supervisory architectures and powers, as well as the differences in the general legal frameworks relevant to the provision of supervisory cooperation may create some practical problems; notably, when a CSA from a Member State requests the performance of a supervisory action to a CSA from another Member State, the latter may not be able to perform it owing to lack of powers, or because such provision of cooperation would result in a breach of its domestic laws. The Lamfalussy reports acknowledged the diversity of supervisory competences of CSAs across the European Union and the potential negative impact that such differences might have on supervisory cooperation;[252] they also highlighted the need for convergence of supervisory powers available to CSAs.[253] These calls for greater convergence were reflected in various FSAP directives, such as the MiFID and the MAD, which introduced regimes concerning the minimum supervisory powers of CSAs. For example, Article 12 of the MAD and Article 50.2 of the MiFID both developed rather comprehensive *ad minimis* catalogues of powers that CSAs must have at their disposal for the exercise of supervisory functions, including, among others, the authority to access documents and data,[254] to require or demand information from any person,[255] and to

249. *See generally,* Donato Masciandaro et al., *Regulating the Regulators: The Changing Face of Financial Supervision Architectures Before and After the Crisis*, 6 EUR. COMPANY L. 187 (2009) (explaining why Member States change their financial regulatory schemes).

250. PETER VAN CLEYNENBREUGEL, MARKET SUPERVISION IN THE EUROPEAN UNION: INTEGRATED ADMINISTRATION IN CONSTITUTIONAL CONTEXT 210 (2015).

251. *See* ECB, *supra* note 247.

252. *See* Initial Lamfalussy Report, *supra* note 80, at 34-35; Lamfalussy Report, *supra* note 80, at 21; *see also* Commission, Communication from the Commission: Review of the Lamfalussy Process – Strengthening Supervisory Convergence, COM (2007) 727 final, at 10.

253. *See* Lamfalussy Report, *supra* note 80, at 38.

254. MAD, *supra* note 167, art. 12.2(a); MiFID, *supra* note 168, art. 50.2(a).

255. MAD, *supra* note 167, art. 12.2(b); MiFID, *supra* note 168, art. 50.2(b).

carry out on-site inspections.[256] The specific scope of these minimum supervisory powers was nonetheless limited by Member States' domestic laws.[257] If a Member State's domestic laws did not empower a CSA to directly exercise a given supervisory power included in the catalogue of minimum supervisory powers set by the relevant EU financial laws,[258] the latter embraced the possibility of and required the co-exercise of such powers with other regulatory authorities, their delegation to regulatory authorities, or their exercise by application to judicial authorities.[259] In other words, according to the regulatory model encompassed by EU financial law, for each supervisory power listed among the minimum powers there ought to be an authority able to either exercise or co-exercise it in every Member State. Whereas this regulatory framework brought about increasing consistency to the EU financial supervisory system, it also had some flaws, notably, it encouraged a minimum harmonization of powers available at the Member State level for supervisory tasks rather than a convergence of CSAs' supervisory powers across Member States. Under this system, tasks instrumental to financial supervision may be decentralized across various authorities, not necessarily limited to CSAs. These supervisory chains pose a risk of increasing the complexity of the supervisory architecture.[260] Likewise, they may make supervisory cooperation more complex because, under them, the accomplishment of a single supervisory action–such as the gathering of information from a market participant–may require coordinated action by or authorizations from different entities in one Member State. The risk of inefficient supervisory cooperation may be exacerbated when some authorities–such as the judiciary–in charge of some tasks within a supervisory chain lack independence or efficiency.

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256. MAD, *supra* note 167, art. 12.2(c); MiFID, *supra* note 168, art. 50.2(c).

257. *See, e.g.*, MAD, *supra* note 167, art. 12.2 ("the powers referred to in paragraph 1 of this Article shall be exercised *in conformity with national law* and shall include at least the right to . . .").

258. This could, for instance, be the case in which a CSA of a given Member State is not empowered to intervene telephone conversations or enter the premises of a firm only after receiving judicial authorization. On the differences between the powers of CSAs of the Member States in relation to market abuse supervision, see CESR, Review Panel Report: MAD Options and Discretions (CESR/09-1120), at 88-93.

259. *See, e.g.*, MAD, *supra* note 167, art. 12.1; MiFID, *supra* note 168, art. 50.1.

260. *See, e.g.*, Nicolas Véron, *Is Europe Ready for a Major Banking Crisis?*, 4 (Bruegel Policy Brief No. 2007/03, 2007).

The de Larosiére Report voiced concerns about the persistence of important differences in the powers of CSAs and recommended the adoption of measures aimed at enhancing the consistency of CSAs' supervisory remits across the European Union.[261] In its *Communication on Reinforcing Sanctioning Regimes in the Financial Services Sector*,[262] the Commission acknowledged that the differences among legal systems of the Member States was one of the reasons behind the divergences in the sanctioning powers of CSAs and undertook to make proposals targeted at furthering greater convergence in this area.[263] Post-crisis EU legislation has attempted to foster convergence primarily by broadening and redefining the catalogue of powers of CSAs. For example, the MAR has added the power "to enter the premises of natural and legal persons in order to seize documents and data"[264] to the list of minimum powers of CSAs, as this was a power lacked by some CSAs.[265] Despite these improvements in the consistency of the scope of the CSAs' supervisory powers, the post-crisis EU financial laws are largely inspired by the regime of minimum harmonization of supervisory powers subject to national implementation, as developed by the FSAP directives.[266] Consequently, they reflect one of the weaknesses of the pre-crisis regime, namely, the risk of supervisory powers being exercised through chains of actors. This may increase the complexity of –while also hindering the efficiency of–supervisory cooperation.

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261. De Larosiére Report, *supra* note 38, at 23, 39-42.

262. Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Reinforcing sanctioning regimes in the financial services sector, COM (2010) 716 final.

263. *Id.* at 6.

264. MAR, *supra* note 171, art. 23.2(e).

265. *See* Commission, Commission Staff Working Paper, Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Insider Dealing Market Manipulation (Market Abuse) and the Proposal for a Directive of the European Parliament and of the Council on Criminal Sanctions for Insider Dealing and Market Manipulation, SEC (2011) 1217 final, at 25.

266. *See, e.g.*, MAR, *supra* note 171, art. 23.2 ("In order to fulfil their duties under this Regulation, competent authorities shall have*, in accordance with national law*, at least the following supervisory and investigatory powers") (emphasis added); *see also* MiFID II, *supra* note 156, art. 72.1; MAR, *supra* note 171, art. 23.1; Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, art. 64.2, 2013 O.J. L 176/338 [hereinafter CRD IV].

An aspect relating to the CSAs' ability to cooperate with each other, to which the post-de Larosiére overhaul has given particular attention, is the CSAs' mandates. The creation of the ESFS and the Banking Union, and the allocation of important tasks to CSAs within them, has led to the configuration of transnational mandates that obligate CSAs to accomplish goals beyond their own jurisdictions. For instance, in their role as members of the governing bodies of the ESAs, the SSM and the SRM, representatives of CSAs must act in the interest of the European Union as a whole.[267] Some post-crisis EU laws also embrace general transnational mandates that CSAs must abide within their day-to-day supervision at the national level. For example, Article 7 of the Capital Requirements Directive IV ("CRD IV") stipulates that: "the competent authorities in each Member State shall, in the exercise of their general duties, duly consider the potential impact of their decisions on the stability of the financial system in the other Member States concerned and, in particular, in emergency situations, based on the information available at the relevant time."

Despite the post-crisis broadening of the Member State CSAs' mandates, the latter remain, to a primary extent, national and relate to the accomplishment of objectives pertaining to financial systems, markets, institutions and firms in the CSAs' own jurisdictions. The laws instituting national CSAs often acknowledge, in an explicit manner, the national character of the CSAs' mandates. For example, in the UK, the Financial Services and Markets Act 2000 ("FSMA 2000") defines the FCA's integrity objective as: "protecting and enhancing the integrity of the UK financial system".[268]

There is some tension between the national character of the core mandates of Member State CSAs and the latter's position within EU financial regulatory and supervisory structures–such as the ESFS and the SSM–oriented towards cross-border goals.[269] When it comes to the specific area of cooperation, a potential problem is that a CSA from a Member State may be faced with a request of cooperation,

267. *See, e.g.*, ESAs Regulations, *supra* note 114, arts. 42, 46; SRM Regulation, *supra* note 135, art. 47.

268. Financial Services and Markets Act 2000, c. 8, Part 1A, Chapter 1, § 1D(1).

269. On the potential conflicts between EU and national mandates for financial sector supervisors *see* Daniel C. Hardy, *A European Mandate for Financial Sector Supervisors in the EU,* 21-22 (IMF Working Paper No. 09/5, 2009).

whose compliance with would advance EU-wide objectives of financial supervision to the detriment of that Member State's supervisory mandates. Although the principle of supremacy of EU law ordinarily requires a national mandate that conflicts with a duty of cooperation set by EU law to be set aside,[270] a CSA may be nonetheless incentivized to refuse cooperation or provide an incomplete cooperation to maximize its compliance with its domestic mandates.

The accountability relationships within which CSAs operate are critical to understanding how CSAs balance the various mandates, duties, and interests at stake in a particular cooperation context. Although the post-crisis overhaul on EU financial services regulation and supervision incorporates some forms of multi-level transnational accountability–for example an ESA may hold a CSA to account through the binding mediation mechanism of Article 19 of the ESAs Regulations–, the account principals with the power to call and/or hold CSAs to account are largely domestic actors. For example, the power to appoint and dismiss the heads of CSAs lies with governments and/or parliaments in each Member State. Similarly, the creation, abolition and funding of CSAs depends on decisions made by political institutions in the jurisdictions of the CSAs concerned.[271] In addition, the accountability of CSAs at the national level is essentially determined by the extent to which they accomplish their mandates,[272] which tend to have a marked national character. Owing to the predominantly domestic nature of both the mandates and accountability of the Member State CSAs, when these CSAs are faced with cooperation requests in which domestic interests are at stake, they may have an incentive to prioritize the maximization of such interests rather than the broader goals embraced by EU law cooperation duties or mandates.[273] This may be particularly true when

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270. ALINA KACZOROWSKA, EUROPEAN UNION LAW 285 (4th ed. 2016).

271. Donato Masciandaro, Maria J. Nieto & Marc Quintyn, *Will They Sing the Same Tune? Measuring Convergence in the New European System of Financial Supervisors*, *in* HANDBOOK OF CENTRAL BANKING, FINANCIAL REGULATION AND SUPERVISION: AFTER THE FINANCIAL CRISIS 509-11 (Sylvester Eijffinger & Donato Masciandaro eds., 2011).

272. Iglesias-Rodríguez, *supra* note 1, at 15. On the importance of clear mandates for ensuring accountability *see* Eva Hüpkes et al ., *Accountability Arrangements for Financial Sector Regulators,* 3 (IMF Economic Issues No. 39, 2006).

273. In the early stages of the global financial crisis, CSAs' actions driven by the protection of national interests sometimes had distortive effects on international capital flows.

CSAs are not properly insulated from undue political pressure and stakeholder interferences in their respective Member States.

VIII. THE EUROPEAN POLITICAL CRISIS, BREXIT, AND THE FUTURE OF SUPERVISORY COOPERATION IN THE EUROPEAN UNION

From the outset, the EU single market for financial services has developed through a process of incremental integration. The Single European Act, the FSAP, the Lamfalussy and de Larosiére architectures, the Banking Union, and the Capital Markets Union[274] represent steps of such a process, which has led to increasing degrees of regulatory and supervisory convergence as well as greater centralization of decision-making at the EU level.[275] The various crises that the European Union has been facing since the year 2008 do, nevertheless, raise some concerns about the future, scope, and pace of the process of EU financial services integration.

On the one side, the financial, euro, and sovereign debt crises, and their effects on the EU economy, have reduced the trust of citizens in the European Union[276] and led to a decline of support of the process of EU integration.[277] Likewise, disagreements between

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An example was asset ring-fencing in the UK and Germany in response to the Icelandic Banks' crisis and Lehman's default, respectively. *See* Stijn Claessens, *The Financial Crisis and Financial Nationalism*, *in* EFFECTIVE CRISIS RESPONSE AND OPENNESS: IMPLICATIONS FOR THE TRADING SYSTEM 269-70 (Simon J. Evenett et al. eds., 2009).

274. The Capital Markets Union is a plan that was adopted by the Commission in September 2015. Its main goal is to create a single EU capital market by 2019. The focus of the Capital Markets Union Plan is on, *inter alia*, the promotion of mechanisms of direct finance and cross-border capital flows –*see* Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan on Building a Capital Markets Union, COM (2015) 468 final.

275. *See, e.g.*, Jennifer Payne & Elizabeth Howell, *The Creation of a European Capital Market*, *in* RESEARCH HANDBOOK ON THE LAW OF THE EU'S INTERNAL MARKET (Panos Koutrakos & Jukka Snell eds., 2017); Commission, Feedback Statement on the Public Consultation on the Operations of the European Supervisory Authorities Having Taken Place from 21 March to 16 May 2017 (June 20, 2017), at 5, https://ec.europa.eu/info/sites/info/files/2017-esas-operations-summary-of-responses_en.pdf [https://perma.cc/X8VQ-LBSR] (archived Mar. 8, 2018).

276 . *See, e.g.*, Chase Foster & Jeffry Frieden, *Crisis of Trust: Socio-Economic Determinants of Europeans' Confidence in Government,* 18 EUR. UNION POLITICS 511, 512 (2017).

277. *See, e.g.*, Vivien A. Schmidt, *The Eurozone's Crisis of Democratic Legitimacy: Can the EU Rebuild Public Trust and Support for European Economic Integration?*, 7 (Directorate-

Member States regarding responses to these crises–for example, Germany supports austerity and structural reforms while Greece opposes them–have led to greater polarization and tensions.[278] In addition, the post-crisis trend of centralization of financial regulatory, supervisory, and, more generally, executive powers at the EU level[279] has not been equally welcomed by all Member States.[280] On the other side, the EU's legitimacy and political crises have been magnified by Member States' diverging approaches to core areas of EU policy, such as migration and security, which have accentuated internal frictions within the European Union.[281]

General for Economic and Financial Affairs European Economy Discussion Paper No. 15, 2015).

278. *See, e.g.*, Klaus Armingeon & Skyler Cranmer, *Position-Taking in the Euro Crisis*, 24 J. OF EUR. PUB. POLICY 1, 2 (2017); Alastair Macdonald & Jan Strupczewski, *Who Rules? Euro Zone Budget Tensions Surface*, REUTERS (Nov. 17, 2016), https://www.reuters.com/article/us-eurozone-budgets-supervisor/who-rules-euro-zone-budget-tensions-surface-idUSKBN13C22R [https://perma.cc/MR6C-QJJF] (archived Mar. 8, 2018).

279. For examples of this kind of centralization, *see* Stefano Micossi, *How the EZ Crisis is Permanently Changing EU Institutions* (Centre for Economic Policy Research Policy Insight No. 65, 2013).

280. For example, the United Kingdom has long been a strong opponent of shifting decision-making power from national bodies to EU bodies, such as the shift made by the ESFS –*see, e.g.*, Lucia Quaglia, *The 'Old' and 'New' Politics of Financial Services Regulation in the European Union*, 17 NEW POL. ECON. 515, 525 (2012); *see also United Kingdom v. European Parliament & European Council*, Case C-270/12 [2014] ECR I-0, ¶ 101, http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dc90808aa4aa2d419ba46b9df567a1b8d7.e34KaxiLc3qMb40Rch0SaxyNaxr0?text=&docid=140965&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1322385 [https://perma.cc/7FED-ZYCY] (archived Mar. 8, 2018) (rejecting the UK's challenge to the constitutionality of the powers of ESMA in respect of short-selling bans); *United Kingdom v. European Central Bank [ECB]*, Case T-496/11, 2015, ¶ 110, http://curia.europa.eu/juris/document/document.jsf?text=&docid=162667&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1323584 [https://perma.cc/VLQ5-EAPM] (archived Mar. 8, 2018) (accepting the UK's argument that the ECB lacked the power to impose requirements regarding the location of Central Counterparty Clearing Houses ("CCPs")). Likewise, the German Federal Financial Supervision Authority ("BaFin") also voiced concerns over the centralization of supervisory powers in the SSM –*see* Domenico Lombardi & Manuela Moschella, *Domestic Preferences and European Banking Supervision: Germany, Italy and the Single Supervisory Mechanism*, 39 W. EUR. POL. 462, 473 (2016).

281. *See generally,* Gabriela Baczynska, *No Compromise in Sight, EU Ministers at Odds over Immigration*, REUTERS (Nov. 18, 2016), https://www.reuters.com/article/us-europe-migrants-eu/no-compromise-in-sight-eu-ministers-at-odds-over-immigration-idUSKBN13D1AF [https://perma.cc/G35S-5YMR] (archived Mar. 8, 2018); Francois Murphy & Isla Binnie, *Austria Says to Control Migrants on Italy Border, Rome Protests*, REUTERS (July 4, 2017), https://www.reuters.com/article/us-europe-migrants-austria-italy/austria-says-to-control-

One of the manifestations of the EU's various crises has been the rise of in popularity of political parties that oppose EU integration, notably in France, Italy, the Netherlands, and Germany.[282] Another more dramatic outcome was the decision by the United Kingdom to leave the European Union.[283] In addition, at the EU level, the Commission and the Council have been mulling over a multi-speed European Union with different degrees and speeds of integration across Member States.[284]

A. The EU-UK Supervisory Relationship after Brexit

Brexit raises important questions about the future of financial integration and supervisory cooperation in Europe. The United Kingdom is one of the main international financial centers and it hosts some of the largest financial entities from the EU internal market.[285] The PRA and the FCA–as well as their predecessors–have played a central role in shaping EU financial services regulation and supervision.[286] Brexit will transform the nature of the relationships between the CSAs in the European Union and those in the United Kingdom. The position of the United Kingdom in this new framework will largely depend on whether the negotiations between the European Union and the United Kingdom result in a "soft" or a "hard" Brexit.

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migrants-on-italy-border-rome-protests-idUSKBN19P1B5 [https://perma.cc/NGT3-CAMU] (archived Mar. 8, 2018).

282. *See* Benjamin Dodman, *France, Germany and the Netherlands: The Elections that Could Derail the EU in 2017*, FRANCE 24 (Dec. 31, 2016), http://www.france24.com/en/20161230-eu-elections-2017-le-pen-fillon-wilders-immigration-france-germany-netherlands [https://perma.cc/N5DU-3HR5] (archived Mar. 8, 2018).

283. The majority of the votes in the EU referendum on June 23, 2016 supported Brexit. For an analysis of the results of the EU referendum, *see* Elise Uberoi, *European Union Referendum 2016* (House of Commons Briefing Paper CBP 7639, 2016).

284. *See infra,* Section VIII.B.

285. *See, e.g.*, CITY OF LONDON CORPORATION, LONDON: EUROPE AND THE WORLD'S FINANCIAL CENTRE (2014); Simeon Djankov, *The City of London after Brexit*, 5-10 (London School of Economics, Financial Markets Group Discussion Paper No. 762, 2017).

286. *See generally,* NORTON ROSE FULBRIGHT, SHAPING LEGISLATION: UK ENGAGEMENT IN EU FINANCIAL SERVICES POLICY-MAKING (2016) (summarizing case studies of the influence of the United Kingdom on five recent EU financial services laws).

In a soft Brexit scenario, the United Kingdom would keep its membership in the European Economic Association ("EEA")[287] and, consequently, companies established in the United Kingdom would be able to maintain access to the single market for financial services in the European Union through the single passport.[288] Under this framework, the United Kingdom would be subject to EU financial markets legislation[289] and, therefore, to the corresponding cooperation duties vis-à-vis other CSAs and the ESAs. With respect to the position of the United Kingdom within the ESFS, the representatives of the PRA and the FCA would become non-voting members of the Boards of Supervisors of the ESAs.[290] When it comes to supervisory cooperation disputes, CSAs in the United Kingdom would be subject to the mediation mechanism of Article 19 of the ESAs Regulations; however, only the European Free Trade Association ("EFTA") Surveillance Authority, not the ESAs, would have the authority to

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287. Eilis Ferran, *The UK as a Third Country Actor in EU Financial Services Regulation,* 2 (University of Cambridge Legal Studies Research Paper No. 47/2016, 2016).

288. Under the single passport rights, financial entities authorized in a European Economic Association ("EEA") Member State have the right to provide services in other EEA Member States without additional authorizations. *See* European Parliament, Briefing on Understanding Equivalence and the Single Passport in Financial Services: Third-Country Access to the Single Market (PE 599.267, 2017), at 3, http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599267/EPRS_BRI(2017)599267_EN.pdf [https://perma.cc/GV2X-CR3L] (archived Mar. 8, 2018).

289. The EEA Agreement extends the Single Market freedoms to EEA-European Free Trade Association ("EFTA") countries, currently Iceland, Liechtenstein, and Norway, thus subjecting these countries to the EU internal market laws. *See* European Parliament, Briefing Note: Overview of EU Rules Applicable to EEA/EFTA Countries in Financial Services, Competition and Taxation (PE 408.579, 2008), at 2.

290. The ESAs Regulations were incorporated into the EEA Agreement by: Decision of the EEA Joint Committee No. 199/2016 of 30 September 2016 Amending Annex IX (Financial Services) to the EEA Agreement [2017/276], 2016 O.J. L 46/4 (incorporating the EBA Regulation); Decision of the EEA Joint Committee No. 200/2016 of 30 September 2016 Amending Annex IX (Financial Services) to the EEA Agreement [2017/277], 2016 O.J. L 46/13 (incorporating the EIOPA Regulation); and Decision of the EEA Joint Committee No. 201/2016 of 30 September 2016 Amending Annex IX (Financial Services) to the EEA Agreement [2017/278], 2016 O.J. L 46/22 (incorporating the ESMA Regulation). The heads of the relevant CSAs of EEA-EFTA Member States are non-voting members of the Boards of Supervisors of the ESAs–*see, e.g.*, EEA Consolidated Version of Regulation (EU) No. 1093/2010 of the European Parliament and of the Council of 24 November 2010 Establishing a European Supervisory Authority (European Banking Authority), Amending Decision No. 716/2009/EC and Repealing Commission Decision 2009/78/EC (2010 O.J. L 331/12) as Adapted for the Purposes of the EEA Agreement by Decision of the EEA Joint Committee No. 199/2016 of 30 September 2016 (2017 O.J. L 46/4), art. 40.1(b) [hereinafter EEA Consolidated Regulation No. 1093/2010].

issue a binding mediation decision against these CSAs.[291] The likelihood of the UK's membership in the EEA post-Brexit is, in principle, low[292] because membership would imply a series of commitments, such as acceptance of the EU's four freedoms and indirect judicial oversight by the CJEU,[293] which clash with the UK Conservative Party's manifesto.[294]

Regarding the possibility of UK financial entities relocating to the European Union to maintain access to the single market for financial services, an opinion issued by ESMA in May 2017[295] suggests that authorizations issued to relocating entities will be subject to strict conditionality[296] and CSAs of the Member States will be expected to monitor the real reasons these entities move to the European Union and to "reject any relocation request creating letter-box entities where, for instance, extensive use of outsourcing and delegation is foreseen with the intention of benefitting from an EU passport, while essentially performing all substantial activities or functions outside the EU27."[297]

In a hard Brexit scenario,[298] namely one in which the United Kingdom does not maintain membership in the EEA and there is no

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291. *See, e.g.,* EEA Consolidated Regulation No. 1093/2010, *supra* note 290, art. 19.3.

292. There are some discussions about the effects of Brexit on the UK's membership in the EEA; specifically, whether after leaving the European Union, the United Kingdom would retain its membership in the EEA, or if, on the contrary, it would cease being an EEA contracting party. *See, e.g.*, ALLEN & OVERY, IMPLICATIONS OF EEA MEMBERSHIP OUTSIDE THE EU - DIFFERENT NAME, SAME GAME? 7 (2016), http://www.allenovery.com/Brexit-Law/Documents/Macro/EU/AO_BrexitLaw_-_EEA_Membership_Jul_2016.PDF [https://perma.cc/9KUB-DKQW] (archived Mar. 8, 2018).

293. Agreement on the European Economic Area, arts. 6-7, 2016 O.J. L 1 E/3 [hereinafter EEA Agreement]; *see also* HOGAN LOVELLS, THE UK AND THE EEA AFTER BREXIT (2017), http://www.hoganlovellsbrexit.com/_uploads/downloads/11075_CM_BREXIT-EEA_INFO_E-zbmct.pdf [https://perma.cc/K559-CFG3] (archived Mar. 8, 2018).

294. CONSERVATIVE AND UNIONIST PARTY, MANIFESTO 2017: FORWARD, TOGETHER 35-36 (2017). At the time of writing this paper, the Conservative Party was the UK's ruling party. *See also* Jim Edwards, *Theresa May's Silent Decision to Leave the EEA is Setting Up Britain for the Worst of all Possible Brexit Deals*, BUSINESS INSIDER (Jan. 26, 2017), http://www.businessinsider.com/theresa-may-eea-britain-disastrous-brexit-deal-2017-1.

295. ESMA, General Principles to Support Supervisory Convergence in the Context of the United Kingdom Withdrawing from the European Union (ESMA42-110-433) (May 31, 2017).

296. In areas relating to, among others, the governance, operations, and outsourcing and delegation agreements of the relocating financial entities. *Id.* at 3-6.

297. *Id.* at 5.

298. Various commentators see hard Brexit as a highly likely scenario –*see, e.g.*, John Springford, *Why a Hard Brexit Looks Likely*, 110 CENTRE FOR EUROPEAN REFORM BULLETIN

alternative agreement giving it similar rights,[299] the United Kingdom would become a third-country for regulatory and supervisory purposes.[300] In such a scenario, the UK's access to the single market for financial services would depend on the issuance of an equivalence decision by the Commission[301] finding the financial regulatory and supervisory regime in the United Kingdom to be equivalent to that in the European Union.[302] The access rights granted under the equivalence framework are, however, much more restricted than those available through the single passport.[303] For instance, equivalence can only be requested by third-countries and granted by the Commission when an EU financial law allows for such possibility, and only for the specific purposes stipulated in such law. Moreover, a decision on equivalence can be unilaterally withdrawn by the Commission.[304] Regarding financial supervision, the UK CSAs would no longer be subject to supervisory cooperation duties required under EU law; nor would they form part of the ESFS and its supervisory cooperation instruments. More generally, Brexit, particularly its "hard" version, will cause greater divergence between the EU law and UK law,[305] which may have a potential impact on the ability of CSAs from both sides of the Channel to cooperate with each other.

1, 2-3 (2016); Martin Wolf, *Business Should Assume a Hard Brexit*, FINANCIAL TIMES (Jan. 12, 2017). A survey conducted before the start of the Brexit negotiations between the European Union and the United Kingdom showed that among non-British Europeans there is wide support for a hard Brexit. Jon Henley & Pamela Duncan, *Two-thirds of Europeans Believe EU Should Take Hard Line on Brexit – Poll*, THE GUARDIAN (June 19, 2017, 7:01 PM), https://www.theguardian.com/world/2017/jun/20/two-thirds-europeans-believe-eu-hard-line-brexit-poll [https://perma.cc/WY67-2JVQ] (archived Mar. 8, 2018).

299. Ferran, *supra* note 287, at 41.

300. *Id.* at 42.

301. Karel Lanoo, *EU Financial Market Access After Brexit*, 51 INTERECONOMICS 255, 258-260 (2016).

302. On the concept of equivalence in financial services *see* European Parliament, *supra* note 288, at 2 and Commission, Commission Staff Working Document on EU equivalence decisions in financial services policy: an assessment, SWD (2017) 102 final.

303. *See, e.g.*, Gavin Finch & John Glover, *Goodbye Passport, Hello Equivalence? Brexit Banks Compromise*, BLOOMBERG NEWS (Jan. 16, 2017), https://www.bloomberg.com/professional/blog/goodbye-passport-hello-equivalence-brexit-banks-compromise/ [https://perma.cc/VG22-JP73] (archived Mar, 8, 2018).

304. European Parliament, Third-Country Equivalence in EU Banking Legislation (PE 587.369, 2017), at 2.

305. *See, e.g.*, WILLIAM WRIGHT, THE POTENTIAL IMPACT OF BREXIT ON EUROPEAN CAPITAL MARKETS: A QUALITATIVE SURVEY OF MARKET PARTICIPANTS 15 (2016).

In areas of systemic importance for the financial system, Brexit may require the European Union to redefine its relationship with the United Kingdom in order to address potential threats to the stability of the EU financial system. One area of regulation that will likely need this redefining is post-trading.[306] In June 2017, the Commission proposed a new regulatory framework[307] for third-country Central Counterparty Clearing Houses ("CCPs")[308] aimed at strengthening their supervision to mitigate systemic risks in the European Union.[309] Due to the central role that CCPs play in the functioning of financial systems, their failure could have a systemic impact.[310] Recognized third-country CCPs clear a significant amount of financial instruments denominated in Euro and other currencies of the Member States.[311] As a result, disruptions affecting recognized third-country CCPs may have a major effect in the stability of the EU financial system.[312] In the Commission's view, the supervisory cooperation arrangements embraced by the equivalence regime did not properly guarantee robust supervision of recognized non-EU CCPs:

> after a third-country CCP has been recognized [sic], ESMA has encountered difficulties in accessing information from the CCP,

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306. Post-trading primarily refers to two functions: clearing and settlement. For an overview of post-trading *see* GIOVANNINI GROUP, CROSS-BORDER CLEARING AND SETTLEMENT ARRANGEMENTS IN THE EUROPEAN UNION 4-6 (2001).

307. Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No. 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs, COM (2017) 331 final [hereinafter Commission's Proposal].

308. One of the main functions performed by CCPs is novation. Novation refers to the substitution of a contract between a buyer and a seller of securities for two new contracts, one between the buyer and the CCP and another between the seller and the CCP. By interposing itself between the buyer and the seller and guaranteeing the performance of the obligations of the parties in case of default by any of them, the CCP mitigates counterparty risk. On the role of CCPs in risk mitigation *see* Douglas D. Evanoff et al., *Policymakers, Researchers, and Practitioners Discuss the Role of Central Counterparties*, 30 ECONOMIC PERSPECTIVES, FEDERAL RESERVE BANK OF CHICAGO 2, 3-4 (2006); Kirsi Ripatti, *Central Counterparty Clearing: Constructing a Framework for Evaluation of Risks and Benefits* (Bank of Finland Discussion Paper No. 30/2004, 2004).

309. Commission Press Release, IP/17/1568 (June 13, 2017).

310. Amandeep Rehlon & Dan Nixon, *Central Counterparties: What Are They, Why Do They Matter and How Does the Bank Supervise Them?*, 53 BANK ENG. Q. BULL. 147, 147 (2013); Commission's Proposal, *supra* note 307, at 4.

311. Commission's Proposal, *supra* note 307, at 5.

312. *Id.* at 5-6.

> in conducting on-site inspections of the CCP and in sharing information with the relevant EU regulators, supervisors and central banks. As a result, there is a risk that third country CCP practices and/or adjustments to risk management models go undetected and/or unaddressed, which may have important financial-stability implications for the EU entities.[313]

The Commission's Proposal specifically acknowledges the risks posed by Brexit. The United Kingdom hosts some of the main CCPs clearing euro-denominated transactions, such as London Clearing House Limited ("LCH").[314] Consequently, the UK's withdrawal from the European Union, would lead to a major increase in the volume of transactions being cleared in third-countries and subjected to lesser degrees of EU oversight.[315]

Under the proposed reform, ESMA would be tasked with carrying out assessments on the systemic importance of third-country CCPs for the financial stability of the European Union.[316] These assessments may determine, either that a CCP is or likely to become systemically important ("Tier-2 CCPs"),[317] or that a CCP is neither systemically important nor likely to become so ("Tier-1 CCPs").[318] Tier-1 CCPs would be subject to the general equivalence and recognition regime.[319] Tier-2 CCPs would be further divided in two categories, which would each receive different regulatory treatment. On the one hand, ESMA may consider a Tier-2 CCP to be systemically important; such CCP would be under a special regulatory regime where, in addition to compliance with the general equivalence conditions, it must fulfill additional requirements, such as the EMIR prudential rules applicable to CCPs in the European Union.[320] On the other hand, ESMA may conclude that a CCP is of substantial systemic importance;[321] this would apply to CCPs that, because of their particular features (e.g. their concentration of

313. *Id.* at 5.

314. *See* Philip Stafford & Rachel Toplensky, *EU Outlines 3 Options for London's Euro Clearing Business*, FINANCIAL TIMES (May 4, 2017).

315. Commission's Proposal, *supra* note 307, at 6.

316. Commission's Proposal, *supra* note 307, at 24, recital 29.

317. Commission's Proposal, *supra* note 307, at 24; and proposed art. 25.2a of EMIR.

318. Commission's Proposal, *supra* note 307, at 24; and proposed art. 25.2(e) of EMIR.

319. Commission's Proposal, *supra* note 307, at 24.

320. Commission's Proposal, *supra* note 307, at 24-25; and proposed art. 25.2b(a) of EMIR.

321. Commission's Proposal, *supra* note 307, at 25; and proposed art. 25.2c of EMIR.

clearing operations) pose major risks to the stability of the European Union or to one or more Member States;[322] the Commission's Proposal deems the regulatory and supervisory arrangements embraced by the third-country equivalence-recognition regime to be unsuitable for this type of CCPs and that, therefore, they should not have access to it;[323] ESMA may propose to the Commission that a CCP deemed to be of substantial systemic importance is not recognized; if the Commission adopts an implementing act to that effect, then the recognition regime would be dis-applied, with the result that the third-country Tier-2 CCP concerned could only provide services within the EU single market by relocating to the European Union.[324] The criteria that ESMA will use to determine the systemic importance of CCPs include their size, the value of the transactions cleared in each EU currency, and the impact that their failure would have on the EU financial system.[325] Consequently, the proposed regime might result in some UK-based CCPs that play a central role in the clearing of euro-denominated transactions, such as LCH, being forced to move their clearing business to the European Union or else lose their access to the EU single market.[326]

Overall, the proposed reform would result in greater centralization of supervisory functions pertaining to third-country CCPs at the EU level. Notably, ESMA would be entrusted with the supervision of both Tier-1 and Tier-2 CCPs, particularly with respect to ongoing compliance with the conditions for recognition.[327] In addition, some of the EMIR's proposed amendments are aimed at fostering supervisory cooperation by, for example, requiring that "the cooperation arrangements between ESMA and the relevant competent authorities of equivalent CCP third-country regimes . . . be effective in practice."[328] The Commission's Proposal also stipulates that equivalence and recognition will be conditional on the effective

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322. Commission's Proposal, *supra* note 307, at 25-26.

323. *Id.*; and proposed art. 25.2c of EMIR.

324. Commission's Proposal, *supra* note 307, at 26; and proposed art. 25.2c of EMIR.

325. Commission's Proposal, *supra* note 307, at 24; and proposed art. 25.2a of EMIR.

326. Huw Jones, *LCH Urges EU to Avoid Forced Relocation of Euro Clearing*, REUTERS (June 7, 2017), https://www.reuters.com/article/uk-britain-eu-clearing/lch-urges-eu-to-avoid-forced-relocation-of-euro-clearing-idUKKBN18Y1FR [https://perma.cc/SQ3Z-3RZ9] (archived Mar. 8, 2018).

327. Commission's Proposal, *supra* note 307, at 26; and proposed art. 25.b of EMIR.

328. Commission's Proposal, *supra* note 307, at 26; and proposed art. 25.7 of EMIR.

cooperation by third-country CSAs. If these CSAs fail to cooperate in good faith with ESMA or other EU supervisors, the Commission can decide to revoke an equivalence decision.[329] The Commission's Proposal has been complemented by the ECB's *Governing Council Recommendation of 22 June 2017 to Amend Article 22 of the Statute of the European System of Central Banks and of the European Central Bank*.[330] Under this proposed reform, CCPs would be put under the ECB's regulatory and supervisory remit.[331] The ECB's proposal largely builds on the CJEU's decision in Case T-496/11 regarding the UK's challenge to the power of the ECB to regulate CCPs and, notably, to its competence to impose location requirements under the *Eurosystem Oversight Policy Framework*.[332] The CJEU upheld the UK's view but, at the same time, acknowledged that the ECB could request the EU legislature to grant the ECB the power to regulate CCPs if the ECB deemed such power necessary to the proper performance of its tasks.[333] The proposed amendment to Article 22 of the Statute of the European System of Central Banks would result in additional centralization of CCP clearing regulation and supervision at the EU level, with the ECB playing a central role in the oversight, not only of EU CCPs, but also of third-country CCPs that clear euro-denominated transactions.[334] The ECB has indicated that it will take a strict approach to the recognition of third-country CCPs in order to preserve financial stability in the European Union.[335] Consequently, the formulation of this proposal in the midst of the Brexit talks has

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329. Commission's Proposal, *supra* note 307, recital 26.

330. Recommendation for a Decision of the European Parliament and of the Council amending Article 22 of the Statute of the European System of Central Banks and of the European Central Bank (ECB/2017/18) (presented by the European Central Bank), 2017 O.J. C 212/14.

331. The amended version of Article 22 of the Statute of the European System of Central Banks ("ESCB") would read as follows: "The ECB and national central banks may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems, and clearing systems for financial instruments, within the Union and with other countries." *Id.* art. 1.

332. ECB, EUROSYSTEM OVERSIGHT POLICY FRAMEWORK (2011).

333. *United Kingdom v. European Central Bank [ECB]*, Case T-496/11, 2015, ¶ 109, http://curia.europa.eu/juris/document/document.jsf?text=&docid=162667&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1323584 [https://perma.cc/Y5X8-NBX6] (archived Mar. 8, 2018).

334. *See* ECB, *supra* note 330, recital 7.

335. *See* Benoît Cœuré, *European CCPs after Brexit:. Speech at the Global Financial Markets Association* (June 20, 2017).

raised concerns among UK's policy-makers and financial industry actors, who foresee a potential threat to a key sector of the UK's financial industry.[336]

In the post-Brexit scenario, the incentives of CSAs from the European Union and the United Kingdom to cooperate with each other will largely be determined by the degrees of financial interdependence between the European Union and the United Kingdom. A first potential scenario is one where the United Kingdom would lose relevance as a European financial center. This may happen, for instance, if there is an increase in financial outflows from the United Kingdom to the European Union in combination with a decrease in financial inflows from the European Union to the United Kingdom.[337] In such a case, the scope of cooperation between the European Union and the United Kingdom would be more limited. A second potential scenario is one where the United Kingdom retains its relevance as a European financial center and the high degrees of financial interdependence between the European Union and the United Kingdom are maintained.[338] In such a second scenario, CSAs would have incentives to develop arrangements that guarantee an efficient supervisory cooperation, even in absence of a strong framework of binding cooperation duties.

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336. *See* Alessandro Speciale, *ECB Raises Brexit Heat with Bid for Power Over Euro Clearing*, BLOOMBERG MARKETS (June 23, 2017, 2:43 AM), https://www.bloomberg.com/news/articles/2017-06-23/ecb-bids-for-power-over-euro-clearing-as-brexit-debate-heats-up [https://perma/cc/692S-E3UT] (archived Mar. 8, 2018).

337. Post-referendum data suggests that Brexit may have a negative impact on UK-based British stock market funds. *See* Simon Bowers, *UK Investment Funds Suffered £5.7bn Outflows After Brexit Vote*, THE GUARDIAN (Aug. 23, 2016, 2:43 PM), https://www.theguardian.com/business/2016/aug/23/uk-investment-funds-suffered-5-billion-pound-outflows-after-brexit-vote [https://perma.cc/35MS-NV4S] (archived Mar. 8, 2018).

338. Some commentators argue that, owing to the high interdependencies between the EU and UK financial systems, a Brexit deal that hinders the position of the City of London, would be negative for the European Union as well. *See* Daniel Boffey, *EU Will Lose Out from Bad Brexit Deal on City, Says Leaked Report*, THE GUARDIAN (Feb. 1, 2017, 6:48 AM), https://www.theguardian.com/business/2017/feb/01/eu-brexit-deal-city-leaked-report-european-parliament-article-50 [https://perma.cc/63T6-VGVP] (archived Mar. 8, 2018).

B. The Prospect of a Multi-Speed European Union and its Impact on Supervisory Cooperation

The EU political crisis, which was to a certain degree exacerbated by the Brexit vote,[339] received mixed policy reactions. Whereas some proposals point in the direction of greater integration and centralization of financial supervision at the EU level, others might lead to the coexistence of mixed degrees of integration within the single market for financial services.

On the one side, the EU economic and political crises have increased awareness within the EU-27 about the need to advance the process of capital markets integration to support the EU economy.[340] The *Mid-Term Review of the Capital Markets Union Action Plan*, published by the Commission on June 8, 2017, acknowledges the instrumental role that supervision plays in the proper functioning of capital markets and suggests the need to move towards greater integration of the EU financial supervisory framework.[341] The reforms put forward by the Mid-Term Review include a future revision of the powers of the ESAs and, particularly, of ESMA aimed at fostering their role in EU financial supervision and broadening the areas of the financial system within their direct supervisory control.[342] These reforms, which would lead to more centralization of financial supervision in the European Union, build on the plan for a Financial Union[343] proposed by the Five President's Report published in June 2015.[344] The pillars of the Financial Union project are the Banking Union and the Capital Markets Union.[345] The Five President's Report

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339. *See, e.g.*, European Shadow Fin. Regulatory Comm. [ESFRC], *Europe Under Threat: The Political Dynamics of Brexit Interacting with Weakness in the European Financial System*, Statement No. 42 (Sept. 16, 2016).

340. Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review of the Capital Markets Union Action Plan, COM (2017) 292 final, at 8 [hereinafter Mid-Term Review].

341. *Id.*

342. *Id*. at 8, 10-11.

343. *Id*. at 8.

344. Commission, Completing Europe's Economic and Monetary Union (June 22, 2015), https://ec.europa.eu/commission/sites/beta-political/files/5-presidents-report_en.pdf [https://perma.cc/4AD8-ZFL8] (archived Mar. 8, 2018) [hereinafter Five President's Report].

345. *Id.* at 11-12.

envisaged the future creation of a Single European Capital Markets Supervisor for the Capital Markets Union.[346]

On the other side, the idea of a multi-speed Europe, which has been gaining force since the Rome Summit of March 2017,[347] raises some questions about the future of financial integration and supervisory cooperation in the European Union. In the *White Paper on the Future of Europe*, published on March 1, 2017,[348] the Commission presented five potential scenarios regarding the future of the European Union. These scenarios, which ranged from "less EU" to "more EU,"[349] reflected different political views about the process of EU integration. One of the pathways suggested by the Commission was "the European Union allows willing Member States to do more together in specific areas."[350] This idea, which received mixed degrees of support from Member States,[351] was embraced by the leaders of the EU-27, the Council, the Parliament, and the Commission in the Rome Declaration of March 25, 2017.[352] There is some uncertainty regarding whether and to what extent the single

346. *Id*. at 12.

347. European Council Meeting of 25 March 2017.

348. Commission, White Paper on the Future of Europe: Reflections and Scenarios for the EU27 by 2025, COM (2017) 2025, at 15-25 [hereinafter White Paper on the Future of Europe].

349. The proposed scenarios were the following: (i) "Carrying on;" (ii) "Nothing but the single market;" (iii) "Those who want more do more;" (iv) "Doing less more efficiently;" and, (v) "Doing much more together." For an overview of the policies embraced by each of these scenarios *see id.* at 29.

350. *Id.* at 20-21.

351. Whereas France, Germany, Italy, and Spain supported the idea of a multi-speed Europe –*see* Aline Robert, *'Big Four' Call for New European Dynamic, Multi-Speed EU*, EURACTIV (Mar. 7, 2017), https://www.euractiv.com/section/future-eu/news/big-four-call-for-new-european-dynamic-multi-speed-eu/ [https://perma.cc/ZN37-RAQW] (archived Mar. 8, 2018)–, the Visegrad Group, namely Czech Republic, Hungary, Poland, and Slovakia, opposed it, arguing that it could lead to a disintegration of the Single Market, the Schengen area, and the European Union –*see* Polish Presidency of the Visegrad Group, Joint Statement of the Heads of Governments of the V4 Countries, Strong Europe – Union of Action and Trust: Input to Rome Declaration 2017 (2017), https://www.vlada.cz/assets/media-centrum/aktualne/Joint-Statement-of-the-Heads-of-Governments-of-the-V4-Countries-_Strong-Europe-_-Union-of-Action-and-Trust_-Input-to-Rome-Declaration-2017.pdf [https://perma.cc/A5ZP-V2JG] (archived Mar. 8, 2018).

352. In this respect, the signatories of the Rome Declaration agreed on the following text: "We will act together, at different paces and intensity where necessary, while moving in the same direction, as we have done in the past, in line with the Treaties and keeping the door open to those who want to join later. Our Union is undivided and indivisible." –Council of the European Union Press Release, 149/17 (Mar. 25, 2017).

market for financial services would be included within the scope of a multi-speed European Union. The *White Paper on the Future of Europe* does not include the financial sector among the areas that would operate under multi-tier arrangements.[353] In addition, after the Rome Summit, EU policy-makers have made a series of decisions, such as the above-referred proposals to strengthen ESMA's powers in the field of post-trading, that encompass an underlying notion of single-speed European Union and of advancing, *en bloc*, in the process of integration of the financial supervisory framework.

There are policy arguments justifying a same-speed approach to financial regulation and supervision. Notably, the creation of different speeds or tiers of financial integration in the European Union could hinder the process of development and consolidation of the single market for financial services. The coexistence of various levels of supervisory integration with asymmetries in the extent and scope of cooperation duties depending on the Member States concerned could result in distortions in the quality and consistency of EU financial supervision. Indeed, a multi-speed internal market for financial services would be contrary to the objective of "ensuring common implementation of the rules for the financial sector and more centralized [sic] supervisory enforcement"[354] and, more generally, to the process of construction of a Financial Union.

IX. CONCLUSION

The post-financial crisis regulatory overhaul has dramatically transformed supervisory relationships in the European Union. The new system is based on a greater centralization of powers at the EU level, with EU bodies and institutions, such as the ESAs and the ECB, playing a key role in both the exercise and coordination of financial supervision. Nonetheless, the EU financial supervision architecture remains largely decentralized and the CSAs of the Member States, each with their own, and often dissimilar, structures, mandates and powers, carry out important day-to-day supervision of their own financial markets, actors, and institutions. One of the challenges

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353. White Paper on the Future of Europe, *supra* note 348, at 20-21.

354. Commission, Reflection Paper on the Deepening of the Economic and Monetary Union, COM (2017) 291, at 20.

brought about by this new complex, multi-level architecture is how to articulate an efficient coordination, interaction, and cooperation between the actors entrusted with supervisory responsibilities at its various levels. The response of EU law has been threefold.

In the first place, there has been a process of increasing harmonization of the rules on supervisory cooperation. EU Directives and Regulations in the financial field have developed a rather comprehensive catalogue of cooperation duties, reducing the discretion of Member States in the interpretation of the nature and scope of supervisory cooperation obligations.

Second, the mechanisms for solving supervisory cooperation disputes among CSAs have been improved and strengthened. Notably, the allocation of binding mediation powers to the ESAs vis-à-vis CSAs, albeit subject to important limitations, constitutes an important change of paradigm compared to the soft-law nature of the Lamfalussy Committees' mediation decisions. The threat of deployment of those powers may create incentives for CSAs to comply with their cooperation duties, so as to avoid the potential costs of an ESA's binding intervention in a supervisory cooperation dispute.

Third, post-crisis EU laws have broadened the catalogue of minimum supervisory powers at the disposal of CSAs of the Member States, hence increasing their ability to fulfill requests of cooperation from fellow CSAs. Likewise, the ESFS and the Banking Union have embraced a transnationalization of supervisory mandates whereby Member State CSAs are bound to the accomplishment, not only of national objectives, but also of EU-wide supervisory targets.

Despite the advancement of EU financial services integration and supervisory convergence brought by the post-crisis regulatory overhaul, the ESFS, and the Banking Union, this Article has identified and analyzed important obstacles for an efficient supervisory cooperation in the European Union.

First, EU financial laws still encompass exceptions to the duty to cooperate that may be subject to biased interpretations and opportunistic uses by CSAs in order to refuse cooperation in particular instances. More generally, the analysis has shown that the content and scope of supervisory cooperation duties as defined by EU law often lack clarity and precision. This carries the risk of diverging interpretations by CSAs across the European Union and, consequently, of supervisory dissent.

Second, within the ESFS, the use of instruments for the settlement of disagreements between CSAs is subject to strict conditions that considerably limit their applicability in cases of supervisory cooperation disputes. Moreover, the activation of the ESAs' mediation mechanism may create tensions and hinder trust between CSAs and, consequently, affect their future cooperation. Regarding disputes between an ESA and a CSA, the ESFS implicitly vests resolution power in the ESAs, hence giving rise to potential conflicts of interest.

Third, notwithstanding the increasing degrees of harmonization of supervisory powers across the European Union, there still are important differences in the competences of CSAs in various Member States. This may, in turn, affect their ability to fulfill cooperation requests. Likewise, whereas the ESFS and the Banking Union have instituted transnational supervisory mandates, CSAs from the Member States operate under accountability structures that are primarily domestic. This may incentivize CSAs to pursue the prioritization of national interests in detriment of the accomplishment of EU-wide targets.

Finally, the EU political crisis, Brexit –which may result in the United Kingdom becoming a third-country for supervisory purposes– and the prospects of a multi-speed European Union with various degrees of integration, raise some concerns about the future of the process of EU financial integration and supervisory cooperation within the single market for financial services.

In spite of these various crisis fronts, and of the limitations of the current EU legal and regulatory frameworks in dealing with the complexity of the financial supervision architecture, capital markets is an area where the process of integration has been advancing steadily. Brexit has indeed reinforced the determination of EU policy-makers to furthering such process; as put by Commissioner Dombrovskis: "As we face the departure of the largest EU financial centre, we are committed to stepping up our efforts to further strengthen and integrate the EU capital markets." [355] Moreover, the EU institutions consider the enhancement of supervisory cooperation and convergence within

355. Commission Press Release, IP/17/1529 (June 8, 2017).

the European Union to be a key priority in the process of future financial reforms. For example, one of the main elements of the Commission's public consultation on the operations of the ESAs related to the effectiveness of their tools and powers in fostering supervisory convergence and cooperation across borders.[356] Also, the *Mid-Term Review of the Capital Markets Union Action Plan* has highlighted the need to strengthen the powers of ESMA to guarantee the consistency of financial supervision across the European Union.[357] On September 20, 2017 the Commission published a Proposal for a Regulation[358] that is largely aimed at achieving more integrated supervision in the European Union; the Proposal's reforms include an strengthening of the powers of the ESAs, a new governance structure for the ESAs less dependent on Member States' interests, as well as greater centralization of financial supervision at the EU level.[359]

Overall, these reforms may contribute to enhance the quality and efficiency of supervisory cooperation in the European Union; on the one side, by removing legal and regulatory barriers to cooperation, they may increase the ability of CSAs to cooperate with each other; on the other side, by supporting greater financial integration, these reforms may help to align the interests of CSAs and, consequently, their incentives to provide meaningful cooperation.

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356. Commission, Public Consultation on the Operations of the European Supervisory Authorities (2017), at 7-8, https://ec.europa.eu/info/sites/info/files/2017-esas-operations-consultation-document_en.pdf [https://perma.cc/YC7C-EQWH] (archived Mar. 8, 2018).

357. Mid-Term Review, *supra* note 340, at 8.

358. *See* Commission Proposal on the Review of the ESAs, *supra* note 214.

359. *See* Commission, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, Reinforcing integrated supervision to strengthen Capital Markets Union and financial integration in a changing environment, COM (2017) 542 final, at 3-10.