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Abstract

To apply the law in a multilevel system in a uniform manner and with that to ensure a common and consistent administrative practice is a complicated and challenging undertaking. In a multilevel system like the European Union with 28 different Member States and their different legal and social cultures as well as different administrative traditions this is especially true. Unlike nation states where a common administrative culture and jurisdiction ensures to a great extent the uniform application of the law, this still has to emerge in the European Union through building new forms of cooperation between the different levels and actors. This is all the more necessary since differences in the application process are only tolerable and manageable to a certain extent. In the European debt crisis, the importance of such a common and consistent administrative practice, this time in European financial supervision, once more became apparent.

For a stable and well-functioning financial system within the European Union's internal market, the effectiveness as well as the enforcement of rules has to be ensured through the uniform application of the respective legislation by an appropriate supervisory system. However, due to the high number of options in financial regulation and weak cooperation mechanisms in the old administrative system of financial supervision a uniform level of supervision was not achieved. As a result, major changes in the administrative structure of financial supervision were carried out and the European System of Financial Supervision as well as the Banking Union were established.

This dissertation explores the effectiveness of the cooperation mechanisms between the European and the national level in the European Union's new administrative framework of financial supervision with regard to a common and consistent supervisory practice in microprudential financial supervision. To be able to do so three typical areas of supervision, (1) the acquisition and exchange of information, (2) preventive and accompanying supervisory measures, and (3) repressive and corrective actions, are examined and it is analysed how the two levels cooperate when executing supervisory instruments in the abovementioned areas. For this analysis the concept of "composite administration" as used in German administrative law is adduced and its approach regarding the cooperation of different public authorities when applying the law is adopted.

By analysing the cooperation mechanisms and their effectiveness in three typical areas of supervision, this dissertation contributes to the systematization and deeper understanding of administrative activities within the European Union and the cooperation between the European and the national level when applying Union law. In addition, it will provide useful insights on how multilevel governance can be effectively organized. This can be of further use in the future when the cooperation between the two levels in other policy areas has to be developed and organized and can therefore serve as a template for a European administration. Furthermore, the analysis of the supervisory activities selected allows to examine the distribution of (decision-making) power between the European and the Member State level and with that enables to assess the European administrative system’s stage of integration.

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Munich, March 2018 Ann-Katrin Pötter

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List of Abbreviations

ACER	Agency for the Cooperation of Energy Regulators
Authorities	European Supervisory Authorities
BEREC	Body of European Regulators for Electronic Communications
BRRD	Directive 2014/59/EU (Bank Recovery and Resolution Directive)
Board	Single Resolution Board
CEBS	Committee of European Banking Supervisors
CEIOPS	Committee of European Insurance and Occupational Pensions Supervisor
CESR	Committee of European Securities Regulators
CRD II	Directive 2009/111/EU (Capital Requirements Directive)
CRD III	Directive 2010/76/EU
CRD IV	Directive 2013/36/EU
DGSD	Directive 2014/49/EU (Deposit Guarantee Scheme Directive)
EBA	European Banking Authority
EBA Regulation	Regulation (EU) No 1093/2010
ECB	European Central Bank
ECN	European Competition Network
EIOPA	European Insurance and Occupational Pensions Authority
EIOPA Regulation	Regulation (EU) No 1094/2010
ECJ	European Court of Justice
ESFS	European System of Financial Supervision
ESM	European Stability Mechanism
ESMA	European Securities and Markets Authority
ESMA Regulation	Regulation (EU) No 1095/2010
ESRB	European Systemic Risk Board
FSAP	Financial Service Action Plan

Fund	Single Resolution Fund
GC	General Court
IGA	Intergovernmental Agreement
Joint Committee	Joint Committee of the European Supervisory Authorities
JST	Joint Supervisory Team
MoU	Memorandum of Understanding
Regulation on Credit Rating Agencies	Regulation (EU) No 1060/2009
Short Selling Regulation	Regulation (EU) No 236/2012
SSM	Single Supervisory Mechanism
SSM Framework Regulation	Regulation (EU) No 468/2014 of the ECB
SSM Regulation	Council Regulation (EU) No 1024/2013
SRM	Single Resolution Mechanism
SRM Regulation	Regulation (EU) No 802/2014
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

"[R]ules and their enforcement do not merely exist.
They must be applied with regularity and some
degree of consistency [...]. This is administration."

Theodore J. Lowi, *The End of Liberalism*, 1969

Introduction

The financial crisis which started in 2007 and turned into the European debt crisis in 2009 exposed substantial weaknesses in the European Union's administrative framework of financial supervision. A particular problem of financial supervision in the European Union, as highlighted by the de Larosière Report and many others, was a "destructive imbalance in the regulatory and supervisory architecture"[1] of the European Union's financial system and the importance of an effective and well-functioning supervisory system for a proper outcome of the "laws on the books" came to the fore.[2]

From the outset, the focus of European integration has been in particular on building an internal market by harmonizing the substantive law of European Union Member States, but without paying too much attention to the application and implementation of the respective rules. In financial market law as well, the regulatory structure addressed cross-border activities of large financial institutions to build an internal market for financial services. But this structure did not adequately cover cross-border supervision and coordination and it finally led to a mismatch between financial actors who operated across the European Union and nationally-based supervision and resolution.[3] Besides this imbalance in the regulatory and supervisory architecture, the inconsistent application of the law by Member States' national authorities and

[1] See Niamh Moloney, 'EU Financial Market Regulation after the Global Financial Crisis: „More Europe" or More Risk?' (2010) 47, Common Market Law Review, 1317, 1318.

[2] The de Larosière Report was issued by the de High-Level Group on Financial Supervision in the European Union, chaired by Jacques de Larosière, which was mandated by the Commission in November 2008 to examine the financial crisis in the European Union and lead to the Report in 2009. In this report it is stated: "[...] the enforcement of existing regulation, when adequate (or improving it where necessary), and better supervision, can be as important as creating new regulation." De Larosière Group, 'Report of the High-Level Group on Financial Supervision in the EU chaired by Jacques de Larosière' (2009), para 42; see also Niamh Moloney, '4. Supervision in the Wake of the Financial Crisis - Achieving Effective 'Law in Action' - A Challenge for the EU', in Eddy Wymeersch, Klaus J. Hopt and Guido Ferrarini (eds), *Financial Regulation and Supervision: A Post-crisis Analysis* (Oxford University Press 2012), para 4.03.

[3] As Meryvn King, governor of the Bank of England, named it: "global in live, national in death". Financial Services Authority, 'The Turner Review' (2009), 36, <http://www.fsa.gov.uk/pubs/other/turner_review.pdf> accessed 01.10.2017; See also Moloney, 'EU Financial Market Regulation', 1318.

the danger of national authorities influencing the financial system and be influenced by market participants came to light.[4]

For a stable and well-functioning financial system, the effectiveness as well as the enforcement of rules has to be ensured through an appropriate supervisory system.[5] In addition, in cases like the European Union with its internal market also a uniform application of the respective legislation is of great importance. However, the high number of options in financial regulation when implementing and applying Union legislation made a uniform level of supervision impossible.[6] The need for more convergence when applying Union law became therefore apparent.[7]

While regulation is an indispensable component to provide and ensure a stable and well-functioning financial system, a proper supervisory system is the other key pillar to maintain the functioning of the financial system and to deploy it against emerging financial system risk.[8] Even though supervision and regulation are closely interrelated and some supervisory measures

[4] Due to the great importance of the financial system for modern states' economies and the aim of securing the functionality of the (national) financial systems, the system of financial supervision is prone to regulatory capture like no other. See Eilis Ferran and Valia Babis, 'The European Single Supervisory Mechanism' (2013) University of Cambridge Faculty of Law Research Paper No 10/2013, 11 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2224538> accessed 01.10.2017; Jörn Axel Kämmerer, 'Bahn frei der Bankenunion? Die neuen Aufsichtsbefugnisse der EZB im Lichte der EU-Kompetenzordnung' (2013) 32, Neue Zeitschrift für Verwaltungsrecht, 830, 831; Alexander Thiele, *Finanzaufsicht* (Mohr Siebeck 2014), 21, 64, 79, 91, 105.

[5] See Theodore J. Lowi, *The End of Liberalism. Ideology, Policy, and the Crisis of Public Authority* (1st edn, Norton 1969), 50; Renaud Dehousse, 'Regulation by Networks in the European Community: The Role of the European Agencies' (1997) 4, Journal of European Public Policy, 246, 246; Meike Eekhoff, *Die Verbundaufsicht* (Mohr Siebeck 2008), 1 et seq; Paul Craig, *EU Administrative Law* (2nd edn, Oxford University Press 2012), 107 et seq.

[6] In the de Larosière Report it was stated that the present regulatory framework lacked cohesiveness due to many different options provided to EU Member States in the level one directives as well as diverse interpretations of the level three committees. De Larosière Group, 'De Larosière Report' (2009), para 102 et seq; Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung, 'Jahresgutachten 2012/13' (2012), no 264, <https://www.sachverstaendigenrat-wirtschaft.de/jahresgutachten-2012-20130.html> accessed 01.10.2017.

[7] Even though the different European institutions were always aware of the importance of the effectiveness of the practical application of EU law. For this see European Parliament, 'Resolution on the Responsibility of the Member States for the Application of and Compliance with Community Law' (9 February 1983) OJ C68/32. There the European Parliament declares that the "uniform, complete and simultaneous application of Community law in all Member States is a fundamental prerequisite for the existence of a Community governed by the rule of law"; and the Commission, 'Making the Most of the Internal Market: Strategic Programme' (Communication) COM(93) 632 final, 1: "But the establishment of a genuine single market is not just a matter of adopting Community-level legislation within a deadline. It is a continual process of ensuring that this common legal framework is applied, widely-understood, enforced and, where necessary, developed in a coherent way to meet new needs. In that sense, the Union is at the beginning, not at the end, of its task."

[8] See Niamh Moloney, *EU Securities and Financial Markets Regulation* (3rd edn, Oxford University Press 2014), 945.

contain elements of regulation, both terms should be examined and briefly distinguished to disclose how they will be used in this book.[9]

Supervision and regulation consist of different elements, and manifold meanings of the terms exist.[10] Regulation on the one hand is an instrument to create rules to achieve a certain goal ("law in the books") and is therefore change oriented; supervision on the other hand focuses on the comparison of the target and the actual performance and with that on the proper application of the law.[11] Supervision in the traditional sense is a sovereign task, immanent to the states for controlling actions of private parties to ensure compliance with the respective rules and regulations to secure the particular system.[12]

The two aspects comprising supervision, as it is understood and worked with here, are, first of all to observe and examine the behaviour of surveillance objects through supervisors and, second, if there is a discrepancy between the actual and desired actions, the possibility of the supervisors to step in and take corrective actions.[13] Especially this last corrective element is not

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[9] According to the de Larosière Group "[r]egulation is the set of rules and standards that govern financial institutions; [...] supervision is the process designed to oversee financial institutions in order to ensure that rules and standards are properly applied." De Larosière Group, 'De Larosière Report' (2009), para 38; Ann-Katrin Kaufhold, *Systemaufsicht: Anforderungen an die Ausgestaltung einer Aufsicht zur Abwehr systemischer Risiken - entwickelt am Beispiel der Finanzaufsicht* (Mohr Siebeck 2016), 363.

[10] For a very detailed and thorough analysis see inter alia Martin Eifert, '§ 19 Regulierungsstrategien', in Wolfgang Hoffmann-Riem, Eberhardt Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts, Band I: Methoden, Maßstäbe, Aufgaben, Organisation* (C.H. Beck 2012), paras 1 et seq; Peter M. Huber, '§ 45 Überwachung', in Wolfgang Hoffmann-Riem, Eberhardt Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts Band III: Personal, Finanzen, Kontrolle, Sanktionen, Staatliche Einstandspflichten* (2nd edn, C.H. Beck 2013), paras 1-47; Wolfgang Kahl, '§ 47 Begriff, Funktionen und Konzepte von Kontrolle', in Wolfgang Hoffmann-Riem, Eberhardt Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts Band III: Personal, Finanzen, Kontrolle, Sanktionen, Staatliche Einstandspflichten* (2nd edn, C.H. Beck 2013), paras 10-31; see also Eric J. Pan, 'Understanding Financial Regulation' (2011) Cardozo Legal Studies Research Paper No 329, 15 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1805018> accessed 01.10.2017.

[11] This shows the close interconnection of regulation and supervision. While supervision in some instances can therefore be understood as being an instrument of regulation, not every form of supervision is yet a form of regulation. Kaufhold, *Systemaufsicht*, 361 et seq.

[12] See Christoph Ohler, 'Staatliche Aufsicht über Hedgefonds und Private Equity?', in Stefan Leible and Matthias Lehmann (eds), *Hedgefonds und Private Equity - Fluch oder Segen?* (Jenaer Wissenschaftliche Verlagsgesellschaft 2009), 143 et seq; even though a stronger focus on privatization as well as a stronger tendency to regulate could lead to the impression that the importance of supervision is declining, this would be misleading. Supervision is still one of the central tasks of every administration. Huber, '§ 45 Überwachung', paras 28-29, 220-223.

[13] According to the UK government "supervision is the application and enforcement of rules […] on individual firms." HM Treasury, 'Reforming financial markets' (2009), 54; Wolfgang Kahl, 'Der Europäische Verwaltungsverbund: Strukturen-Typen-Phänomene' (2011) 50, Die Verwaltung, 353, 361, 374. For more information on the objectives of financial supervision see inter alia Christoph Ohler, '§ 32 Bankenaufsichtsrecht', in Dirk Ehlers, Michael Fehling and Hermann Pünder (eds), *Besonderes Verwaltungsrecht Band 1, Öffentliches Wirtschaftsrecht* (3rd edn, C.F. Müller 2012), paras 9 et seq; Christoph Ohler, '§ 10 Finanzmarktregulierung und –aufsicht', in Matthias Ruffert (ed), *Enzyklopädie Europarecht, Europäisches Sektorales Wirtschaftsrecht*, vol 5 (Nomos 2013), paras 76 et seq; and financial regulation Eric J. Pan, '7. Organizing Regional Systems: The US

uncontested.[14] But this corrective element is particularly relevant for a multilevel system like the European Union. Therefore, in this book supervision is understood in a wide sense and the corrective element is included.

In general, applying the law in a multilevel system in a uniform manner and with that ensuring a common and consistent supervisory practice is a complicated and challenging matter, since differences in the application process are only tolerable and manageable to a certain extent and degree.[15] This is especially true in the European Union with 28 different Member States and their different legal and social cultures as well as different administrative traditions and no clear division of competences between the two levels regarding the application of law.[16] Unlike nation states where a common administrative culture and jurisdiction ensures (at least to a great extent) uniform application of the law, in the European Union this still has to emerge through building new forms of cooperation between the different levels and actors.[17]

The main difficulty for building such a common administrative culture in the European Union lies with the two different administrative levels, the European and the national level, and their interplay when applying Union law. Traditionally, the European Union's administrative system consists of two main types of administration: direct and indirect (this will be more closely examined in Chapter 1).

Example', in Niamh Moloney, Eilis Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (2015), 190 et seq.

[14] For further references see Kahl, '§ 47 Kontrolle', para 5; See also A.J.G. Ibáñez, *The Administrative Supervision and Enforcement of EC Law: Powers, Procedures and Limits* (Hart 1999), 16.

[15] See Ibáñez, *The Administrative Supervision and Enforcement of EC Law*, 1 et seq; Gernot Sydow, 'Die Vereinheitlichung des mitgliedstaatlichen Vollzugs des Europarechts in mehrstufigen Verwaltungsverfahren' (2001) 34, Die Verwaltung, 517, 518; Sabino Cassese, 'European Administrative Proceedings' (2006) 68, Law and Contemporary Problems, 21, 23 et seq.

[16] See Ibáñez, *The Administrative Supervision and Enforcement of EC Law*, 3; Herwig C.H. Hofmann and Alexander H. Türk, '3. Policy Implementation', in Herwig C.H. Hofmann and Alexander H. Türk (eds), *EU Administrative Governance* (1st edn, Edward Elgar 2006), 582; for more information on the different supervisory models see also Eddy Wymeersch, 'The Structure of Financial Supervision in Europe: About Single, Twin Peaks and Multiple Financial Supervisors' (2006), 38 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=946695> accessed 01.10.2017; Giorgio Di Giorgio and Carmine Di Noia, '9. Financial Supervisors: Alternative Models', in Donato Masciandaro and Marc Quintyn (eds), *Designing Financial Supervision Institutions: Independence, Accountability and Governance* (Edward Elgar 2007), 342 et seq.

[17] See Ute Mager, 'Die Europäische Verwaltung zwischen Hierarchie und Netzwerk', in Hans-Heinrich Trute and others (eds), *Allgemeines Verwaltungsrecht – zur Tragfähigkeit eines Konzepts* (Mohr Siebeck 2008), 394; for more information on the develompment of European administration see Arthur Benz, 'Differentiating Multi-Level Administration: Patterns of administrative co-ordination in the European Union' (2016), 1 et seq <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795429> accessed 01.10.2017.

In financial supervision, following this traditional approach, indirect administration has existed with the national authorities carrying out the day-to-day supervision. As a consequence of the financial crisis, there have now been reform efforts to enhance the existing system of indirect administration and to assure more convergence in financial supervision as well as to develop a common and consistent supervisory practice. These reform efforts have led to major changes in the institutional structure of the financial supervision system in the European Union.
However, in this book I only focus on the supervisory activities of microprudential financial supervision which include supervisory activities of the three ESFS Authorities and the SSM and SRM actors.[18] Macroprudential considerations, and with that the ESRB, will be excluded from this analysis.[19] This (new) institutional structure will be subject to the present study.

In the following, I will analyse if the administrative framework and its cooperation mechanisms between the European and the national level are an effective instrument to overcome the shortcomings of the previous system of indirect administration and to ensure more convergence and a common and consistent supervisory practice in the European Union when applying Union law. For this I will adduce the concept of "composite administration" as used in German administrative law and adopt its approach regarding the cooperation of different public authorities when applying the law for an assessment of the administrative system of financial supervision.[20] This also allows me to introduce this in German academia well-established concept regarding the cooperation of a plurality of legally independent public authorities to the analytical discussion of the establishment of the system of financial supervision.

[18] These actors are for the ESFS EBA, ESMA and EIOPA and for the SSM the ECB as well as for the SRM the Board.

[19] For more information on the ESRB see Chryssa Papathanassiou and Georgios Zagouras, '6. A European Framework for Macro-Prudential Oversight', in Eddy Wymeersch, Klaus J. Hopt and Guido Ferrarini (eds), *Financial Regulation and Supervision: A post-crisis analysis* (Oxford University Press 2012), paras 6.01 et seq.

[20] The term "composite administration" was introduced by von Bogdandy and Dann. Composite administration means that a plurality of legally independent public authorities pursue aims of public concern as a common task. In contrast to a federal state, those authorities are not part of the same legal entity and only form a compound or composite arrangement. Composite administration comprises functional cooperation and organizational separation. The concept of composite administration is more specific than concepts of multi-level-structures or networks, which can include various aspects such as competences, organizational structure or procedures alike. Armin von Bogdandy and Philipp Dann, 'International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority', in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions - Advancing International Institutional Law* (2009), 2016, 2034 et seq; see also Eberhardt Schmidt-Aßmann, 'Europäische Verwaltung zwischen Kooperation und Hierarchie', in Hans-Joachim Cremer and others (eds), *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger* (Springer 2002), 1375 et seq. For more on the European Union and composite administration see BVerfG, 21.06.2016 - 2 BvR 2728/13, para 140, and BVerfG, 15.12.2015 - 2 BvR 2735/14.

To be able to evaluate the effectiveness of the administrative framework in financial supervision, I examine three typical areas of supervision and investigate how the two levels cooperate when executing supervisory instruments in these different areas.[21] The three areas of supervision are: First, the acquisition and exchange of information; second, preventive and accompanying supervisory measures; and third, repressive and corrective actions.[22] Preventive and accompanying supervisory instruments include selective as well as long-term supervisory measures, for example the authorization and registration of financial institutions and their withdrawal or investigatory powers.[23] Repressive and corrective actions are comprised of measures which allow the competent authorities to intervene in cases in which there is an actual or impending discrepancy between the current and target situation or a breach of binding supervisory provisions.

While the second area can be associated with the first element of supervision as it is understood in this book (observing and examining the surveillance objects), the latter can be associated with the second element of supervision. Notwithstanding this analytical differentiation, supervision is a uniform process and because of that there will be some overlap between the different areas of supervision, especially with regard to acquiring and exchanging information which is relevant for both elements of supervision. But because of the particular importance of information for every administrative activity, the acquisition and exchange of information is still examined separately.

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[21] For a list of typical supervisory instruments, see Thomas Groß, 'Verantwortung und Effizienz in der Mehrebenenverwaltung' (2006) Staatsrechtslehrertagung, 163 <https://www.degruyter.com/downloadpdf/books/9783110914665/9783110914665.106/9783110914665.106.xml> accessed 01.10.2017. Groß argues that to be able to generally capture the coordination of different administrative levels one has to analyse (in his case six) different types of administrative instruments: The exchange of information (*Informationsaustausch*), supervision regarding the legitimacy of an action (*Rechtskontrolle*), executive rulemaking (*abstrakt-generelle Normkonkretisierung*), instructions (*Einzelweisungen*), the right of a superordinate authority to step in and take over the execution process (*Übernahme der Zuständigkeit*) and co-decision-making procedures (*gemeinsame Entscheidungsverfahren*). In this book, the focus will not be on general instruments of administrative cooperation, but rather on typical supervisory areas and their supervisory instruments. But his main idea, that is, to analyse the execution of different types of instruments to gain insights into the cooperation of different administrative levels when carrying out their work, can be transferred to this analysis; see also Rolf Stober, *Allgemeines Wirtschaftsverwaltungsrecht, Grundlagen des deutschen, europäischen und internationalen öffentlichen Wirtschaftsrechts* (18th edn, Kohlhammer 2014), 201 et seq; Thiele, *Finanzaufsicht,* 208 et seq.

[22] See Kaufhold, *Systemaufsicht,* 366.

[23] Authorization and registration are preventive supervisory measures since with these measures supervisors try to ensure that only people/institutions carry out certain (harmful) activities who/which can guarantee the proper execution of those activities; see Huber, '§ 45 Überwachung', paras 101-102; Thiele, *Finanzaufsicht,* 208; Christoph Ohler, *Bankenaufsicht und Geldpolitik in der Währungsunion* (C.H. Beck 2015), § 5, paras 205 et seq, 219 et seq.

To divide supervision into these three different areas will allow the different forms of cooperation to be structured and categorized. It will give insights into how the different areas of supervision are carried out, how interconnected the two levels are and how competences, powers and limits are allocated. This means in particular, where in financial supervision cooperation takes place, how cooperation is organized, who is the final decision-making authority and what is the legal nature of the different cooperation mechanisms. Furthermore, it will highlight the degree of hierarchy between the two levels and with that the level of integration and the degree of Europeanization in the field of financial supervision.[24]

This approach has been chosen because concentrating on the execution of supervisory activities and with that on the operational side allows for a clear evaluation of the administrative structure's effectiveness regarding a common and consistent supervisory practice in the European Union and to systematize the administrative cooperative instruments.[25] Moreover, focusing on the three different areas and their administrative activities also helps avoid the terms of "multilevel governance" and "networks" when analysing the existing structure since these terms are not expedient for this investigation where the final decision-making authority and the division of competences is important.[26]

In the first part (Chapter 1) the administrative structure and the division of competence regarding the application of Union law and the cooperation of the different levels, as they can be found in the Treaties[27] and in secondary legislation, where relevant, will be examined. Even though there is no clear line of division of power between the two levels as it can be found in national legal orders, it will still be necessary to analyse the (few) legal requirements which are provided for by the Treaties.[28]

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[24] See Mager, 'Die Europäische Verwaltung', 382.

[25] See Schmidt-Aßmann, who wrote: "Since the organizational arrangements represent, in fact, the most characteristic feature of European Composite administration, European administrative law must be shaped - to a far greater extent than national administrative law - as a law of organization and of inter-administrative procedures. Procedural and organizational law have developed to major regulatory tools in the sphere of European administration.", Eberhardt Schmidt-Aßmann, 'Introduction: European Composite Administration and the Role of European Administrative Law' in Oswald Jansen and Bettina Schöndorf-Haubold (eds), *The European Composite Administration* (Intersentia 2011) 22; see also Eberhardt Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (2nd edn, Springer 2006) 404.

[26] As von Bogdandy and Dann understand it, multi-level and networks insinuate a certain form or the missing of any hierarchy (top-down hierarchy [multi-level] and the absence of hierarchy [networks]). But of course, different levels of hierarchy can be found in the different mechanisms of administrative cooperation. von Bogdandy and Dann, 'Composite Administration', 2034 et seq.

[27] The Treaties refer to the TEU and the TFEU.

[28] See Ibáñez, *The Administrative Supervision and Enforcement of EC Law*, 3.

In a second step, the academic literature that has been dealing with the issue of the application of Union law, and especially the exercise of supervision, will be examined and displayed as far as it is relevant for my argumentation. In addition, four areas of economic supervision will be described to present characteristics of supervisory cooperation. This first part will give the necessary insights to understand the basic principles of the application of Union law as well as to understand the different forms of cooperation, which already existed between the European and the national administrative level. It will further allow to set the cooperation mechanisms in the wider context of European administration.

In Chapter 2 and 3, the institutional structure of financial supervision will be presented and the legislation establishing the ESFS as well as the SSM and SRM will be scrutinized. Here the regulations will be examined in detail regarding the three areas of supervision (the acquisition and the exchange of information, preventive and accompanying supervisory measures as well as repressive and corrective actions) and the different supervisory instruments.
This part will show comprehensively how the supervisory instruments are carried out and who is involved in the decision-making and application process. It will furthermore give insights on the final decision-making authority, in the different areas and situations of the supervisory process.

In the last part (Chapter 4), an assessment of the effectiveness of the supervisory framework and the supervisory instruments with respect to the establishment of a common and consistent supervisory practice is carried out. For that the vertical and horizontal relations of the two levels and the degree of centralization will be examined. In this part, the focus will lie on the division of competences and powers between the different levels as well as the different forms of cooperation while the degree of intensity when interacting and influencing one another will be of particular importance.
This will allow us to understand the roles the different administrative levels play in the various areas of supervision and to present the main characteristics regarding the acquisition and exchange of information, preventive and accompanying supervisory measures, and repressive and corrective actions. Since with these new mechanisms the two levels are now closely interconnected, in a final step the question regarding the different actors' accountability is raised and the accountability mechanisms included in the relevant legislation are presented.

While Chapter 2 and 3 will provide useful insights on how multilevel governance can be organized and serve as an area of reference for future developments in European administrative governance, Chapter 4, in contrast, will evaluate the effectiveness of the administrative framework, focusing on the level and process of European integration.
In the final conclusion, these investigations will lead to the question if this new system of financial supervision is a qualitatively new form of European administration or if existing structures have merely been deepened and if this framework could be used as a template for future reforms in European economic supervision.

Even though competences, powers and forms of cooperation differ depending on the policy area and are carried out very differently in the different competence areas of the European Union (the same holds true for supervision), the findings obtained in one policy area allow us, in certain cases, to draw some conclusions regarding other areas of administration. It is necessary to work in such reference areas and to review the findings obtained in one reference area regarding their capability to use them as general principles and which can be transferred to other areas of administration to be able to develop a common administrative culture in the European Union, to adjust this structure to new situations and challenges and to ensure legal certainty and stability.[29]
The financial supervision system qualifies as such an area of reference regarding the design of the cooperation mechanisms between the two levels due to numerous reasons.[30] First of all, financial market supervision is and has always been an area of advanced regulation with a great deal of vertical and horizontal forms of cooperation. Second, financial supervision has, under the influence of Union law, experienced major changes in the last couple of years. Europeanization of administrative organization in financial supervision took place in a more intense way than in other comparable areas, and it can therefore be seen as an experimental

[29] For more information on reference areas and their importance for further developments of administrative law see Andreas Voßkuhle, '§ 1 Neue Verwaltungsrechtswissenschaft', in Wolfgang Hoffmann-Riem, Eberhardt Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts Band I: Methoden, Maßstäbe, Aufgaben, Organisation*, vol 1 (2nd edn, C.H. Beck 2012), paras 43 et seq; see also Karl-Heinz Ladeur, 'Die Bedeutung eines Allgemeinen Verwaltungsrechts', in Hans-Heinrich Trute and others (eds), *Allgemeines Verwaltungsrecht – Zur Tragfähigkeit eines Konzepts* (Mohr Siebeck 2008), 797.
[30] An area of reference refers to the analysis of a specific policy area regarding certain aspects and the examination as to whether the mechanisms and structures found are relevant for and can be transferred to the entire system. If this is the case, one can develop general structures for the administrative system as a whole. Gernot Sydow, *Verwaltungskooperation in der Europäischen Union* (Mohr Siebeck 2004), 120.

laboratory where the changes and their consequences can now be studied.[31] Because of that, financial market supervision is well-qualified to serve as a point of reference for future forms of supervisory cooperation in other areas of the internal market.[32]

With the assessment of the effectiveness of the supervisory structure in European Union financial supervision, this dissertation contributes to the systematization and better understanding of administrative activities in the European Union and the cooperation between the two levels when applying Union law. The insights acquired can be used in the future for other policy areas to develop and organize the cooperation between the two levels and can therefore show a future model of European administration. Furthermore, the analysis of the supervisory activities selected allows for an examination of the distribution of (decision-making) power to the European and the Member States levels and with that allows us to assess the European administrative system's stage of integration.[33]

[31] See Christoph Ohler, 'Modelle des Verwaltungsverbundes in der Finanzmarktaufsicht' (2016) 49, Die Verwaltung, 309, 309.
[32] See Hans Christian Röhl, '§ 18 Finanzmarktaufsicht', in Michael Fehling and Matthias Ruffert (eds), *Regulierungsrecht* (C.H. Beck 2010), paras 42-43; Jörn Axel Kämmerer, 'Das neue Europäische Finanzaufsichtssystem (ESFS) – Modell für eine europäisierte Verwaltungsarchitektur?' (2011) 30, Neue Zeitschrift für Verwaltungsrecht, 1281, 1281.
[33] See Hofmann and Türk, '3. Policy Implementation', 75.

Chapter 1: The Administrative Structure in the European Union

There are only a few provisions in the Treaties explicitly dealing with the competence of applying Union law and, in addition, there is no clear distinction between regulatory power and the power to apply the law.[34] However, the utmost limit of the European Union's competence regarding administrative activity is drawn by the European Union's regulatory power.[35] The most well-known provisions conferring the competence to apply Union law to the European level are in competition law and state aid law, see Articles 105 and 108(3) TFEU.[36]
Most of the provisions in Union primary law are task-based, however, and leave it to secondary legislation to allocate the competence to apply Union law to the Commission or to European agencies.[37]

1. Administrative Patterns in the Treaties of the European Union

There are many different concepts and terms to describe administration in the European Union, especially when national administrations are involved in the application process. Among them are inter alia: direct and indirect administration,[38] centralized and shared administration,[39]

[34] For more information see Hans D. Jarass, 'Die Kompetenzverteilung zwischen der Europäischen Gemeinschaft und den Mitgliedstaaten' (1996) 121, Archiv des öffentlichen Rechts, 173, 183 et seq; Steffen Augsberg, '§ 6 Europäisches Verwaltungsorganisationsrecht und Vollzugsformen', in Jörg Philipp Terhechte (ed), *Verwaltungsrecht der Europäischen Union* (Nomos 2011), para 10 et seq; Christoph Krönke, *Die Verfahrensautonomie der Mitgliedstaaten der Europäischen Union* (Mohr Siebeck 2013), 44.
[35] The question if the competences of the EU go further than its regulatory power is still very controversial. The dominant view is that the competence to apply the law is limited compared to the EU's regulatory power. For more details see Mager, 'Die Europäische Verwaltung', 283; Eberhardt Schmidt-Aßmann, '§ 5 Verfassungsprinzipien für den Europäischen Verwaltungsverbund', in Wolfgang Hoffmann-Riem, Eberhardt Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts Band I: Methoden, Maßstäbe, Aufgaben, Organisation*, vol 1 (2nd edn, C.H. Beck 2012), paras 17 et seq; Krönke, *Die Verfahrensautonomie der Mitgliedstaaten*, 44.
[36] See Schmidt-Aßmann, '§ 5 Verfassungsprinzipien für den Europäischen Verwaltungsverbund', paras 19 et seq.
[37] See Thomas Groß, 'Die öffentliche Verwaltung als normative Konstruktion', in Hans-Heinrich Trute and others (eds), *Allgemeines Verwaltungsrecht – zur Tragfähigkeit eines Konzepts* (Mohr Siebeck 2008), 360.
[38] See Jürgen Schwarze, *Europäisches Verwaltungsrecht, Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft* (2nd edn, Nomos 2005), CI.
[39] Craig calls it centralized and shared administration. Centralized administration means that Union legislation imposes obligations on the Commission to discharge policies without any form of cooperation with the Member State administrations. Shared administration, which is the predominant model, means that the Commission and the national authorities are involved in the decision making process. Craig, *EU Administrative Law*, 26 et seq.

integrated administration, executive federalism,[40] co-administration, common administration,[41] and mixed proceedings[42]. Here the terms direct and indirect administration will be used.

The concept of direct and indirect administration orientates itself on the actors applying the law. Direct administration thereby refers to the application of Union law by European actors and indirect administration refers to the application of Union law by Member States' national authorities.[43] For the European Union to be able to execute direct administration, administrative powers have to be transferred to the European level.[44] There are not many provisions in the Treaties that allocate the application of Union law to the European level. This shows that the application of Union law first and foremost lies in the hands of Member States' national authorities.[45] Because of that, direct administration is the exception and indirect administration is the rule.[46] There are different reasons for that, one of which is the lack of the European Union authorities' capacity and another of which is due to the Member States interest in retaining the power to carry out the sovereign task of applying the law.[47]

This allocation of competences is also true for financial supervision. Until the financial crisis, financial supervision had followed the usual European division of tasks. In accordance with Article 26 TFEU, a European internal market for financial services was established, but at the same time and in line with one of the basic principles of Union law, Article 291(1) TFEU, the

[40] See Hofmann and Türk, '3. Policy Implementation', 74, 583.
[41] See Mario P. Chiti, 'Forms of European Administrative Action' (2006) 68, Law and Contemporary Problems, 37, 37 et seq.
[42] See Giacinto Della Cananea, 'The European Union's Mixed Administrative Proceedings' (2006) 68, Law and Contemporary Problems, 197, 197 et seq.
[43] See Schwarze, *Europäisches Verwaltungsrecht*, CI.
[44] This is possible with primary and secondary law as well as the doctrine of implied powers. For more information see inter alia Hofmann and Türk, '3. Policy Implementation', 74 et seq.
[45] See Andreas Haratsch, Christian Koenig and Matthias Pechstein, *Europarecht* (10th edn, Mohr Siebeck 2016), paras 455 et seq; see also Eva G. Heidbreder, '8. Regulating Capacity Building by Stealth: Pattern and Extent of EU Involvement in Public Administration', in Philipp Genschel and Markus Jachtenfuchs (eds), *Beyond the Regulatory Polity? The European Integration of Core State Powers* (Oxford University Press 2013); Philipp Genschel and Markus Jachtenfuchs, 'More Integration, Less Federation: The European Integration of Core State Powers' (2015) Robert Schuman Centre for Advanced Studies 2015/33 <http://cadmus.eui.eu/bitstream/handle/1814/35976/RSCAS_2015_33.pdf?sequence=1> accessed 01.10.2017. Heidbreder, Genschel and Jachtenfuchs name public administration as one of the Member States' core state powers.
[46] See Paul Craig, 'A New Framework for EU Administration: The Financial Regulation 2002' (2006) 68, Law and Contemporary Problems, 107, 110 et seq; Krönke, *Die Verfahrensautonomie der Mitgliedstaaten*, 27; Haratsch, Koenig and Pechstein, *Europarecht*, paras 455 et seq.
[47] See Hofmann and Türk, '3. Policy Implementation', 582; Haratsch, Koenig and Pechstein, *Europarecht*, para 458.

institutional and procedural autonomy of the Member States for applying and supervising the application and execution of Union law was maintained.[48]

1.1 Indirect Administration in the European Union

The dominant administrative system in the Treaties is a decentralized one. This is now, inter alia, reflected by Article 291 TFEU. Pursuant to Article 291(1) TFEU, it is the Member States that have to adopt all measures of national law necessary to implement legally binding Union acts.[49] Only if according to Article 291(2) TFEU uniform conditions for implementing legally binding Union acts are needed can the European Parliament and Council confer implementing powers to the European level. Article 291 TFEU governs the vertical relationship of the European Union and its Member States regarding the application of Union law.[50] This shows very clearly the division of competences in the Treaties.[51]

Even though the extent and scope of Article 291(1) TFEU is yet unclear, it is not merely of a descriptive nature.[52] The main question remains whether Article 291(1) TFEU contains some form of allocation of competences regarding the implementation of Union law. One way to read Article 291(1) TFEU is to understand it as a specification of the Member State's duty of loyalty to efficiently implement and execute Union law. It would thereby only confirm, and not establish, an obligation of the Member States and demand the Member States' act to implement Union law accordingly. The second possibility is to understand Article 291(1) TFEU as actually taking a principle decision regarding the implementation of Union law in favour of the Member States. So far, the majority of Union laws' literature leans towards the second meaning.

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[48] This has not only been wanted from an internal market perspective but also because larger financial markets rate as more solvent and thus more stable. Moreover, an integrated financial area makes the implementation of the ECB's monetary policy easier. Commission, 'European Financial Stability and Integration Report 2010' SEC(2011) 489, 39; Annetje Ottow, 'Europeanization of the Supervision of Competitive Markets' (2012) 18, European Public Law, 191, 193; Ohler, '§ 10 Finanzmarktregulierung und –aufsicht', paras 32-35; Ohler, *Bankenaufsicht*, § 5, paras 1-2.

[49] Article 291(1) TFEU also states that the Member States adopt all measures of national law and with that takes up the principle of national procedural autonomy. Implementation in that sense refers to the implementation of directives as well as to the application of Union law regarding all measures stated in Art. 288 TFEU, with the exception of recommendations and opinions. Martin Gellermann, 'Artikel 291 AEUV', in Rudolf Streinz (ed), *EUV/AEUV* (2nd edn, C.H. Beck 2012), para 4; see also Thomas von Danwitz, *Europäisches Verwaltungsrecht* (Springer 2008); Kahl, 'Der Europäische Verwaltungsverbund', 353 et seq.

[50] See Robert Schütze, 'From Rome to Lisbon: „Executive Federalism" in the (new) European Union' (2010) 47, Common Market Law Review, 1385, 1398; Schmidt-Aßmann, '§ 5 Verfassungsprinzipien für den Europäischen Verwaltungsverbund', para 19 et seq.

[51] See Krönke, *Die Verfahrensautonomie der Mitgliedstaaten*, 63.

[52] See Martin Nettesheim, 'Artikel 291 AEUV', in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union: EUV/AEUV* (61st edn, C.H. Beck 2017), para 4.

This is justified with Article 291(2) TFEU. Article 291(2) TFEU states the principle of the Member States' primacy when implementing Union law as well as the allocation of the administrative competences of the European Union and its Member States. Moreover, Article 291(2) TFEU reflects the principle of subsidiarity, Article 5(3) TEU. Hence, Article 291 TFEU with its paragraphs (1) and (2) establishes a relationship of "rule and exception" regarding the implementation of Union law.[53] Even though there are good reasons for the second position, it remains to be seen which meaning the European Court of Justice will favour.

But even though the scope of Article 291(1) TFEU is important, Article 291(2) TFEU is of greater relevance in this context. In contrast to Article 291(1) TFEU, Articles 291(2) and (3) TFEU clearly distribute competences to the European level.[54] Article 291(2) TFEU determines that in the exceptional case where uniform conditions for implementing legally binding Union acts are needed, the European Parliament and the Council can confer implementing powers to the Commission or the Council and with that to the European level. This shows that the application of Union law by European institutions is the exception.[55]

But besides stating the primacy of the application of Union law by the Member States, Article 291(2) TFEU also shows the limits of the Member States' competence to apply Union law. In all cases where uniform conditions for implementing legally binding Union acts are needed, implementing powers can be conferred to the European level.[56]

The subordinate and assisting role of the European level is also emphasized in Art 197(2) TFEU. According to Article 197(2) TFEU, the European Union can support the Member States to improve their administrative capacity to implement Union law by facilitating the exchange of information and civil servants as well as supporting training schemes. But the European Union only plays a supporting role in this case, and it only works on a voluntary basis. The Member States are not obliged to make use of this support.[57] Article 197 TFEU very clearly shows the supporting function of the European Union towards its Member States as well as its function to govern administrative cooperation between the Member States.

[53] See ibid., para 5.
[54] See ibid., para 7.
[55] See von Danwitz, *Europäisches Verwaltungsrecht*, 315.
[56] See Kahl, 'Der Europäische Verwaltungsverbund', 353 et seq.
[57] See Johannes Saurer, *Der Einzelne im europäischen Verwaltungsrecht* (Mohr Siebeck 2014), 18.

Besides those explicit provisions, there are also some general provisions and principles that govern the relationship between the European Union and its Member States and which also support the decentralized approach regarding the application of Union law.

According to Article 4(2) TEU, the European Union is obliged to respect the Member States' national identities and with that also the Member States' right of regional and local self-government.[58] In addition, Article 5(1) TEU, the principle of conferral, also applies to the division of administrative competences.[59] According to this principle, there has to be an explicit allocation of competence to the European level, otherwise the competence lies with the Member States.[60] Besides the principle of conferral, also the principles of subsidiarity, Article 5(3) TEU, and proportionality, Article 5(4) TEU, as well as the respect of Member States' national identities limit the possibility of transferring competences to the European level.[61]

But there are also certain limits on the decentralized approach and the Member States' institutional and procedural autonomy when applying Union law.[62] First, Member States are bound by the principle of sincere cooperation, Article 4(3) TEU, which obliges them to respect the principle of equivalence and effectiveness when applying Union law. This is also reflected by Article 197(1) TFEU, according to which the effective implementation of Union law, which is essential for the proper functioning of the European Union, is understood as a matter of common interest.[63] But even though the Member States are bound by Union law, when their own national authorities apply Union law that does not mean that there is some form of hierarchical subordination with respect to European Union institutions.[64]

1.2 Direct Administration in the European Union

Even though the dominant system of administration in the Treaties is a decentralized one, elements of direct administration can also be found. When examining direct administration in the Treaties, first of all one has to name the Commission's very explicit powers to ensure the

[58] See Schmidt-Aßmann, '§ 5 Verfassungsprinzipien für den Europäischen Verwaltungsverbund', para 17.
[59] See ibid., 275.
[60] See von Danwitz, *Europäisches Verwaltungsrecht,* 315; Saurer, *Der Einzelne im europäischen Verwaltungsrecht,* 20.
[61] See Mager, 'Die Europäische Verwaltung', 283; Schmidt-Aßmann, '§ 5 Verfassungsprinzipien für den Europäischen Verwaltungsverbund', paras 20-21; Saurer, *Der Einzelne im europäischen Verwaltungsrecht,* 21.
[62] See Peter Szczekalla, '§ 5 Handlungsformen im europäischen Verwaltungsrecht', in Jörg Philipp Terhechte (ed), *Verwaltungsrecht der Europäischen Union* (Nomos 2011), para 62.
[63] See Kahl, 'Der Europäische Verwaltungsverbund', 354.
[64] See von Danwitz, *Europäisches Verwaltungsrecht,* 306.

application of the Treaties and to exercise coordinating, executive and management functions as laid down in the Treaties, Article 17(1) TEU. Furthermore, in Article 298 TFEU it is now explicitly stated that the European Union, when carrying out its missions through its institutions, bodies, offices and agencies, has the support of an open, efficient and independent European administration.

Article 298(1) TFEU lays down the basic principles of European administrative institutions as well as of their administrative work, but it does not provide a competence to establish these institutions.[65] This competence can be derived from the right of European institutions to organize their own affairs and to decide how to fulfil and complete their tasks.[66] Especially Article 298(2) TFEU can be of great importance in the future because it provides a possible legal basis for future European administrative legislation.[67]

Besides those rather general provisions, there is also a limited number of provisions that explicitly state the European Union's administrative competence to apply Union law. The main competence areas where the European Union makes use of such powers are competition law,[68] state aid law,[69] the management of European Union funds,[70] and the common commercial policy.[71] In addition, many of the provisions of the European Union's policy areas include the competence to administer and execute Union law without limiting it to a certain form of activity. These provisions are legal bases for the European Union's administrative activities. This includes inter alia the agricultural,[72] transport[73] and environmental policy.[74] Other

[65] See Markus Krajewski and Ulrich Rösslein, 'Artikel 298 AEUV', in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union: EUV/AEUV* (61st edn, C.H. Beck 2017), para 3.
[66] See Krönke, *Die Verfahrensautonomie der Mitgliedstaaten,* 46; Krajewski and Rösslein, 'Artikel 298 AEUV', para 4.
[67] See Saurer, *Der Einzelne im europäischen Verwaltungsrecht,* 16.
[68] See Articles 103, 105 TFEU.
[69] See Articles 108, 109 TFEU.
[70] See Article 163 TFEU.
[71] See Article 207 TFEU. For more information regarding the European Union's competences see Krönke, *Die Verfahrensautonomie der Mitgliedstaaten,* 45; Saurer, *Der Einzelne im europäischen Verwaltungsrecht,* 17.
[72] See Articles 40(3), 43(2) TFEU.
[73] See Articles 91(1), 100(2) TFEU.
[74] See Article 192(1) TFEU.

provisions, as for example Articles 114,[75] 352 TFEU[76] and the doctrine of implied powers,[77] have been used as a legal basis to develop a European administration. In those cases, the details of the application of Union law are laid down in secondary legislation. This will be touched upon below in more detail.

2. Cooperation in the European Union's Administrative Procedures

The concept of direct and indirect administration is based on the principle of separation. This concept clearly differentiates between the administration by European actors and the indirect administration by Member States' national authorities. But this "system of divided administration" does not hold true anymore.[78]

The categories of direct and indirect administration are not sufficient to explain the complex structures which link the European and national administration when applying Union law.[79] Between the different national administrations and the European Union, a form of composite administration with regard to information sharing, decision-making and supervision has

[75] In several of its decisions the ECJ has approved of Article 114 TFEU as the correct legal basis to establish direct administration or some form of shared administration of European Union institutions. For more information see Case C-359/92, *Republic of Germany v Council of the European Union* (ECJ, 9 August 1994), para 37, Case C-66/04, *UK v European Parliament and Council of the European Union* (ECJ, 6 December 2005), paras 41 et seq., and Case C-217/04, *UK v. European Parliament and Council of the European Union* (ECJ, 2 May 2006), paras 42 et seq. But there are certain limitations to this provision. First and foremost, the adopted measures have to lead to an approximation of the Member States' laws which have as their object the establishment and functioning of the internal market. See Krönke, *Die Verfahrensautonomie der Mitgliedstaaten,* 46 et seq. Saurer, *Der Einzelne im europäischen Verwaltungsrecht,* 20; Tomi Tuominen, 'The European Banking Union: A Shift in the Internal Market Paradigm?' (2017) 54, Common Market Law Review, 1359.

[76] Here the requirement of unanimity leads to an actual obstacle. But also, the subsidiarity of this provision to other more specific provisions in the Treaties lead to a higher level of justification if used.

[77] Regarding Schmidt-Aßmann, the doctrine of implied powers does not have to be used. For him the scope of the objective oriented policy provisions is wide enough to also cover the competence of administrative activities. Schmidt-Aßmann, '§ 5 Verfassungsprinzipien für den Europäischen Verwaltungsverbund', para 20.

[78] Since the Commission launched the internal market initiative in 1985 and the follow-up measures to the Sutherland report, cooperation and not separation of the different (national and European) administrative actors is the key issue regarding the application of Union law, <http://europa.eu/rapid/press-release_IP-92-986_en.htm> accessed 01.10.2017. For more information see Sydow, *Verwaltungskooperation,* 2, 4; Thomas Groß, 'Die Kooperation zwischen europäischen Agenturen und nationalen Behörden' (2005) 40, Europarecht, 54, 54 et seq; Gernot Sydow, 'Vollzug des europäischen Unionsrechts im Wege der Kooperation nationaler und europäischer Behörden' (2006) 59, Die Öffentliche Verwaltung, 66, 66 et seq; Gabriele Britz, 'Vom Europäischen Verwaltungsverbund zum Regulierungsverbund? Europäische Verwaltungsentwicklung am Beispiel der Netzzugangsregulierung bei Telekommunikation, Energie und Bahn' (2006) 41, Europarecht, 46, 46 et seq; Mager, 'Die Europäische Verwaltung', 372.

[79] See Hofmann and Türk, '3. Policy Implementation', 575.

evolved and is still evolving.[80] This shows elements of a European administration.[81] Again, a great deal of different terms to describe this form of administrative cooperation exist.[82] Here it will be referred to as "composite administration".

European administrative governance is shaped by separation regarding the administration's organizational side and cooperation regarding its functional side.[83] The organizational side is characterized by an organizational and personnel separation due to the principle of the Member States' institutional and procedural autonomy.[84] But besides this separation, a great number of horizontal and vertical forms of cooperation came into existence.[85]

Vertical forms of cooperation run between the European and the Member States level while horizontal forms of cooperation run between different Member States administrations.[86] Even though the term "vertical cooperation" seems to include some form of hierarchy, in the case of Union law it rather reflects a system of "checks and balances" where no one side always has the final say. Cooperation in this case means a trustful interaction between the two different levels. Vertical cooperation is particularly pronounced where the Member States apply Union law in the form of indirect administration, but the Commission and European agencies have

[80] For more information on the term "composite administration" see footnote 20. von Bogdandy and Dann, 'Composite Administration', 2016, 2034 et seq; see also Schmidt-Aßmann, 'Europäische Verwaltung zwischen Kooperation und Hierarchie', 1375 et seq; Eberhardt Schmidt-Aßmann, 'I. Introduction: European Composite Administration and the Role of European Administrative Law', in Oswald Jansen and Bettina Schöndorf-Haubold (eds), *The European Composite Administration* (Intersentia 2011), 1 et seq; Moritz Hartmann, *Europäisierung und Verbundvertrauen* (Mohr Siebeck 2015), 47 et seq.

[81] For more information on the term "European administration" see inter alia Herwig C.H. Hofmann, Gerard C. Rowe and Alexander H. Türk, *Administrative Law and Policy of the European Union* (Oxford University Press 2011), 57 et seq; see also Eberhardt Schmidt-Aßmann, 'Strukturen Europäischer Verwaltung und die Rolle des Europäischen Verwaltungsrechts', in Alexander Blankenagel, Ingolf Pernice and Helmuth Schulze-Fielitz (eds), *Verfassung im Diskurs der Welt, Liber Amicorum für Peter Häberle zum siebzigsten Geburtstag* (Mohr Siebeck 2004), 396 et seq.

[82] See for example Annetje Ottow, who refers to it as "mixed administration", Ottow, 'Supervision of Competitive Markets', 193; Other terms that are used are "policy networks", Patrick Kenis and Volker Schneider, '2. Policy Networks and Policy Analysis: Scrutinizing a New Analytical Tool Box', in Bernd Marin and Renate Mayntz (eds), *Policy Networks, Empirical Evidence and Theoretical Considerations* (Campus Verlag 1991), 40 et seq; and "executive federalism", Koen Lenaerts, 'Regulating the Regulatory Process: "Delegation of Powers" in the European Community' [1993], European Law Review, 23, 27 et seq. For more information see also Eberhardt Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* (2nd edn, Springer 2006), 384 et seq.

[83] See Schmidt-Aßmann, '§ 5 Verfassungsprinzipien für den Europäischen Verwaltungsverbund', para 18.

[84] See Mager, 'Die Europäische Verwaltung', 372.

[85] See Rob Widdershoven, 'The Role of National Administrative Law in Transnational Enforcement Cooperation', in J.A.E. Vervaele (ed), *Transnational Enforcement of the Financial Interests of the European Union* (Intersentia 1999), 131, 135; André Klip and John A.E. Vervaele, '2. Supranational Rules Governing Cooperation in Administrative and Criminal Matters', in André Klip and John A.E. Vervaele (eds), *European Cooperation Between Tax, Customs and Judicial Authorities* (The Hague, Wolters Kluwer 2001), 12, 23; Sydow, *Verwaltungskooperation*, 1.

[86] See Schmidt-Aßmann, *Verwaltungsrecht*, 36; Schmidt-Aßmann, '§ 5 Verfassungsprinzipien für den Europäischen Verwaltungsverbund', paras 25-28a.

hearing, consent and approval rights and through that are included in the administrative procedures.

But vertical cooperation also exists in the event of direct administration, which is continuously expanding. In addition, horizontal cooperation based on Union law between national authorities of the different Member States takes place more and more often.[87] Here transnational administrative acts as well as European Union-wide certifications are highly relevant.[88] The expansion of direct administration as well as the establishment of more and more European agencies leads to a shift in powers regarding the application of law towards the Commission and thereby to the European level.[89]

These multiple forms of horizontal and vertical cooperation challenge the classical administrative frameworks. They are a distinctive feature of European administration and demand the development of European administrative legal institutes.[90]

There are two different models for how these interactions between the two levels take place. Either (decentral) national actors participate in (central) European decision-making procedures or (central) European actors contribute to decentral forms of administrative application.[91]

One of the main functions of this composite administration is to ensure the collection and exchange of essential information between the European and the national level as well as between the different national actors in the European Union.[92] The obligations for the European and the national level to cooperate find their legal bases either in the Treaties[93] or, more

[87] See Huber, '§ 45 Überwachung', para 85. See for an example of horizontal cooperation, Directive 2011/89/EC regarding the supplementary supervision of financial entities in a financial conglomerate.

[88] See for an example Article 17 Directive 93/42/EEC. For more information on transnational administrative acts see Matthias Ruffert, 'XII. European Composite Administration: The Transnational Administrative Act', in Oswald Jansen and Bettina Schöndorf-Haubold (eds), *The European Composite Administration* (Intersentia 2011), 277 et seq; Wolfgang Hoffmann-Riem, '§ 33 Rechtsformen, Handlungsformen, Bewirkungsformen', in Wolfgang Hoffmann-Riem, Eberhardt Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts Band II: Informationsordnung, Verwaltungsverfahren, Handlungsformen* (2nd edn, C.H. Beck 2012), para 84; Huber, '§ 45 Überwachung', para 85.

[89] The national authorities are hereby responsible for the legal relationship to the market participants but the content of the regulatory power depends on the European level's participation. Huber, '§ 45 Überwachung', paras 81-84.

[90] To develop those administrative institutions, it is useful to analyse the individual actors' administrative actions. See Schmidt-Aßmann, *Verwaltungsrecht*, 404.

[91] In the first model, the contribution of the national actors is reduced to information sharing and the obligation of administrative assistance. Kahl, 'Der Europäische Verwaltungsverbund', 354 et seq.

[92] See Armin Hatje, *Die gemeinschaftsrechtliche Steuerung der Wirtschaftsverwaltung* (Nomos 1998), 134 et seq; Schmidt-Aßmann, '§ 5 Verfassungsprinzipien für den Europäischen Verwaltungsverbund', para 25.

[93] As for example Articles 5(1), 33(1), 87(1), 108(1) TFEU. Also, Article 4(3) TEU, the principle of sincere cooperation, establishes secondary obligations to existing cooperation.

typically, in secondary legislation.[94] Most of the time these cooperation mechanisms are established by the European Union legislators. For this, the Union legislators use the wide variety of options regarding the organizational design of European Union administration provided for by the Treaties.[95] Changes in European administrative organization mainly take place through secondary law-making like this. Through the establishment of these different forms of cooperation between European and national actors, a new layer of administration emerges.[96]

Competences and tasks of the administration in the European Union are divided between the European and the Member State level. But the execution of these tasks and their administrative application takes place through different mechanisms of cooperation.
There are some typical institutional structures in which these forms of cooperation take place. Because of their relevance for this work, agencies and networks will be briefly examined.[97] The European Union legislature uses the wide scope of organizational freedom provided for in the Treaties to establish many different administrative networks and agencies.[98] While European Union agencies are highly relevant for the vertical dimension of applying Union law, networks play an important role in the horizontal dimension of the application process.[99]
Those institutional structures are not necessarily unconnected from each other. They can also function with or in addition to one another.[100] Formalized administrative network structures, for example, function with or in addition to the establishment of agencies. They supplement the

[94] In addition, some informal ways of cooperation have emerged. Saurer, *Der Einzelne im europäischen Verwaltungsrecht,* 13; see also von Danwitz, *Europäisches Verwaltungsrecht,* 609, 615 et seq.
[95] See Saurer, *Der Einzelne im europäischen Verwaltungsrecht,* 14, 23.
[96] See Schmidt-Aßmann, *Verwaltungsrecht,* 36.
[97] Since there is no close link between committees and the present administrative framework of European financial supervision, committees will not be analysed here. For more information on committees see Jens Blom-Hansen and Gijs Jan Brandsma, 'The EU Comitology System: Intergovernmental Bargaining and Deliberative Supranationalism?' (2009) 47, Journal of Common Market Studies, 719; see also Günther F. Schäfer and Alexander H. Türk, '8. The Role of Implementing Committees', in Thomas Christiansen and Torbjörn Larsson (eds), *The Role of Committees in the Policy-Process of the European Union* (Edward Elgar 2007), 182; Maria Monica Fuhrmann, 'Neues zum Komitologieverfahren' (2007) 60, Die Öffentliche Verwaltung, 464, 464 et seq; and Schmidt-Aßmann, *Verwaltungsrecht,* 383 et seq; Schmidt-Aßmann, '§ 5 Verfassungsprinzipien für den Europäischen Verwaltungsverbund', paras 16, 26; Beate Braams, *Koordinierung als Kompetenzkategorie* (Mohr Siebeck 2013), 97 et seq.
[98] See Saurer, *Der Einzelne im europäischen Verwaltungsrecht,* 23.
[99] See Craig, *EU Administrative Law,* 31 et seq.
[100] See Wolfgang Hoffmann-Riem, '§ 10 Eigenständigkeit der Verwaltung', in Wolfgang Hoffmann-Riem, Eberhardt Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts Band I: Methoden, Maßstäbe, Aufgaben, Organisation* (2nd edn, C.H. Beck 2012), paras 53a et seq.

Commission's executive position in the implementation of Union law and lead to greater convergence of administrative practice.[101]

2.1 European Agencies

The emergence of agencies in the European Union started in the 1990s.[102] They represent an institutional form of composite European administration.[103] Although they are established through European legal acts as a European Union body with a legal personality and are mentioned in Articles 298(1) and 263(5) TFEU, they still have a close connection to the Member States' administrations due to Member States' representatives in the agencies' Management Boards.[104] However, agencies are part of the Union's own administration.[105]

The tasks of the individual agencies differ. They can range from information gathering to making individual decisions or even drafting technical regulations (which then have to be approved by the Commission). Depending on their tasks and powers, the respective policy area, and the existing set of rules, the agencies are either situated closer to the European level and with that to the European Union's direct administration or they form part of the cooperation model of the two levels.[106] Because of their tasks and their institutional structure, agencies are a mixture of direct and indirect administration.[107]

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[101] See Dehousse, 'The Role of the European Agencies', 246; Hofmann and Türk, '3. Policy Implementation', 90 et seq; Craig, *EU Administrative Law,* 143.

[102] For deeper insights regarding the earlier establishment of agencies in the European Union see Giandomenico Majone, 'The New European Agencies: Regulation by Information' (1997) 4, Journal of European Public Policy, 262, 262 et seq; see also Saurer, *Der Einzelne im europäischen Verwaltungsrecht,* 17.

[103] For a good overview see Matthias Ruffert, 'Verselbständigte Verwaltungseinheiten: Ein europäischer Megatrend im Vergleich', in Hans Christian Röhl and others (eds), *Allgemeines Verwaltungsrecht - zur Tragfähigkeit eines Konzepts* (Mohr Siebeck 2008), 431 et seq, 440 et seq; see also Edoardo Chiti, 'Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies' (2004) 10, European Law Journal, 402, 402 et seq; Edoardo Chiti, 'Administrative Proceedings involving European Agencies' (2006) 68, Law and Contemporary Problems, 219, 219 et seq; Edoardo Chiti, 'European Agencies' Rulemaking: Powers, Procedures and Assessment' (2013) 19, European Law Journal, 93, 93 et seq.

[104] The Management Board is the agency's agenda setter and makes its key decisions. The Commission has a minority role in the agency's Management Board, where the majority of the members are Member States representatives. Craig, *EU Administrative Law,* 31.

[105] See Saurer, *Der Einzelne im europäischen Verwaltungsrecht,* 24.

[106] See Craig, *EU Administrative Law,* 31.

[107] See Kahl, 'Der Europäische Verwaltungsverbund', 358.

One can differentiate between executive agencies[108] and regulatory agencies.[109] Executive agencies are established to support the Commission in carrying out its tasks. For that, executive agencies have a supporting role and are subordinate to the Commission. Regulatory agencies, on the other hand, have a broader range of responsibilities and work more independently.[110] Their tasks range from collecting and providing information and services to exercising certain implementing powers.[111]

Within the field of European agencies, many issues are still very controversial and unresolved.[112] In this context, one has to mention the Meroni doctrine regarding the issues of delegating discretionary powers to agencies and preserving the institutional balance of power in the European Union.[113] Another still problematic and unresolved issue is the question of the (correct) legal basis for establishing agencies.[114] But even though these are still important questions other issues are now coming to the fore. Today the questions regarding democratic

[108] Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programs.

[109] For a detailed overview regarding the different kinds of agencies: Commission, 'Communication from the Commission to the European Parliament and the Council of 11 March 2008: European Agencies – The way forward' [SEC(2008) 323] COM(2008) 135 final, 2 et seq. See also Edoardo Chiti, 'The Emergence of a Community Administration: the Case of European Agencies' (2000) 37, Common Market Law Review, 309, 311. Chiti, for example, differentiates information function agencies, responsible for collecting, managing and disseminating information, and executive agencies, in charge of executing new EU regimes and service provisions; Schmidt-Aßmann, '§ 5 Verfassungsprinzipien für den Europäischen Verwaltungsverbund', para 23.

[110] See Augsberg, '§ 6 Vollzugsformen', para 73 et seq.

[111] See Hofmann and Türk, '3. Policy Implementation', 88.

[112] A good overview regarding current issues regarding European agencies and the newly established Authorities can be found in Ottow, 'Supervision of Competitive Markets', 215 et seq; Ohler, 'Verwaltungsverbund und Finanzaufsicht', 324.

[113] In the Meroni ruling, the Court of Justice stated that the delegation of powers by the Commission to a body established under private law is lawful if "it involves clearly defined executive powers which can […] be subject to strict review" and if it does not involve "a discretionary power which may […] make possible the execution of actual economic policy", Case 9/56, *Meroni* [1958] ECR 133, 152. The Meroni doctrine is still relevant today when establishing EU agencies and transferring tasks and powers to the entities. However, in the short selling ruling the Court of Justice used a much wider interpretation regarding the transfer of powers than in the Meroni ruling and made some very clear differentiations between the two cases, C-270/12, *Short selling* (Court of Justice 22 January 2014), paras 41 et seq. For more information on the ECJ's short selling ruling see Carl Frederik Bergström, 'Shaping the New System for Delegation of Powers to EU Agencies: United Kingdom v. European Parliament and Council (Short Selling)' (2015) 52, Common Market Law Review, 219, 219 et seq; see also Xénophon A. Yataganas, 'Delegation of Regulatory Authority in the European Union - The Relevance of the American Model of Independent Agencies' (2001) Jean Monnet Working Paper 3/01, 21 et seq <http://www.jeanmonnetprogram.org/archive/papers/01/010301.html> accessed 01.10.2017; Ottow, 'Supervision of Competitive Markets', 215; Ohler, 'Verwaltungsverbund und Finanzaufsicht', 321, 323.

[114] Regarding the question of the correct legal basis see the Court of Justice's decision: C-217/04, *ENISA* [2006] ECR I-3771, and Saurer, *Der Einzelne im europäischen Verwaltungsrecht,* 21; Ohler, 'Verwaltungsverbund und Finanzaufsicht', 321.

legitimacy as well as transparency and accountability are drawing more and more attention.[115] Especially the issue of accountability will be dealt with in more detail in Chapter 4.

2.2 Networks in European Administration

For administrative structures which involve the European as well as the national level, Union law uses the term "network" in many cases.[116] Networks are a very common organizational form of European administration. Even though the term is frequently used in European legislation, there are also informal forms of such cooperation between authorities of the different Member States without any mention in Union legislation.[117] There are two different ways the term "network" emerges.[118] First of all, as the term has been introduced by political scientists, it is used in a descriptive way, and second, it is used (in European legislation) in a normative way.[119]

The term "network" as used by political scientists describes an intensified and permanent form of administrative cooperation of national administrators or national regulatory authorities and

[115] For more information regarding the issue of accountability see Herwig C.H. Hofmann and Alessandro Morini, 'Constitutional Aspects of the Pluralisation of the EU Executive through 'Agencification'' (2012) 37, European Law Review, 419, 27 et seq; see also Ottow, 'Supervision of Competitive Markets', 216.

[116] The ESFS is established as an "integrated network" of national and EU supervisory authorities, Recital 9 EBA Regulation. Furthermore, in antitrust law: "the Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation", Recital 15, Council Regulation (EC) No 1/2003. See as well Regulation (EC) No 1907/2006 (REACH Regulation). For more information see Kämmerer, 'ESFS', 1286. For more information on the "network concept" see Karl-Heinz Ladeur, 'Towards a Legal Theory of Supranationality - The Viability of the Network Concept' (1997) 3, European Law Journal, 33.

[117] See Hofmann and Türk, '3. Policy Implementation', 290 et seq.

[118] For more information regarding the value of the term "network" for legal scholars see Christoph Möllers, 'Netzwerk als Kategorie des Organisationsrechts - Zur juristischen Beschreibung dezentraler Steuerung', in Janbernd Oebbecke (ed), *Nicht-Normative Steuerung in denzentralen Systemen* (Franz Steiner Verlag 2005), 285 et seq.

[119] For its usage by political scientists see Kenis and Schneider, '2. Policy Networks', 27 et seq. In contrast it is used in a normative way by Recital 9 EBA Regulation (for the ESFS) and Recital 15 Council Regulation (EC) No 1/2003 (for the ECN). Mager, 'Die Europäische Verwaltung', 395; Wolfgang Kahl, 'Europäische Behördenkooperationen - Typen und Formen von Verbundsystemen und Netzwerkstrukturen', in Michael Holoubek and Michael Lang (eds), *Verfahren der Zusammenarbeit von Verwaltungsbehörden in Europa* (Linde 2012), 35. For the ESCB see also: Ann-Katrin Kaufhold, 'Systemaufsicht - Der Europäische Ausschuss für Systemrisiken im Finanzsystem als Ausprägung einer neuen Aufsichtsform' (2013) 46, Die Verwaltung, 21, 30 et seq; Thiele, *Finanzaufsicht*, 517 et seq. Christian Seiler, 'Das Europäische System der Zentralbanken (ESZB) als Verantwortungsverbund: Systemgebundene Aufgabenerfüllung durch eigenständige Kompetenzträger' (2004) 39, Europarecht, 52, 52 et seq; Hugo J. Hahn and Ulrich Häde, *Währungsrecht* (2nd edn, C.H Beck 2010), § 16, paras 134-141. Regarding the ESCB's structure and tasks see: Jochen Hoffmann, '§ 27 Europäisches Währungsverwaltungsrecht', in Jörg Philipp Terhechte (ed), *Verwaltungsrecht der Europäischen Union* (Nomos 2011), paras 1-11. Hoffmann stresses the institutional particularity of the ESCB, since its administrative decentralized approach is already invoked in Article 282(1) TFEU where the national central banks are stated as being an "institutional" part of the ESCB.

(sometimes) the European level.[120] The advantage of the network concept when used in this descriptive way is that the question of competence is of little importance, making it possible to examine the reality of administrative cooperation. It shows very well the close interrelation, connection and cooperation between different national actors and/or the European level.[121] However, this descriptive use of the term does not allow us to draw any conclusion regarding the distribution of power, competence and the level of hierarchy in European administration, thereby leaving out the legal aspects which are important for a legal approach of European administration.[122] Since these aspects will be highly relevant for this work, this network concept will not be further used to classify and systematize the forms of coordination.

Networks, in a normative way, are a characteristic of European Union administration. Their roles and influence in the different policy areas vary.[123] In general, there are three different kinds of tasks networks are to fulfil: expertise, coordination and peer review. Members of the network, in most instances national authorities, contribute their expertise to the European legislative process (mainly providing input to the Commission), they align national application practices by drawing up uniform standards for applying Union law and last but not least they provide expertise for and comment on each other's implementing practice.[124]

The European level, and here especially the Commission, often plays an important role in establishing these networks. Networks improve the exchange of information and lead to a more uniform application of Union law. They are in general an example for horizontal cooperation. But in some instances, networks also include an element of vertical cooperation when coordination and cooperation between the national authorities and that between the national authorities and the European level are facilitated.[125] They allow for an adequate degree of uniformity when applying Union law, something necessary for the internal market, while maintaining the basic concept of decentralized implementation.[126]

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[120] See Hofmann and Türk, '3. Policy Implementation', 290 et seq; Kahl, 'Der Europäische Verwaltungsverbund', 359.

[121] See Mager, 'Die Europäische Verwaltung', 394.

[122] See Sydow, *Verwaltungskooperation,* 78 et seq; Christoph Möllers, 'Transnationale Behördenkooperation: Verfassungs- und völkerrechtliche Probleme transnationaler administrativer Standardsetzung' (2005) 65, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 351, 380 et seq; Mager, 'Die Europäische Verwaltung', 372 et seq, 395 et seq.

[123] For example, the ECN has been established as a forum for discussion and cooperation between different national competent authorities. Something similar exists with respect to the Florence Forum for electricity and the Madrid Forum for gas. For more information see Craig, *EU Administrative Law,* 32 et seq.

[124] See Ottow, 'Supervision of Competitive Markets', 203.

[125] See Craig, *EU Administrative Law,* 33.

[126] See Dehousse, 'The Role of the European Agencies', 254.

But also when used in this normative way, the term “network” usually combines various aspects, for instance the organizational structure, procedures and competences.[127] Using this term in a normative way again prevents cooperation mechanisms and legal relationships from being analysed and systematized regarding the individual actors’ contributions.[128] Because of that, this notion of the term "network" is also not sufficient for capturing the legal aspects of cooperation between the different levels.

Last but not least, regarding the ESFS, the term "network" is used rather incidentally and the European and national authorities are said to be primarily forming some kind of "system".[129] However, the term "system" is also not suited to providing clarification regarding the administrative framework and the supervisory mechanisms of financial supervision.

3. Economic Supervision in European Union Law

Also, in economic supervision different areas are to a large extent Europeanized. The basic administrative model chosen here, with the exception of competition law, is a decentralized form of administration accompanied by complex structures of vertical and horizontal cooperation mechanisms between the different levels and the national authorities of the different Member States.[130]

In the next section, the administrative model and the cooperation mechanisms of supervision in the communications and energy sectors as well as supervision of national competition and consumer authorities are briefly analysed. This provides the opportunity to look into the cooperation mechanisms of two very different supervisory concepts. The significance of the first two areas of supervision lies in the extensive developments and changes in the area of liberalized sectors. The importance of the other two areas, in contrast, comes from the fact that supervision regarding consumer protection and supervision in competition law covers not just one but all markets in each case from a particular perspective.

[127] See von Bogdandy and Dann, ‘Composite Administration’, 2034 et seq.
[128] See Mager, ‘Die Europäische Verwaltung’, 394.
[129] See Kämmerer, ‘ESFS’, 1286.
[130] See Huber, ‘§ 45 Überwachung’, paras 80 et seq; Kahl, ‘§ 47 Kontrolle’, paras 220 et seq; Jörg Gundel, ‘§ 3 Verwaltung’, in Reiner Schulze, Manfred Zuleeg and Stefan Kadelbach (eds), *Europarecht* (3rd edn, Nomos 2015), paras 119 et seq.

3.1 Supervision in Liberalized Sectors: The Communications and Energy Sector

Supervision in the communications and energy sectors was established to initiate and ensure competition in areas which were traditionally controlled by national monopolies (incumbents).[131] But due to the infrastructure needed in these areas (the energy and communication networks) that cannot easily be replicated, those incumbents enjoyed significant market powers even after their exclusive rights and privileges were abolished. Because of that, supervisors' main tasks in liberalized sectors is to supervise and regulate these markets with regard to tariffs and access rights as well as to settle possible disputes.[132]

This initial situation clearly distinguishes supervision in liberalized sectors from financial supervision since initiating competition was never an issue in financial supervision.

To achieve greater centralization and Europeanization of supervision, some institutional cooperation mechanisms at the European level were put in place: In 2009, BEREC[133] and the ACER[134] were established. BEREC has been established to ensure the consistent application of the European Union's regulatory framework for electronic communication networks and services by developing closer cooperation among national regulatory authorities as well as between national regulatory authorities and the Commission. ACER's task, in contrast, is to help national regulatory authorities perform their tasks and coordinate their action at the European level.[135] Both thereby serve as an interlink between the national and the European level.[136] While BEREC has to ensure the consistent application of the European Union regulatory framework by advising and delivering non-binding opinions to national regulatory

[131] For more information on the reforms in the European telecommunication sector see Nina Boerger and Joseph Corkin, '2. How Regulatory Networks Shaped Institutional Reform under the EU Telecoms Framework', in Catherine Barnard, Markus Gehring and Iyiola Solanke (eds), *Cambridge Yearbook of European Legal Studies Volume 14, 2011-2012* (Hart Publishing 2012), 49 et seq; and for the energy sector Eberhard Bohne, 'Conflicts Between National Regulatory Cultures and EU Energy Regulations' (2011) 19, Utilities Policy, 255, 255 et seq.

[132] See Ottow, 'Supervision of Competitive Markets', 192; Silke Harz, *Behördliche Koordinierungsausschüsse im europäischen Finanzmarktaufsichts- und Regulierungsrecht* (Verlag Dr. Kovac 2013), 22, 24, 26 et seq.

[133] Regulation (EC) No 1211/2009. BEREC is composed of the Board of Regulators, which consists of one representative per Member State who shall be the head or nominated high-level representative of the national regulatory authority, see Article 4(1), (2) Regulation (EC) No 1211/2009. The Commission attends BEREC meetings as an observer and is represented at an appropriate level.

[134] Regulation (EC) No 713/2009.

[135] For this see Article 1(3) Regulation (EC) No 1211/2009 and Article 1(2) Regulation (EC) No 713/2009. Ottow, 'Supervision of Competitive Markets', 209; see also Kahl, 'Europäische Behördenkooperationen', 38.

[136] See Ottow, 'Supervision of Competitive Markets', 209; see also Kahl, 'Europäische Behördenkooperationen', 38, 42.

authorities and the Commission,[137] ACER in contrast, also to its predecessor ERGEG,[138] has the power to adopt individual regulatory decisions in a number of specific cases. While BEREC's responsibilities are solely of an advisory nature and it has no powers to take binding decisions, ACER can take its own binding decisions on certain technical issues,[139] namely, on issues in which the competent national regulatory authorities have been unable to reach an agreement[140] as well as on cross-border infrastructure[141] and certain exemptions and derogations.[142] ACER, therefore, has considerably more powers than BEREC.[143]

3.1.1 The Communications Sector

The European Union's communications sector consists of different vertical and horizontal cooperation mechanisms.[144] Directive 2002/21/EC, amended by Directive 2009/140/EC, on a common regulatory framework for electronic communications networks and services, establishes a set of procedures to ensure the harmonized application of the regulatory framework throughout the European Union.[145]

For this, Article 7 Directive 2002/21/EC is of particular importance. Article 7 Directive 2002/21/EC offers different measures to ensure the consistent application of Union law.[146] It lays down the requirements to consolidate the internal market for electronic communications and states different forms of cooperation between the national regulatory authorities as well as the national regulatory authorities and the European level. First of all, Article 7(2) Directive 2002/21/EC determines that the national regulatory authorities shall contribute to the building of the internal market by working with each other as well as with the Commission and BEREC in a transparent manner to ensure the consistent application of Union law.[147] Second, there are

[137] For more information and a precise description see Article 2 Regulation (EC) No 1211/2009 and Recital 8 Regulation (EC) No 1211/2009.
[138] The European Regulators Group for Electricity and Gas which has been replaced by ACER in 2009.
[139] See Article 7 Regulation (EC) No 713/2009.
[140] See Article 8 Regulation (EC) No 713/2009.
[141] See Article 7(7) Regulation (EC) No 713/2009.
[142] See Article 9 Regulation (EC) No 713/2009. ACER can also issue opinions and recommendations to transmission system operators, regulators, and the European Parliament, the Council, and the Commission, see Article 4 Regulation (EC) No 713/2009. Ottow, 'Supervision of Competitive Markets', 209 et seq.
[143] Ibid., 210.
[144] See Kahl, 'Europäische Behördenkooperationen', 38.
[145] Article 1(1) Directive 2002/21/EC.
[146] See Kahl, 'Europäische Behördenkooperationen', 39.
[147] National regulatory authorities should, in particular, work with the Commission and BEREC to identify the types of instruments and remedies best suited to address particular types of situations in the marketplace.

several possibilities for the European level, the Commission and BEREC, to intervene in national decision-making.[148]

Besides the more general obligation to cooperate, Article 7(3) Directive 2002/21/EC states that national regulatory authorities must, in certain listed cases, make draft decisions accessible to the Commission, BEREC and the other national regulatory authorities which will then have the possibility to comment on those draft decisions and to deliver an opinion to the respective national regulatory authority. The respective national regulatory authority has the obligation to take the "utmost account" of the comments. If the intended measure aims at defining a relevant market which differs from Article 15(1) Directive 2002/21/EC or decides whether or not to designate an undertaking as having significant market power and this decision also affects trade between Member States, the Commission even has the right to take a decision requiring the respective national regulatory authority to withdraw or amend the draft measure.[149]

In addition, the Commission has the power in certain narrowly defined cases to veto or amend the draft measure.[150] Article 7 Directive 2002/21/EC therefore ensures an improvement regarding the exchange of information and the consistent application of the European Union regulatory framework for electronic communication networks. More importantly, it also gives the Commission and BEREC the possibility to influence the national regulatory authorities' decision-making process.[151]

These different possibilities show a broad range of vertical and horizontal forms of cooperation and put the Commission, in certain cases, in the position to even have final decision-making authority. These cooperation and coordination measures are an example for ex ante supervision and therefore preventive control because all forms of cooperation take place before the national regulatory authority takes a measure and gives the European as well as the other national authorities the possibility to influence the draft decision (to differing extents).[152]

Besides this, with regard to BEREC horizontal cooperation also takes place. First of all, BEREC's Board of Regulators consists of representatives from the different national regulatory

[148] See Ottow, 'Supervision of Competitive Markets', 199; see also Kahl, 'Europäische Behördenkooperationen', 39.

[149] Article 7(4), (5) Directive 2002/21/EC. Before taking the decision, the Commission must take the utmost account of BEREC's opinion. This shows that even though BEREC can only take non-binding decisions, its decisions have a certain relevance and, in many instances, will influence the Commission's final decision.

[150] See Ottow, 'Supervision of Competitive Markets', 199.

[151] Ibid.

[152] Ibid., 200.

authorities established in each Member State. This Board of Regulators coordinates and exchanges information. Second, even though BEREC's opinions are non-binding, it is authorized, in various cases, to deliver opinions to national regulators as well as to the Commission. The national regulatory authorities as well as the Commission have to take the utmost account of any opinion, advice, recommendation, guidelines or regulatory best practice adopted by BEREC.[153] This also improves and supports horizontal cooperation and the consistent application of the European Union regulatory framework for electronic communications.

3.1.2 The Energy Sector

In the regulatory framework of the European energy market, similar mechanisms exist. First of all, there are notification duties for national regulatory authorities when taking certain decisions. According to Article 10 Directive 2009/72/EC,[154] to be able to certify and designate an undertaking as transmission system operator, the Commission has to be notified about the certification and designation decisions.[155] Regarding the decision on certification, the Commission has to deliver its opinion as to its compatibility with the respective requirements within two months.[156] Here again, the respective national regulatory authority has to take the "utmost account of that opinion" when adopting its final decision.[157]

Moreover, in the case of Directive No 2009/72/EC, the Commission or a national regulatory authority can request ACER to express an opinion on the compliance of a decision taken by a national regulatory authority with the guidelines referred to in the respective Directive or Regulation (EC) No 714/2009.[158] Only in cases of serious doubt may the Commission ask the national regulatory authority to withdraw its decision.[159]

Concerning common rules for the internal market in natural gas,[160] and the conditions for access to the network for cross-border exchanges in electricity,[161] national regulatory authorities have certain notification duties towards the Commission. They have to notify the Commission if they

[153] See Articles 2, 3 Regulation (E) No 1211/2009.
[154] Directive 2009/72/EC is on common rules for the internal market in electricity.
[155] See Article 10(2), (6) Directive 2009/72/EC.
[156] See Article 3(1) Regulation No (EC) 714/2009.
[157] See Article 3(2) Regulation No (EC) 714/2009.
[158] See Article 39 Directive 2009/72/EC.
[159] See Article 39(6) Directive 2009/72/EC. Ottow, 'Supervision of Competitive Markets', 201.
[160] Directive 2009/73/EC.
[161] Regulation (EC) No 714/2009.

want to grant a derogation to a natural gas undertaking from the requirements to allow access to, for example, transmission and distribution systems,[162] or if they want to make an exemption for capacity allocated to interconnectors.[163] The Commission then has the right to either ask to amend or withdraw the decision.[164]

In the case of Article 48(2) Directive 2009/73/EC, the Commission has the power to take the final decision itself if the national regulatory authority does not comply with the Commission's decision. In contrast to that, in cases of Article 17(2) Regulation (EC) No 714/2009, it is assumed that the respective national regulatory authority will comply with the Commission's decision and inform it accordingly.[165] In the case of Article 17 Regulation (EC) No 714/2009, before taking a decision, ACER can submit an advisory opinion, which can provide a basis for the national regulatory authorities' decision.[166] ACER is even authorized to take the decision itself either if the national regulatory authorities concerned cannot reach an agreement or if the national regulatory authorities jointly request it.[167] In contrast to Article 48 Directive 2009/73/EC, in cases of Article 17 Regulation (EC) No 714/2009 the national regulatory authorities' decision-making process can already be influenced in the drafting phase.

Supervisory powers in the energy market involve several notification duties of the national regulatory authorities and the Commission's competence to request national regulatory authorities to amend or withdraw their decision. In the case of Article 48 of Directive 2009/73/EC, the Commission even has the power to take a final decision itself. In other cases, the national regulatory authorities have notification duties, and the Commission has the possibility to deliver an advisory opinion.

Supervision in the energy market is, with the exception of Articles 3, 17(5) Regulation (EC) No 714/2009, ex post supervision in contrast to supervision in the communications sector. While in the communications sector the Commission can intervene in the decision-making process (therefore supervision takes place ex ante), the involvement of the Commission in the energy sector concerns only final (and already taken) decisions.[168] ACER's and BEREC's roles are, other than for very few exceptions with regard to ACER, of a supportive nature towards

[162] See Article 48(2) Directive 2009/73/EC.
[163] See Article 17(7) Regulation (EC) No 714/2009.
[164] See Article 48(2) Directive 2009/73/EC, Article 17(8) Regulation (EC) No 714/2009.
[165] The procedures for that are laid down in Council Decision 1999/468/EC.
[166] See Article 17(4) Regulation (EC) No 714/2009.
[167] See Article 17(5) Regulation (EC) No 714/2009.
[168] See Ottow, 'Supervision of Competitive Markets', 201.

the Commission. But the main European actor with regard to final decision-making powers in liberalized sectors is the Commission.

3.2 Supervision in Competition and Consumer Protection Law

The second area of supervision investigated here is supervision in consumer protection and competition law. Supervision in consumer protection and competition law applies and focuses on all markets but from a particular perspective.

3.2.1 Consumer Protection Law

With Regulation (EC) No 2006/2004 on the cooperation between national authorities responsible for the enforcement of consumer protection laws, rules for cooperation and the distribution of responsibilities between the individual national competent authorities have been adopted. Supervision is provided for via a system of 'home state control'.[169] Regulation (EC) 2006/2004 states the competent authority and installs rules of mutual assistance between the different national competent authorities in case of intra-European Union infringements.[170]

Mutual assistance includes first of all the exchange of information, upon request and without request;[171] second, the request for enforcement measures;[172] and third, the coordination of market surveillance and enforcement activities.[173] In general, all national competent authorities have to comply with the different requests and have to provide the requested information or take the requested enforcement measures. Only in certain limited cases stated in Article 15 Regulation (EC) No 2006/2004 can the national competent authorities refuse to comply with the request.[174]

The exchange of information without request applies to intra-EU infringements. If a national competent authority becomes aware of such an infringement, it has to notify the Commission and the other national competent authorities of the infringement.[175] It also has to inform the

[169] Ibid., 219.
[170] See Article 2(1) Regulation (EC) No 2006/2004.
[171] See Articles 6, 7 Regulation (EC) No 2006/2004.
[172] See Article 8 Regulation (EC) No 2006/2004.
[173] See Article 9 Regulation (EC) No 2006/2004.
[174] See Ottow, 'Supervision of Competitive Markets'.
[175] See Article 7(1) Regulation (EC) No 2006/2004.

Commission and the other national competent authorities if it takes further enforcement measures or receives a request for mutual assistance regarding that infringement.[176]

Further notification duties of a national competent authority towards the Commission exist in case of coordination of market supervision,[177] and in cases when rejecting a request for mutual assistance.[178] If a national competent authority requests that another national competent authority carries out enforcement measures and the two authorities cannot reach an agreement, the matter is brought to the Commission who then issues an opinion. If an enforcement measure is taken, the national competent authority has to notify the other national competent authorities and the Commission.[179]

For this system of mutual assistance to work properly, the institutional structure has been adapted and a Consumer Protection Cooperation Network has been established.[180] Each Member State has to designate one national competent authority and one single liaison office responsible for the application of the regulation Article 3(d), 4(1) Regulation (EC) No 2006/2004. The liaison offices serve as intermediary bodies between the different national competent authorities and the European level.[181] The Consumer Protection Cooperation Network uses a secure IP tool, the Consumer Protection Cooperation System.[182] It was established to facilitate the exchange of information. The main task of the network so far is one of an IT network and not so much of an infrastructure for other forms of cooperation. Because of that, it has not had a bigger impact on cooperation between the two different levels and is not comparable to other networks.[183]

3.2.2 Competition Law

In European competition law the situation is different. With Council Regulation (EC) No 1/2003, the system of European competition law has experienced major changes. Since then it

[176] See Article 7(2) Regulation (EC) No 2006/2004.
[177] See Article 9(3) Regulation (EC) No 2006/2004.
[178] See Article 15(5) Regulation (EC) No 2006/2004.
[179] See Article 8(6) Regulation (EC) No 2006/2004.
[180] See Commission, 'Report on the Application of Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on Cooperation between National Authorities Responsible for the Enforcement of Consumer Protection Laws (the Regulation on Consumer Protection Cooperation' COM(2009) 336 final, 3.
[181] See for example Articles 9(2), 11(2), 12(2), (5) Regulation (EC) No 2006/2004.
[182] To have access to all the information, the Commission has to set up an electronic database, see Article 10 Regulation (EC) No 2006/2004. Commission, 'Report on the Application of Regulation (EC) No 2006/2004' COM(2009) 336 final, 5.
[183] See Ottow, 'Supervision of Competitive Markets', 205.

has been based on a direct and decentralized application of Union law by the Commission and national competition authorities and national courts.[184] Council Regulation (EU) No 1/2003 creates a system of parallel competences so that the national competition authorities as well as the Commission have the right to apply Articles 101, 102 TFEU.[185]

Together the Commission and the national competition authorities form a network of public authorities which is called ECN.[186] This network was established to ensure the efficient, effective and uniform application of Articles 101, 102 TFEU through the cooperation of the different national competition authorities as well as the cooperation of the national and the European level.[187] The allocation of the exact division of work between the national competition authorities and the Commission is stated by the Commission Notice on cooperation within the Network of Competition Authorities.[188] Within this system of parallel competences, the power remains with the Commission to step in and take over a case and to adopt a decision under Chapter III of Council Regulation (EC) No 1/2003.

If the Commission initiates such a proceeding for the adoption of a decision under Chapter III, the national competition authorities are released of their competence to apply Articles 101, 102 TFEU.[189] If a national competition authority is already acting on a case, the Commission has to consult with that national competition authority before initiating a proceeding.[190] Furthermore, if one national competition authority is already acting on a case, then when receiving a complaint or are acting on their own initiative under Articles 101, 102 TFEU, other competent authorities as well as the Commission may reject the complaint on the ground that another competition authority is already dealing with the case.[191]

Moreover, also national competition authorities and national courts cannot take decisions which would run counter to Commission decisions.[192] While in most cases the application and

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[184] See Articles 5, 6 Council Regulation (EC) No 1/2003. See von Danwitz, *Europäisches Verwaltungsrecht,* 327; Haratsch, Koenig and Pechstein, *Europarecht,* para 1203.

[185] See Commission, 'Notice on Cooperation within the Network of Competition Authorities' 2004/C 101/03, 43, 43; Florian Hänle, *Die neue Europäische Finanzaufsicht. Kompetenzen der neuen Europäischen Wertpapier- und Marktaufsichtsbehörde (ESMA)* (Verlag Dr. Kovac 2012), 173 et seq.

[186] See Recital 15 Council Regulation (EC) No 1/2003. Commission, 'Cooperation within the Network of Competition Authorities' 2004/C 101/03, 43, 43. Haratsch, Koenig and Pechstein, *Europarecht,* para 1203.

[187] The ECN now has evolved so far that details of European and national competition law are discussed and aligned. Ottow, 'Supervision of Competitive Markets', 206 et seq; see also Hänle, *ESMA,* 174.

[188] See Commission, 'Cooperation within the Network of Competition Authorities' 2004/C 101/03, 43, 43 et seq.

[189] See Article 11(6) Council Regulation (EC) No 1/2003. Mager, 'Die Europäische Verwaltung', 379.

[190] See Article 11(6) Council Regulation (EC) No 1/2003.

[191] See Article 13(1) Council Regulation (EC) No 1/2003.

[192] See Article 16 Council Regulation (EU) No 1/2003. See also von Danwitz, *Europäisches Verwaltungsrecht,* 327.

enforcement of European Union competition law lies with the national competition authorities, the Commission nowadays mainly acts regarding serious infringements of competition law. This is the case if the infringement has effects on competition in more than three Member States, if a case is closely linked to other Union law provisions which may be exclusively or more efficiently dealt with by the Commission or if the Community interest requires a Commission decision.[193]

If the Commission is acting under Articles 101, 102 TFEU and wants to take a decision according to Articles 7, 8, 9, 10, 23, 24(2), 29(1) Council Regulation (EC) No 1/2003 it has to consult the Advisory Committee.[194] For the discussion of individual cases, the Advisory Committee consists of representatives from the national competition authorities.[195] This enables the Commission to get an expert opinion before taking a decision and ensures the consistent application of European Union competition rules. If more than one national competition authority is dealing with a case in parallel action, they are obliged to coordinate their actions to the extent possible.[196]

The Commission and the national competition authorities apply the Community rules in close cooperation.[197] To achieve that, the Commission has to transmit copies of the most important documents it has collected to the national competition authorities.[198] The national competition authorities, on the other hand have to inform the Commission when acting under Articles 101, 102 TFEU before or immediately after commencing the first formal investigative measures and have to provide all the necessary and requested information to the Commission.[199]

This information also has to be made available to the other national competition authorities. Furthermore, the national competition authorities have to inform the Commission no later than

[193]This is especially so if the uniform application of Articles 101, 102 TFEU is at stake. Commission, 'Cooperation within the Network of Competition Authorities' 2004/C 101/03, 43, 44 et seq. Ottow, 'Supervision of Competitive Markets', 198; Haratsch, Koenig and Pechstein, *Europarecht,* para 1203.

[194] See Article 14 Council Regulation (EC) No 1/2003.

[195] See Article 14(2) Council Regulation (EC) No 1/2003.

[196] See Commission, 'Cooperation within the Network of Competition Authorities' 2004/C 101/03, 43, 43 et seq, 51.

[197] See Article 11(1) Council Regulation (EC) No 1/2003.

[198] See Article 11(2) Council Regulation (EC) No 1/2003.

[199] See Article 11(3) Council Regulation (EC) No 1/2003 and Commission, 'Cooperation within the Network of Competition Authorities' 2004/C 101/03, 43, 46.

30 days before they adopt a decision as stated in Articles 7 et seq. Council Regulation (EC) No 1/2003.[200] But the Commission still has the power to step in and take over a case.[201]
In addition, the Commission and the national competition authorities are authorized to exchange information (including confidential information) and to use it as evidence[202] as well as to request that another national competition authority conducts inspections as stated in Article 22 Council Regulation (EC) No 1/2003.

In the ECN, many forms and mechanisms of cooperation exist. First of all, there is an active exchange of information among the different actors and they even carry out inspections for one another. Furthermore, national competition authorities have to inform the Commission and can make this information available to other national competition authorities if they are acting under Articles 101, 102 TFEU. Moreover, if they want to take action pursuant to Articles 101, 102 TFEU, they have to notify the Commission and make all the information available to it. These measures ensure that the different actors are well aware of the investigations and decisions of the other competition authorities. If the Commission wants to deal with a case of the national competition authority, it has the power to relieve the respective national competition authority from its competence.
Council Regulation (EC) No 1/2003 contains several horizontal and vertical cooperation measures. It mainly ensures the consistent and active exchange of information and the support between the different competition authorities. But in certain cases, the Commission and with that the European level has the power to step in and deal with a case itself. This decision whether to step in and take over a case lies solely with the European level, though the Member States' national competition authorities have the chance to influence the Commission's decision-making process as members of the Advisory Committee. However, their influence is reduced to a non-binding opinion, of which the Commission has to take the utmost account before taking the decision. It can be noted that with Council Regulation (EC) No 1/2003, the cooperation and coordination between the national competition authorities has improved, but at the same time the Commission is still the guiding and leading supervisory authority who now focuses on the

[200] See Article 11(4) Council Regulation (EC) No 1/2003.
[201] See Article 11(6) Council Regulation (EC) No 1/2003.
[202] See Article 12 Council Regulation (EC) No 1/2003.

important cases and can provide the general framework for the consistent application of European Union competition rules.[203]

4. Conclusion

As shown in the previous part, European economic supervision contains many different forms of vertical and horizontal cooperation mechanisms when carrying out supervision. There are numerous cases in which horizontal and vertical forms of cooperation exist already in the decision-making phase.

In the communications sector, national regulatory authorities have the duty to make certain draft decisions accessible to the other actors (the Commission, BEREC and other national regulatory authorities). While the opinions of these actors are not legally binding, the respective national regulatory authority has to take these opinions into consideration before taking its final decision. In certain listed cases, the Commission even has a veto right regarding those draft decisions.

In the energy sector ACER has, in certain cases, the possibility to submit an advisory opinion before a national regulatory authority takes a decision. Here, as well, this opinion is not binding and the national regulatory authority only has to take the utmost account of this opinion when taking its decision. Only in cases in which either the national regulatory authority concerned cannot reach an agreement or if the national regulatory authorities jointly request it is ACER authorized to take the decision itself. In these examples, ex ante horizontal cooperation between the different national regulatory authorities exists. In addition, when the Commission, or in very limited cases ACER, is the final decision-making authority, a vertical element joins in.

Another element of horizontal cooperation in this first stage of the decision-making process takes place with regard to BEREC. BEREC's main body, the Board of Regulators, consists of representatives from the different national regulatory authorities of each Member State. This Board of Regulators coordinates and exchanges information. BEREC is authorized to deliver opinions to national regulators as well as to the Commission, which both have to take the utmost account of any opinion, advice, recommendation, guideline or regulatory best practice adopted by BEREC. Even though BEREC's opinions are non-binding, their actual impact should not be underestimated.

[203] See Mager, 'Die Europäische Verwaltung', 379; Kahl, 'Europäische Behördenkooperationen', 37; Ottow, 'Supervision of Competitive Markets', 207 et seq.

Besides these ex ante horizontal cooperation mechanisms, ex post horizontal cooperation also takes place. National regulatory authorities have numerous notification duties towards the Commission regarding decisions they have taken. In certain cases, the Commission has the final decision-making power and can either ask the national regulatory authority to amend or withdraw a decision or, in the case of Article 48(2) Directive 2009/73/EC, can even take the decision itself.

In the field of consumer protection, cooperation does not take place within the decision-making process but in the actual execution process of European consumer protection law. Here, the different national competent authorities are obliged to cooperate and mutually assist each other by exchanging information, coordinating market surveillance and enforcement measures, and aiding with enforcement measures. The exchange of information takes place through the CPC Network, which is another element of horizontal cooperation.

This shows a differentiated system of horizontal cooperation mechanisms among national competent authorities of different Member States. In cases in which different national competent authorities cannot reach an agreement, a vertical element exists and the matter is brought to the Commission, which has to issue an opinion.

In competition law, the mechanisms of cooperation are even more manifold. Due to a system of parallel competences, a complex system of vertical and horizontal forms of cooperation exist. In the ECN, the Commission and the national competition authorities apply Union legislation in close cooperation. To achieve this, the Commission has to transmit copies of the most important documents it has collected to the national competition authorities. Moreover, the national competition authorities have to inform the Commission when acting under Articles 101, 102 TFEU. If the Commission makes use of its power to take over a case and relieve the respective national competition authority of its competence to deal with the case, it first has to consult with the Advisory Committee, consisting of representatives from the national competition authorities.

In European competition law, an active exchange of information among the different actors and support among the different competition authorities exists. Even if the Commission takes on a case, the Advisory Committee ensures that cooperation and exchange between the national competition authorities and the European level is maintained.

There are many ways for the different levels to cooperate in the horizontal and vertical dimensions. It can be observed that in competition law with Council Regulation (EC) No 1/2003, cooperation and coordination among the national competition authorities has improved. However, at the same time the Commission is the guiding and leading supervisory authority that now focuses on the important cases and can provide the general framework for the consistent application of European Union competition rules.[204]

Cooperation in supervision in the communications and energy market very much involves the actual decision-making process. In the energy market, with the exception of Articles 3 and 17(5) of Regulation (EC) No 714/2009, supervision is different to cooperation in the communications sector, where it is on decisions which have already been taken. In most of the ex-ante forms of cooperation, the tasks of the European bodies or other national authorities are primarily of an advisory nature, even though those advisory opinions have to be taken into the utmost account by the authorities before taking the decision.[205] This shows forms of a stepped decision-making process, where there are several steps before a final decision can be taken.[206]

Furthermore, there are different network structures in the system of economic supervision. The key function of networks is to facilitate the exchange of information among national authorities.[207] The exchange of information should first of all lead to national authorities contributing their expertise to the European legislative process, second to developing uniform application standards for European legislation (mainly European directives) and third to exchanging expertise and information on each other's implementing practices.[208]

In most of the cases, the cooperation between the different actors concerns the internal relationships between these actors. While the national competent authorities still act towards the market participants.[209] However, hierarchical elements exist in these cooperation structures. The Commission has veto powers in certain cases, it can issue binding instructions to the national competent authorities or, as in the case of competition law, can draw up a case and

[204] See Hofmann and Türk, '17. Europe's Integrated Administration', 576; Mager, 'Die Europäische Verwaltung', 379; Ottow, 'Supervision of Competitive Markets', 207 et seq.
[205] See Ottow, 'Supervision of Competitive Markets', 214.
[206] See Gundel, '§ 3 Verwaltung', paras 138-142.
[207] See Ottow, 'Supervision of Competitive Markets', 203; Gundel, '§ 3 Verwaltung', paras 147 et seq.
[208] See Ottow, 'Supervision of Competitive Markets', 203.
[209] See von Danwitz, *Europäisches Verwaltungsrecht,* 306.

decide it itself.[210] Significant decision-making power is transferred to the European level while the national competent authorities focus on the day-to-day business.[211]

But these veto rights, rights of instructions and in some cases even the power to draw up a case and take the decision itself, are exceptions and only exist in individual cases.[212] The Commission only has very few exclusive competences to take individual decisions.[213] So far, no European regulatory "super"-authority has been established, and the principal of the Member States' autonomy when applying Union law still holds true.[214]

[210] See Gundel, '§ 3 Verwaltung', paras 135 et seq.
[211] See von Danwitz, *Europäisches Verwaltungsrecht,* 306.
[212] See Hans Lühmann, 'Von der Staatsaufsicht zur Unionsaufsicht? Auswirkungen des europäischen Rechts auf das deutsche System der Staatsaufsicht' (1999) 114, Das Deutsche Verwaltungsblatt, 752.
[213] See Thomas Groß, *Die Legitimation der polyzentralen EU-Verwaltung* (Mohr Siebeck 2015), 16.
[214] See von Danwitz, *Europäisches Verwaltungsrecht,* 306; Gundel, '§ 3 Verwaltung', paras 119 et seq.

Chapter 2: The Administrative Framework of European Financial Supervision

Financial stability of financial markets, despite their importance for modern states' economies, cannot be ensured by individual states anymore.[215] In the event of the European Union with its internal market, which also includes an at least partially integrated European financial market, and the euro area, this is even more so. While the internal market provided the impetus for the two earlier key development stages: The White Paper period in 1985 and the FSAP and Lamfalussy period in 1999 and 2001;[216] the deficiencies of the internal market and the reality of fiscal risk have driven this latter period of centralization and consolidation.[217]

The financial crisis showed that the predominant version of harmonizing substantive parts and establishing a loose network structure of supervision were not sufficient for creating a harmonized and stable financial market in the European Union.[218] Because of that, the focus shifted from an economic perspective on financial market integration to a more administrative perspective on economic governance.[219] This lead to major changes in the administrative structure of financial supervision in the European Union.[220]

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[215] See Martin Hellwig, '1. Die Volkswirtschaftliche Bedeutung des Finanzsystems', in Jürgen von Hagen and Johannes Heinrich von Stein (eds), *Obst/Hintner, Geld-, Bank-, und Börsenwesen: Handbuch des Finanzsystems* (40th edn, Schäffer-Poeschel 2000), 3; Anne van Aaken, 'Transnationales Kooperationsrecht', in Christoph Möllers, Andreas Voßkuhle and Christian Walter (eds), *Internationales Verwaltungsrecht: Eine Analyse anhand von Referenzgebieten* (Mohr Siebeck 2007), 219 et seq; Klaus J. Hopt, 'Auf dem Weg zu einer neuen Europäischen und Internationalen Finanzmarktarchitektur' (2009) Rechtspolitisches Forum, 5 <http://ubt.opus.hbz-nrw.de/volltexte/2011/670/pdf/50_Hopt_EBook.pdf> accessed 01.10.2017; Guido Ferrarini and Filippo Chiodini, '8. Nationally Fragmented Supervision over Multinational Banks as a Source of Global Systemic Risk - A Critical Analysis of Recent EU Reforms', in Eddy Wymeersch, Klaus J. Hopt and Guido Ferrarini (eds), *Financial Regulation and Supervision: A post-crisis analysis* (Oxford University Press 2012), 193 et seq.

[216] See Angel Ubide, '21. Financial Market Integration, Regulation and Stability', in Harald Badinger and Volker Nitsch (eds), *Routledge Handbook of the Economics of European Integration* (Routledge 2016), 312. For more information on the Commission's White Paper see Fabio Recine and Pedro Gustavo Teixeira, 'The New Financial Stability Architecture in the EU' (2009) Paolo Baffi Centre Research Paper No 2009-62, 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1509304> accessed 01.10.2017.

[217] See Moloney, 'EU Financial Market Regulation', 1381.

[218] See Ohler, '§ 10 Finanzmarktregulierung und –aufsicht', para 1; For more information on the reforms to the legal framework and institutional architecture and financial stability see also Max Andenas and Iris H.-J. Chiu, 'Financial Stability and Legal Integration in Financial Regulation' (2013) 38, European Law Review, 335.

[219] Commission, 'European Financial Stability and Integration Report 2010' SEC(2011) 489, 39; see also Ohler, '§ 10 Finanzmarktregulierung und –aufsicht', para 2.

[220] See Fabian Amtenbrink, 'Institutionelle Aspekte der neuen europäischen Finanzmarktregulierung und -aufsicht', in Ludwig Gramlich and Cornelia Manger-Nestler (eds), *Europäisierte Regulierungsstrukturen und -netzwerke* (Nomos 2011), 119 et seq; for more information on the causes of the financial crisis see Martin Hellwig, 'Systemic Risk in the Financial Sector: An Analysis of the Subprime-Mortgage Financial Crisis' (2008) Preprints of the Max Planck Institute for Research on Collective Goods 1 et see <https://www.coll.mpg.de/pdf_dat/2008_43online.pdf> accessed 01.10.2017.

One of the prerequisites for a stable and well-functioning financial system in the European Union is a competent and well-designed system of supervision, because without that even the best regulatory policies will be ineffective.[221] In the case of the European Union with its two separate administrative levels and its system of indirect administration, this means identifying the optimum (vertical) location of financial market supervision and establishing a supervisory structure that meets and addresses the shortcomings of the European Union's administrative system.[222]

The distribution of competence and the cooperation and coordination between the European Union and its Member States is one of the fundamental conflicts of Union law. The application and implementation of the law is still seen as an important part of the Member States' sovereignty, but in certain cases the application and implementation of the law and with that supervision is of utmost importance to the European Union, like in the field of financial supervision.[223] What makes supervision in the financial sector an even more sensitive issue is the close link between supervisory control und fiscal responsibility.[224]

To establish a common and consistent supervisory practice in the European Union, mechanisms have to be put in place (actors or supervisory instruments) which facilitate common and consistent supervisory practice in the European Union through uniform legislation, closer cooperation between the different national actors and a centralized instance in cases where there are uncertainties or disagreements regarding the application or even a breach of Union law.[225] The traditional instrument to facilitate, manage and control the consistent application and implementation of the law of different public actors in a political multi-level systems is supervision of and control between the different actors, most of the time by a superordinate central authority.[226]

In an administrative system like the European Union's, there are two different possible solutions for such control through a central authority: First, the European Union can establish a European

[221] De Larosière Group, 'De Larosière Report' (2009), paras 144 et seq.
[222] See Niamh Moloney, '29. Financial Markets Regulation', in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015), 771.
[223] A similar constellation exists with the assignment of the supervision of systemic important banks (SSM) to the ECB. But the requirements for such a delegation are very strict and a legal basis in the Treaties is needed. With Article 127(6) TFEU such a legal basis existed, but in most instances, this will not be the case. Christoph Möllers, *Die drei Gewalten: Legitimation der Gewaltengliederung in Verfassungsstaat, Europäischer Integration und Internationalisierung* (Velbrück Verlag 2008), 190.
[224] See Moloney, '29. Financial Markets Regulation', 777.
[225] Ibid., 775.
[226] See Huber, '§ 45 Überwachung', paras 15 et seq.

agency as a central authority that facilitates cooperation and coordination tasks and takes on supervisory tasks.[227] Agencies have by now been widely used and have a very differentiated structure in terms of tasks and powers. Because of that, their individual design is flexible and their tasks and powers can be adapted to the specific situation.[228] The use of European agencies leads to a combination of vertical and horizontal elements of administration and meets the needs of the European level to control the application of the law and the Member States' interest to participate, since with the agency's Management Board the national authorities are involved in the agency's tasks (horizontal cooperation), but undeniably, with the agency a superordinate European actor is established (vertical cooperation).[229]

The second option would be to link national authorities under the supervision of the Commission. In this case, convergence and a common and consistent administrative practice is achieved through cooperation of the national authorities and the Commission in the decision-making process. When taking a decision, national authorities have to take into account the decisions and opinions of other Member States' national authorities and in some instances even of the Commission. In addition, in certain scenarios, the Commission holds the final decision-making power and with that is in an ideal position, as it leaves the day-to-day work to the national authorities and focuses on standard setting and important individual decisions.[230] Here, as well, horizontal and vertical cooperation mechanisms exist. However, in contrast to the first model, where it is a rather horizontal-cooperative structure, the vertical-hierarchical elements and with that the influence and power of the European level are of greater significance. Both solutions have their advantages and disadvantages and are dependent on the political will of the Member States as to how much power they want to transfer to the European level and the respective competence of the European Union to exercise direct administration.

With the ESFS, the first solution has been chosen with certain decisive modifications regarding the Authorities structure and powers; in the Banking Union an enhanced model of the second solution was established (with ECB instead of the Commission as the central European Union institution).

[227] See Möllers, *Die drei Gewalten*, 190.
[228] For more information regarding agencies in supervision see Chapter 1, 2.1. Ibid.
[229] Ibid.
[230] Ibid., 190 et seq.

The reasons to establish an even more centralized system of banking supervision and resolution with the Banking Union in the euro area became clear after the Authorities had entered into operation in 2011. The transfer of supervisory powers to the ECB was mainly driven by the deepening of the crisis in the euro area, and it became clear that an improvement of cooperation and coordination between the different national competent authorities would not be sufficient to ensure financial stability and to integrate the internal market in financial services in the euro area.[231] The banking system is closely connected to fiscal and economic sustainability, and in a monetary union with a great deal of cross-border externalities in financial regulation, national supervision over financial institutions is not sufficient anymore.[232]

To break the vicious cycle between banks and euro area Member States' national finances and with that to strengthen the euro area banking system, an independent system of supervision and resolution had to be established.[233] In addition, special attention was paid to the resolution of financial institutions. Cross-border insolvencies in a monetary union are highly problematic, and there is a strong need for effective and efficient coordination between different national resolution authorities to avoid transmitting the risk into the wider economy.[234] Because of that, besides establishing a centralized supervisory authority, with the Board a centralized resolution authority was established as well.

The new institutional structure of the ESFS and the Banking Union provides an example for the structural rebalancing of the respective competences of the European Union and its Member States in the field of financial market supervision and an example of how to interlink the two different levels more closely. With the financial crisis, the system of financial supervision in the European Union shifted from a system of mutual recognition and minimum harmonization

[231] See also Recital 2 SSM Regulation. Niamh Moloney, 'European Banking Union: Assessing its Risks and Resilience' (2014) 51, Common Market Law Review, 1609, 1616; Mathias Hanten and Hannes Bracht, 'Die Europäisierung des Bankaufsichtsrechts im Praxistest: die L-Bank Entscheidung des Gerichts der Europäischen Union' (2017) 29, Zeitschrift für Bankrecht und Bankwirtschaft, 236, 237; Ann-Katrin Kaufhold, 'Europäische Bankenunion - vollendet unvollendet? Eine Zwischenbilanz' (2017) 32, Zeitschrift für Gesetzgebung, 18, 23, 24.

[232] See Martin Hellwig, 'Yes Virginia, There is a European Banking Union! But it may not make your wishes come true' (2014) Preprints of the Max Planck Institute for Research on Collective Goods, Bonn 2014/2, 13 <https://www.coll.mpg.de/pdf_dat/2014_12online.pdf> accessed 01.10.2017; Moloney, 'Banking Union', 1622.

[233] See Ferran and Babis, 'The European Single Supervisory Mechanism', 30 et seq; Moloney, 'Banking Union', 1611, 1629; Hellwig, 'Yes Virginia, There is a European Banking Union! But it may not make your wishes come true', 4; Kern Alexander, 'The European Central Bank and Banking Supervision: The Regulatory Limits of the Single Supervisory Mechanism' (2016) 13, European Company and Financial Law Review, 467, 478; Kaufhold, 'Bankenunion', 21, 23.

[234] See Moloney, 'Banking Union', 1616; Jens-Hinrich Binder, 'Cross-border Coordination of Bank Resolution in the EU: All Problems Resolved?' (2016), 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2659158> accessed 01.10.2017.

to a more centralized system. A great deal of the reform program after the financial crisis focuses on "law in action" and with that on regulatory convergence and supervision.[235]

1. The System of Financial Supervision in the European Union before the Crisis

To better understand the changes in financial supervision, this part will briefly summarize the modifications in financial supervision and its development from when the Single European Act came into force in 1987 until the European debt crisis.[236]

In the beginning the aim of financial supervision was to establish an internal market for financial services and to ensure a high degree of investor and consumer protection.[237] An important step towards establishing an internal market for financial services and facilitating cross-border activities of the financial institutions was to set up the freedom of establishment and services for financial institutions.[238]

In 1977, European directives were already beginning to harmonize legal differences in the Member States' supervisory law.[239] In the beginning, those harmonization approaches just took place on the domestic level and were intended to align the national requirements and to converge, in narrowly designed areas, the conditions of competition in the different Member States. Furthermore, to lower market entry barriers, the requirements of the Member States' national laws regarding the authorization to conduct business were harmonized and the requirements of an economic needs test were abolished.[240]

But the elimination of market entry barriers in cross-border business did not take place until 1989 with the decision by the European legislature to realize the internal market through the principle of mutual recognition.[241] The sectoral approach that was then adopted still characterizes financial supervision in the European Union today and led to the development of

[235] See Moloney, 'EU Financial Market Regulation', 1365; Moloney, '4. Supervision in the Wake of the Financial Crisis', paras 4.01-4.16.
[236] For more information on the development of a European financial market see inter alia Christian Bumke, 'Kapitalmarktregulierung - Eine Untersuchung über Konzeption und Dogmatik des Regulierungsverwaltungsrechts' (2008) 41, Die Verwaltung, 227, 239 et seq.
[237] The focus shifted with the financial debt crisis. It now lies on the prevention of systemic risk and on ensuring the stability of the financial system.
[238] See Ohler, 'Verwaltungsverbund und Finanzaufsicht', 311 et seq.
[239] Regarding banking supervision see Directive 77/780/EEC.
[240] See Ohler, 'Verwaltungsverbund und Finanzaufsicht', 312.
[241] See Recital 4, 18 Directive 89/646/EEC; see also ibid.

the three different fields of supervision regarding credit institutions, pension funds and investment firms.[242]

With the Second Council Directive on the coordination of laws, regulations and administrative provisions relating to taking up and pursuing the business of credit institutions, Council Directive 89/646/EEC,[243] the single license for credit institutions and the principle of home Member State prudential supervision were established.[244] From 1 January 1993 on, the authorization of a financial institution by the competent authority of the financial institution's home Member State took legal effect in all other Member States and was binding for the other national competent supervisory authorities.[245] Authorization and the ongoing supervision of credit institutions were primarily carried out by the home Member State's authorities in close cooperation with the national competent authorities of the host Member State.[246] Mutual recognition was hence ensured through a supervisory solution in secondary legislation.[247]

This single license has also been named "European passport for banks" which has later been extended to other financial institutions.[248] With this "passport", the central piece of the supervisory legal framework of that time, financial institutions could exercise the freedom of establishment by establishing new branches in other Member States and providing cross-border financial services.[249] Not only the authorization but also the ongoing control regarding cross-

[242] See Commission, 'European Financial Stability and Integration Report 2010' SEC(2011) 489, 39; see also Ohler, '§ 10 Finanzmarktregulierung und –aufsicht', para 36.

[243] Currently applicable is the Capital Requirements Directive (CRD IV), Directive 2013/36/EU.

[244] See Recital 4 Council Directive 89/646/EEC.

[245] Pursuant to Article 18(1) Council Directive 89/646/EEC, a credit institution that has been authorized and supervised by one national competent authority of a Member State could now carry out certain listed activities in every Member State through the establishment of a branch or by way of the provision of services. Furthermore, Article 13(1) Council Directive 89/646/EEC states: "The prudential supervision of a credit institution, including that of the activities it carries on in accordance with Article 18, shall be the responsibility of the competent authorities of the home Member State, without prejudice to those provisions of this Directive which give responsibility to the authorities of the host Member State." And even clearer is Article 5 Directive 92/49/EEC, which states: "Authorization shall be valid for the entire Community. It shall permit an undertaking to carry on business there, under either the right of establishment or the freedom to provide services."

[246] See for example, certain informational duties regarding the host Member State Article 19(3), Article 20(2) Council Directive 89/646/EEC. Michael Winkelmüller, *Verwaltungskooperation bei der Wirtschaftsaufsicht im EG-Binnenmarkt* (C.H. Beck 2002), 183.

[247] The authorization decision with its automatic legal effect in the other Member States is an example for a transnational administrative act. See also Ohler, 'Verwaltungsverbund und Finanzaufsicht', 313.

[248] While it first covered only credit institutes, with the adoption of the Investment Services Directive, Council Directive 93/22/EEC, the subject matter of capital markets regulation was extended to include investment services. For more information see Niamh Moloney, 'New Frontiers in EC Capital Markets Law: From Market Construction to Market Regulation' (2003) 40, Common Market Law Review, 809, 810.

[249] From then on, host Member States were not allowed to request another form of authorization or endowment capital. The current CRD IV, Directive 2013/36/EU, imposes only few conditions which have to be met by the financial institutions and can be found in Articles 35, 36 CRD IV. The passport structure was also used in other areas as for example in the UCITS Directive, Directive 85/611/EEC, regarding investment funds. The "European

border activities was carried out by the home Member State, and other Member States were obligated to mutually recognize those supervisory measures.[250] This system was meant to exclude competence conflicts. Double verification by the Member States, inconsistent decisions and administrative activities of national competent authorities in different Member States were to be avoided. This facilitated the financial institutions' cross-border activities and reduced their costs because they did not have to comply with two different kinds of administrative requirements but instead had only one central responsible authority.[251]

The competence of the home Member State was justified because it is more practical and more effective to enforce the substantial measures of supervision, as for example equity requirement, in the respective home Member State than in the host Member State.[252] The host Member State, in contrast, has only a few competences and measures to step in and intervene with the financial institution's cross-border business activities.[253]

Until then, the substantive financial market regime had been based on two pillars: "mutual recognition by the Member States of their regulatory systems and [...] home Member State control of pan-EC market activity, with all Member States subject to minimum standards to embed the home Member State anchor."[254] But in the mid-1990s, it was revealed that the system was not working properly. At this point, large areas of capital-market regulation had not been harmonized and were causing obstacles to host Member State control. The existing harmonized areas were pervaded with options, exemptions and derogations. This led to the law being applied and implemented in a wide variety of ways. Because of that, implementation in Member

passport" and the principle of the home Member State's control does not cover the establishment of subsidiaries. For this constellation, supervision on a consolidated basis has been established, see Articles 111 et seq., 116 CRD IV. In case of supervision on a consolidated basis, only one authority has supervisory competence. Article 111 CRD IV states a list of criteria to determine the correct authority. But besides the competence of the supervisor on a consolidated basis, the competence of the host Member State remains unchanged for the supervision on individual basis. To minimize the risk of supervisory failure, supervisory colleges have now been established to ensure the exchange and cooperation between the different national authorities. For more information see Winkelmüller, *Wirtschaftsaufsicht,* 171 et seq; Moloney, 'New Frontiers in EC Capital Markets Law', 810; Ohler, 'Verwaltungsverbund und Finanzaufsicht', 313 et seq.

[250] Again, home Member State control first was established in banking supervision and was then extended to the other financial supervision sectors. Eddy Wymeersch, 'The Future of Financial Regulation and Supervision in Europe' (2005) 42, Common Market Law Review, 987, 997; Ohler, 'Verwaltungsverbund und Finanzaufsicht', 314.

[251] See Winkelmüller, *Wirtschaftsaufsicht,* 186; Ohler, 'Verwaltungsverbund und Finanzaufsicht', 314.

[252] See Ohler, 'Verwaltungsverbund und Finanzaufsicht', 314.

[253] See Article 40 et seq. CRD IV. Ibid.

[254] See Moloney, 'New Frontiers in EC Capital Markets Law', 810.

States was inconsistent and sometimes delayed. Furthermore, no real cooperation existed among the different supervisory authorities.[255]

To achieve a more integrated European capital market, the FSAP was drawn up.[256] It was a reform program to finalize the integration of national financial markets and to provide a coherent regulatory framework. One of the main ideas was to move from Member State rules to full home Member State control, assisted by a detailed network of harmonized rules.[257] However, in 2001, the Lamfalussy Report revealed the real state of capital-market integration and called upon the legislators to complete the regulatory structure as well as to improve the law-making process. [258] This was especially true and important to be able to deliver the FSAP quickly and on time. The Lamfalussy Report also introduced an improved law-making structure for capital market law which was then established and named the Lamfalussy model.[259] For this, the comitology process was adapted to fit the needs of the financial sector regarding law-making and implementation.[260]

Regulating financial markets was divided up into four different levels: The first level, the Union legislature, adopted framework directives according to Article 288(3) TFEU, which focused on the core political principles. The second level, the Commission with the support of level two committees, adopted delegated acts as well as implementing acts and with that "technical rules"

[255] Ibid.

[256] The FSAP was adopted in 1999 to create a European internal market for financial services. It was meant to last for a period of 6 years and contained 42 articles. The FSAP was submitted by the Commission and approved by the Stockholm European Council in May 1999. Moloney, 'EU Financial Market Regulation', 1317, 1355; Brigitte Haar, '6. Organizing Regional Systems: The EU Example', in Niamh Moloney, Eilis Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (2015), 169.

[257] See Moloney, 'New Frontiers in EC Capital Markets Law', 811; Hofmann and Türk, '3. Policy Implementation', 84.

[258] The Lamfalussy process was introduced in 2001 and is named after the chair of the EU advisory committee that created it, Alexander Lamfalussy. It was first introduced in the capital markets sphere and has since been extended to the financial sector as a whole. It laid the foundation for a network-based institutional governance system for supervision in the EU financial system. See Moloney, 'New Frontiers in EC Capital Markets Law', 813; Moloney, 'EU Financial Market Regulation', 1317.

[259] The Committee of Wise Men, 'Final Report of the Committee of Wise Men on the Regulation of European Securities Markets' Brussels, 15 February 2001; Moloney, 'New Frontiers in EC Capital Markets Law', 814; von Danwitz, *Europäisches Verwaltungsrecht,* 633.

[260] For more information see Hofmann and Türk, '3. Policy Implementation', 84; Eddy Wymeersch, 'The Institutional Reforms of the European Financial Supervisory System, an Interim Report' (2010) Ghent Univ Financial Law Institute Working Paper No 2010-01, 5 et seq <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1541968> accessed 01.10.2017. For more information on comitology see Alexander H. Türk, '13. Comitology', in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015), 327 et seq; Jelena von Achenbach, 'Komitologie/Delegierte Rechtsetzung/Durchführungsrechtsetzung', in Jan Bergmann (ed), *Handlexikon der Europäischen Union* (5th edn, Nomos 2015), 585 et seq.

which substantiated the level one legislative acts.[261] The third level, level three committees, which consisted of high level representatives from national supervisory authorities and issued non-binding guidelines and recommendations, was to ensure the consistent application and implementation of the level one and level two acts.[262] The fourth level, finally, consisted of the Commission, with the possibility to start an infringement procedure, pursuant to Article 258 TFEU, to ensure compliance with Union law when implementing and executing Union law.

It becomes obvious that the Lamfalussy model had its focus on regulation through the legislature as well as the administration, but not on the application of the law. With that, its focus was not so much on the application of secondary law, but more on transparency, efficiency and speeding up the law-making process. This was problematic because the substantive legislation, most of the time directives, contained a great deal of terms which needed concretization and left it to the Member States to complete and define the terms. This was especially troublesome due to the large decision-making scope regarding these terms.[263]

In addition, there were no sufficient mechanisms to ensure horizontal forms of cooperation on this level. Member States' competent authorities would not cooperate or coordinate the application of the law regarding efficiency and consistency of the application.[264] Because of that, national competent authorities, which had very different competences, were in no position to make decisions that were aligned and coordinated with each other. Especially the level three committees, which did not have the power to take binding individual decisions, were an obstacle.[265]

With the FSAP and the Lamfalussy model, the focus of the European legislature had been on improving and centralizing law-making, and here a closer cooperation between the European level and the Member States was accomplished. It did not focus on centralized supervision or

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[261] The level two committees were the European Banking Committee, Commission Decision 2004/10/EC, the European Insurance and Occupational Pensions Committee, Commission Decision 2004/9/EC, and the European Securities Committee, Commission Decision 2001/528/EC. The Committees were composed of high level representatives of Member States and chaired by a representative of the Commission.

[262] The level three committees where CESR, CEIOPS and CEBS. Their primary focus was on the regulatory process. They were supporting Commission-led delegated rule making processes. The committees were also designed to support supervisory coordination, but they were hampered by their status as soft law actors. See also Hofmann and Türk, '3. Policy Implementation', 85.

[263] See Ohler, 'Verwaltungsverbund und Finanzaufsicht', 319.

[264] See Natalia Kohtamäki, *Die Reform der Bankenaufsicht in der Europäischen Union* (Mohr Siebeck 2012), 92 et seq.

[265] The shortcomings of the level three committees were already known at an early stage. For more information see Dorothee Fischer-Appelt, '8. Does the EU need a Single European Securities Regulator?', in Herwig C.H. Hofmann and Alexander H. Türk (eds), *EU Administrative Governance* (Edward Elgar 2006), 244 et seq; Ohler, 'Verwaltungsverbund und Finanzaufsicht', 320.

the application of the law. This was highlighted by the introduction of more detailed regulation, especially with the level two rules, and the fact that the Lamfalussy model was still designed to support home Member State control as a decentralized form of supervision.[266]

With the FSAP completed and the Lamfalussy process well established, the attitude in the European Union regarding the harmonization of financial market regulation and the creation of an internal market for financial services right before the financial crisis was relaxed. But even though the FSAP was very successful in speeding up law-making and with that the harmonization process, its limits with regard to converging the application and enforcement processes finally came to light in the financial crisis.[267] With the FSAP and the Lamfalussy process, financial market integration was achieved through the regulation of the large financial institutions' cross-border activities, but it was not accompanied by an adequate form of cross-border supervision and coordination.[268] It became clear that the shortcomings of the financial system could not be resolved only using more regulation.[269] The de Larosière Group found that the "present regulatory framework in Europe lack[ed] cohesiveness."[270] This was mainly due to the high number of options granted to Member States in the respective directives as well as poor supervisory coordination and information sharing between the different national competent authorities.[271]

The different options in financial legislation led to a wide diversity in national implementation and, in addition, different national supervisory systems with different supervisory practices, sanction methods and deficient resources and no clear distribution of competences aggravated the situation.[272] Supervisory cooperation, especially the structure and the power of the level three committees, was also not sufficient to ensure a common and consistent supervisory practice.[273]

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[266] See Moloney, 'New Frontiers in EC Capital Markets Law', 817.
[267] The de Larosière Group found "excessive diversity" to be one of the driving forces behind the impact of the global financial crisis in the EU. De Larosière Group, 'De Larosière Report' (2009), para 105; Haar, '6. Organizing Regional Systems', 169.
[268] See Moloney, 'EU Financial Market Regulation', 1318 et seq.
[269] But of course, adequate and good regulation remains a precondition for a stable financial system.
[270] See De Larosière Group, 'De Larosière Report' (2009), para 102.
[271] This problem was well known since the very beginning of the internal financial market process. The main reason for this lack of harmonization were the level 1 directives. In many cases, they left a number of options to the Member States as a political choice. This made it almost impossible and unrealistic for the level 3 committees to find a single solution. Even in the cases where a directive did not include national options, it could lead to diverse interpretations. Ibid., para 103.
[272] See Moloney, 'EU Financial Market Regulation', 1319 et seq.
[273] See De Larosière Group, 'De Larosière Report' (2009), para 183.

2. The Institutional Structure of Financial Supervision in the European Union

In 2009, the Member States of the European Union and the Commission decided to establish the ESFS,[274] followed by the Banking Union in 2012.[275] With the establishment of the Authorities and the Board as well as the transfer of supervisory powers to the ECB, supervisory oversight has become more concentrated at the European level.[276] In addition, the European Union is now in large part in charge of regulatory control of the European Union's financial market.[277] However, the focus of this book lies on the newly established structure of microprudential supervision.[278] This includes the three Authorities, EBA, ESMA and EIOPA, as well as the two already established mechanisms of the Banking Union, the SSM and the SRM. I will not take into account macroprudential supervision and with that the remaining actor of the ESFS, the ESRB.

Although this dissertation examines coordination mechanisms between the European actors and national authorities, the focus will be on the Authorities' and the SSM's and SRM's founding regulations[279] and not on national particularities because only this perspective will reveal the design of the administrative framework and the actual shift of power. In this section, the organizational and institutional structure of the three Authorities as well as the SSM and the SRM will be briefly outlined.

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[274] With the three Authorities established on 1 January 2011, see Article 82 EBA Regulation. For more information regarding the three Authorities see Michelle Everson, 'A Technology of Expertise: EU Financial Services Agencies' (2012) LSE „Europe in Question" Discussion Paper Series <http://www.lse.ac.uk/europeanInstitute/LEQS%20Discussion%20Paper%20Series/LEQSPaper49.pdf> accessed 01.10.2017; as well as Eilis Ferran, '5. Understanding the New Institutional Architecture of EU Financial Market Supervision', in Eddy Wymeersch, Klaus J. Hopt and Guido Ferrarini (eds), *Financial Regulation and Supervision: A post-crisis analysis* (Oxford University Press 2012), 111 et seq.

[275] The SSM is operating since 4 November 2014, see Article 33(2) SSM Regulation, and the SRM Regulation is applicable since 1 January 2016, see Article 99(2) SRM Regulation.

[276] See Haar, '6. Organizing Regional Systems', 181.

[277] The prudential regulation reform process includes the reform of the CRD II/III/IV which was a first major step towards the centralization of supervision by introducing an obligation to establish colleges of supervisors for cross-border groups and setting out rules on their operation. It also includes the reform of the DGSD and a Regulation on credit rating agencies. Furthermore, the prudential reform has extended to the corporate governance sphere. See Moloney, 'EU Financial Market Regulation', 1326 et seq, 1355.

[278] Also, after the reform process the focus of financial supervision still lies on supervising individual financial actors (microprudential supervision), even though elements of macroprudential supervision have been added (ESRB). See Ann-Katrin Kaufhold, 'Instrumente und gerichtliche Kontrolle der Finanzaufsicht' 49, Die Verwaltung, 339, 339 et seq.

[279] The three founding regulations are for EBA: Regulation (EU) No 1093/2010, for EIOPA: Regulation (EU) No 1094/2010, for ESMA: Regulation (EU) No 1095/2010, for the SSM: Council Regulation (EU) No 1024/2013 as well as Regulation (EU) No 468/2014 of the ECB and for the SRM: Regulation (EU) No 806/2014.

2.1 The ESFS

The ESFS, established in 2010 and in operation since 2011, consists of three Authorities, the ESRB, the Joint Committee and the national competent authorities of the Member States.[280] The ESFS operates on a sectoral basis and the Authorities as well as the national competent authorities primarily carry out microprudential oversight.[281] EBA's area of activity is the supervision of the European banking sector, ESMA's supervisory area is the field of financial markets and EIOPA covers the supervision of insurance companies and pension funds.[282] The ESFS is designed as an integrated network of national and European Union supervisory authorities.[283] It leaves the day-to-day supervision to the national level.[284] The founding acts of the EBA, ESMA and EIOPA are all drafted with the same institutional template, and since the content of the Authorities' founding regulations is almost identical, the following parts will only refer to the EBA Regulation and just in cases where the three regulations differ will that be indicated and the differences pointed out.[285]

2.1.1 The Board of Supervisors

The Board of Supervisors is the principal decision-making body of the respective Authority.[286] According to Article 43(1), (2) EBA Regulation the Board of Supervisors has to "give guidance to the work of the Authority and shall be in charge of taking the decisions […] as well as adopt the opinions, recommendations, and decisions, and issue the advice referred to in Chapter II". The Board of Supervisors is composed of the heads of each Member State's national competent authorities and non-voting representatives of the Commission, the ESRB, the other two

[280] See Article 2(2) Regulation (EU) No 1039/2010. For more information see inter alia Georg Baur and Martin Boegl, 'Die neue europäische Finanzaufsicht - der Grundstein ist gelegt' 11, Zeitschrift für Bank- und Kapitalmarktrecht, 177.
[281] See Moloney, *EU Securities and Financial Markets Regulation,* 943.
[282] For more information on ESMA and the supervision of securities and financial markets see Steffen Augsberg, '§ 34 Wertpapieraufsicht', in Dirk Ehlers, Michael Fehling and Hermann Pünder (eds), *Besonderes Verwaltungsrecht Band 1, Öffentliches Wirtschaftsrecht* (3rd edn, C.F. Müller 2012), paras 26 et seq; as well as Steffen Augsberg, '§ 35 Börsenrecht', in Dirk Ehlers, Michael Fehling and Hermann Pünder (eds), *Besonderes Verwaltungsrecht Band 1, Öffentliches Wirtschaftsrecht* (3rd edn, C.F. Müller 2012), 1 et seq.
[283] See Recital 9 Regulation (EU) No 1039/2010.
[284] See Moloney, 'EU Financial Market Regulation', 1331.
[285] For more information on supervision in the area of insurance law see Lothar Michael, '§ 3 Versicherungsaufsichtsrecht', in Dirk Ehlers, Michael Fehling and Hermann Pünder (eds), *Besonderes Verwaltungsrecht Band 1, Öffentliches Wirtschaftsrecht* (3rd edn, C.F. Müller 2012), paras 1 et seq.
[286] See Articles 40 et seq. EBA Regulation. See also Kämmerer, 'ESFS', 1282; Moloney, *EU Securities and Financial Markets Regulation,* 944.

Authorities and of one representative nominated by the Supervisory Board of the ECB.[287] It is chaired by a non-voting Chairperson of the Authority. In addition, in the cases stated in Article 44(4) - (7) EBA Regulation, other representatives can accompany representatives or can participate in meetings as observers to the Board of Supervisors. The Chairperson and the voting members of the Board of Supervisors have to act independently and in the sole interest of the European Union while carrying out the tasks of the Board of Supervisors.[288] This provision ensures that the voting members of the Board of Supervisors will not be influenced by the Member States' authorities. If Union law is breached,[289] and when settling disagreements,[290] the Board of Supervisors has to convoke an independent panel consisting of the Chairperson of the Board of Supervisors and six other members who are not representatives of the competent authority alleged to have breached Union law and have no interest in the matter nor direct links to the competent authority concerned.[291] The final adoption of the panel's decision is reserved for the Board of Supervisors.[292] The Board of Supervisors' decisions are generally taken by a simple majority of the Board's members.[293]

Decisions to adopt regulatory technical standards and implementing technical standards, to issue guidelines and recommendations and to adopt decisions under Article 9(5) EBA Regulation require a qualified majority which has to include at least a simple majority of members from national competent authorities of participating Member States and a simple majority of members from national competent authorities of non-participating Member States.[294] This provision was adopted after the Banking Union was established and was intended to minimize the loss of influence of the Banking Union's non-participating Member States in the European Union's decision-making fora and with that prevent the "caucusing" of the participating Member States.[295] It aims to ensure that the non-participating Member States, and

[287] See Article 40 EBA Regulation.
[288] See Article 42 EBA Regulation.
[289] See Article 17 EBA Regulation.
[290] See Article 19 EBA Regulation.
[291] For specific tasks, the Board of Supervisors has to establish internal committees and panels, see Article 41 EBA Regulation.
[292] See Article 41(3) EBA Regulation.
[293] See Article 44 EBA Regulation. Deviating provisions are stated in the subparagraphs of Article 44 EBA Regulation.
[294] This terminology refers to the terminology used in the Banking Union. Participating Member States are euro area Member States or Member States which have established a close cooperation in accordance with Articles 2(1), 7 SSM Regulation and thereby "participate" in the SSM. Non-participating Member States are all Member States which are not members of the euro area and who have not established such a close cooperation.
[295] With the establishment of the SSM the SSM's participating Member States started to constitute the majority of the members in EBA's decision-making body. Especially for the UK, the interests of the non-euro Member States

with that Member States which are still not part of the euro area, will not be discriminated or passed over by the euro area Member States.[296] Establishing an adequate balance of the different interests of the euro area Member States and of the other (non-euro) Member States has been of particular importance in an area where the Member States' fiscal and budgetary policy can be at stake.[297]

A similar voting arrangement applies for decisions taken in case of breach of Union law,[298] emergency situations,[299] and the settlement of disagreements between different national competent authorities.[300] Decisions in these cases are adopted by simple majority, but have to include a simple majority of members from national competent authorities of participating Member States and a simple majority of members from national competent authorities of non-participating Member States.[301] To protect the independence of the voting members of the Board of Supervisors, non-voting members and the observers, with the exception of the Chairperson, the Executive Director and the ECB representative nominated by its Supervisory Board, are not allowed to attend any discussions within the Board of Supervisors relating to individual financial institutions unless otherwise provided for in Article 75(3) EBA Regulation or in the acts referred to in Article 1(2).[302]

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began to be at risk. Pierre Schammo, '16. Differentiated Integration and the Single Supervisory Mechanism: Which Way Forward for the European Banking Authority?', in Patrick J. Birkinshaw and Andreas Biondi (eds), *Britain Alone! The Implications and Consequences of United Kingdom Exit from the EU* (Kluwer 2016), 3. <https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2514720> accessed 01.10.2017.

[296] In 2011, 2012 and 2013 the UK, not a member of the euro area, brought actions for annulment against measures of the ECB before the ECJ. The UK stated that those measures would discriminate against clearing systems with a central counterparty, which has no residency in the euro area. For further references see Case T‑496/11 *United Kingdom v European Central Bank (ECB)* (GC, 4 March 2015); Case T-45/12, *United Kingdom v European Central Bank* (Removed 8 May 2015) as well as Case T-93/13 *United Kingdom v European Central Bank* (Removed 8 May 2015). For more information see also Karl-Philipp Wojcik, 'Artikel 63 AEUV', in Hans von der Groeben, Jürgen Schwarze and Armin Hatje (eds), *Europäisches Unionsrecht* (7th edn, Nomos 2015), para 80.

[297] For a very detailed and thorough examination of the voting arrangements, cf. Schammo, '16. Differentiated Integration and the SSM'.

[298] See Article 17 EBA Regulation.

[299] See Article 18(2), (3) EBA Regulation.

[300] See Article 19 EBA Regulation.

[301] See Article 44(1) subpara. 3 EBA Regulation. Except in case of emergency situations this provision will be adjusted as soon as four or fewer voting members are from competent authorities of non-participating Member States. Then the decision proposed by the panel is adopted by a simple majority, which has to include at least one vote from members from competent authorities of non-participating Member States, see Article 44(1) subpara. 4 EBA Regulation.

[302] See Article 44(4) EBA Regulation.

2.1.2 The Chairperson

The Chairperson represents the respective Authority and has to prepare the work and chair the meetings of the Board of Supervisors and the Management Board. The Chair has to be a full-time independent professional and can only be removed from office by the European Parliament following a decision of the Board of Supervisors.[303] This gives the Chairperson a very independent and strong position towards the interests and positions of the Member States. The Chairperson is appointed by the Board of Supervisors on the basis of his/her merit, skills, knowledge of financial institutions and markets, as well as of his/her experience relevant to financial supervision and regulation. This appointment follows an open selection procedure.[304] The European Parliament can object to the designation.

2.1.3 The Joint Committee

To ensure cross-sectoral consistency within the ESFS, a Joint Committee of the three Authorities is established according to Article 54 EBA Regulation. In this committee, the Authorities are supposed to coordinate their different policies and if necessary reach common positions.[305] Within the scope of their tasks and especially with respect to the implementation of Directive 2002/87/EC, the Authorities have to reach joint positions and agree on common actions.[306] When adopting regulatory technical standards, implementing technical standards or in cases of breach of Union law, emergency situations and settlements of disagreements, which also affect the area of competence of one of the other Authorities, decisions have to be adopted in parallel by all three Authorities. The Joint Committee consists of the Chairpersons of the Authorities, and, where applicable, of the Chairperson of any Sub-Committee established according to Article 57 EBA Regulation.[307] To ensure the necessary coordination between macroprudential and microprudential supervision, a representative of the ESRB, as well as of the Commission and the Executive Director, can join the meetings of the Joint Committee as an observer.[308] For this reason, the Chairperson of the Joint Committee is also a Vice-Chair of the ESRB.[309]

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[303] See Article 48(5) EBA Regulation.
[304] See Article 48(2) EBA Regulation.
[305] See Recital 57 EBA Regulation. Kämmerer, 'ESFS', 1282.
[306] See Article 56 subpara. 1 EBA Regulation.
[307] See Article 55(1) EBA Regulation.
[308] De Larosière Group, 'De Larosière Report' (2009), para 148.
[309] See Art 55(3) EBA Regulation.

2.1.4 The Management Board

The Management Board is responsible for the daily work and administrative processes of the Authority.[310] According to Article 47(1) EBA Regulation, it has to ensure that the respective Authority carries out the assigned tasks. It proposes an annual and multi-annual work program which has to be adopted by the Board of Supervisors as the principal decision-making body.[311] In addition the Management Board exercises budgetary powers, adopts the Authorities' staff policy plan and appoints and removes the members of the Board of Appeal.[312] The Management Board is composed of the Chairperson and six other members of the Board of Supervisors. These six other members are elected by and from the voting members of the Board of Supervisors.[313] It should include at least two representatives of non-participating Member States. This shows again the attempt of the European Union to ensure the right balance between participating Member States and non-participating Member States. The independence of the Management Board's members is guaranteed by Article 46 EBA Regulation.

2.1.5 The Executive Director

The Authority is managed by an Executive Director who is a full-time independent professional. The Executive Director also has to prepare the work of the Management Board.[314]

2.2 The Banking Union

Before the financial crisis, despite the euro area's single currency and high level of cross-border externalities, the control over financial institutions was solely national.[315] In June 2012, the heads of state of the euro area decided that the Commission should present a proposal for a single supervisory mechanism on the basis of Article 127(6) TFEU. This was soon followed by the idea to also include a single resolution mechanism. The idea was to involve the ECB and

[310] See Articles 45 et seq. EBA Regulation. Kämmerer, 'ESFS', 1282.
[311] See Article 47(2) EBA Regulation.
[312] See Articles 47(3), (4), (8) EBA Regulation.
[313] See Article 45(1) EBA Regulation.
[314] See Article 53(1) EBA Regulation.
[315] See Hellwig, 'Yes Virginia, There is a European Banking Union! But it may not make your wishes come true', 13.

centralize banking supervision to be able to effectively address the problems which became visible in the European debt crisis.[316] As a result, the SSM and the SRM were established.[317]

In contrast to the ESFS, the SSM and SRM are only applicable in the Member States of the euro area with the possibility for non-euro area Member States to enter into a close cooperation.[318]

While the ESFS was established as a supervisory system for the internal market and with that for the European Union as a whole, the Banking Union is comprised of participating Member States, according to the SSM Regulation. The SSM and SRM Regulations distinguish between "participating Member States" and "non-participating Member States".[319] Participating Member States are automatically all Member States of the euro area and those Member States that establish a close cooperation.[320] Both regulations, the SSM and SRM Regulations, are binding in their entirety and directly applicable in all Member States, in conformity with Article 288(2) TFEU.[321]

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[316] Besides the already stated deficiencies, centralized banking supervision has been understood as a necessary precondition for enabling the ESM funding for direct bank recapitalization, see Recital 4, 5 ESM Treaty. For this see also inter alia Kohtamäki, *Die Reform der Bankenaufsicht*, 92 et seq; Eilis Ferran, 'European Banking Union: Imperfect, But It Can Work' (2014) University of Cambridge Faculty of Law Research Paper No 30/2014, 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2426247> accessed 01.10.2017.

[317] A third component of the Banking Union is the recast Directive 2014/49/EU on deposit guarantee schemes. For more information on the SSM see inter alia ECB, 'Guide to Banking Supervision' (2014), <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssmguidebankingsupervision201411.en.pdf> accessed 01.10.2017; Gianni Lo Schiavo, '7. The Single Supervisory Mechanism: Building the New Top-Down Cooperative Supervisory Governance in Europe', in Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (eds), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing 2015), 117 et seq; for more information on the SRM see Rosalind Z. Wiggins, Michael Wedow and Andrew Metrick, 'European Banking Union B: The Single Resolution Mechanism' (2014) Yale Program on Financial Stability Case Study 2014-5B-V1, 1 et seq <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2577347> accessed 01.10.2017; George S. Zavvos and Stella Kaltsouni, '7. The Single Resolution Mechanism in the European Banking Union: Legal Foundation, Governance Structure and Financing', in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015), 1 et seq. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2531907>

[318] See Article 7 SSM Regulation, Article 4(1) SRM Regulation.

[319] Whereby the tasks conferred on the ECB are only carried out with regard to credit institutions established in the participating Member States. Articles 2(1), 4(1) SSM Regulation, Article 2(a) SRM Regulation.

[320] See Articles 2(1), 7 SSM Regulation. In contrast to other measures adopted within the EU's Economic and Monetary Union legal framework, differentiation in the Banking Union is not based on the objective criteria of participation in the euro area, Article 140 TFEU, but on the political will of the non-participating Member States, since they can enter into a close cooperation without joining the euro area.

[321] See the final sentence of the SSM and SRM Regulation. The legal bases of both regulations, Article 127(6) TFEU for the SSM Regulation and Article 114 TFEU for the SRM Regulation, allow states to adopt generally applicable secondary law. To achieve this differentiation, the SSM and SRM Regulation distinguish between "participating Member States" and "non-participating Member States". For more information on the implications of the use of Article 114 TFEU in the Banking Union see Tuominen, 'The European Banking Union', 1359 et seq; Christian Tietje, 'Artikel 114 AEUV', in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union: EUV/AEUV, Band II* (59th edn, C.H. Beck 2016), paras 80 et seq.

This construction allows the remaining non-participating Member States to join the Banking Union without meeting the requirements of joining the euro area first. At least from an internal market perspective, this very participation-friendly arrangement is to be welcomed because it allows all Member States to participate in the Banking Union, even though so far none of the non-participating Member States established such a close cooperation.

2.2.1 The SSM

The SSM[322] was established according to Article 127(6) TFEU by a Council Regulation. The regulation transfers the power of banking supervision for significant credit institutions in the euro area to the ECB. With this regulation, the ECB, as the core institution of the Monetary Union, gained a new field of activity that now includes supervising systemically important banks in cooperation with the national competent authorities of the participating Member States.[323] To break the link between banks and sovereigns, supervision of significant supervised entities has been put into the hands of the ECB, as an independent institution.[324]

Pursuant to Articles 2(9), 6(1) SSM Regulation, the SSM consists of the ECB and the national competent authorities of the participating Member States. Within the scope of the SSM, as stated in Articles 4(1), (2) and Article 5 SSM Regulation, the national competent authorities act as part of the SSM and have to follow the instructions of the ECB.[325]

However, this does not affect the organizational independence of the national competent authorities. The ECB is exclusively part of the Union's legal sphere; the national competent authorities remain part of the legal spheres of their respective Member States. Furthermore, for

[322] For a very detailed and thorough analysis of the SSM, see Klaus Lackhoff, *Single Supervisory Mechanism. European Banking Supervision by the SSM* (C.H. Beck 2017).

[323] See Article 6 SSM Regulation. This transfer of competences to the ECB was not uncontested. See Julian Langner, 'Rolle der EZB, des Eurosystems und des ESZB in der Finanzaufsicht unter Berücksichtigung des ESRB – Darstellung der neuesten Entwicklungen nach Etablierung der Europäischen Aufsichtsstrukturen', in Edward M. Gramlich and Cornelia Manger-Nestler (eds), *Europäisierte Regulierungsstrukturen und -netzwerke* (Nomos 2011), 145 et seq; Rosalind Z. Wiggins, Michael Wedow and Andrew Metrick, 'European Banking Union A: The Single Supervisory Mechanism' (2015) Yale program on financial stability, case study 2014-5b-V1, 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2577316> accessed 01.10.2017; Thomas Beukers, '6. Constitutional Changes in Euro Government and the Relationship between the ECB and the Executive Power in the Union', in Federico Fabbrini, Ernst Hirsch Ballin and Han Somsen (eds), *What Form of Government for the European Union and the Eurozone?* (Hart Publishing 2015), 95 et seq.

[324] See Article 282(3) TFEU. See Haar, '6. Organizing Regional Systems', 180 et seq; Kaufhold, 'Bankenunion', 21 et seq.

[325] See Article 6(3) SSM Regulation.

areas which do not fall under the scope of the SSM Regulation, the national competent authorities maintain their autonomy.[326]

2.2.1.1 The Supervisory Board

The Supervisory Board is the ECB's supervisory body composed of the Chair, the Vice-Chair, four representatives of the ECB and one representative of the national competent authorities of each participating Member State.[327] All the planning and the execution of the ECB's tasks conferred on it by the SSM Regulation are undertaken by this newly established Supervisory Board (and not by the ECB's Governing Council). Its founding was necessary due to the strict separation of monetary policy and banking supervision.[328] Moreover, to ensure the separation of monetary policy and supervision, the four representatives of the ECB are not allowed to perform duties directly related to the monetary function of the ECB.[329]

The Supervisory Board's tasks are to plan and execute the supervisory tasks conferred on the ECB. However, the Supervisory Board only carries out the preparatory work regarding the supervisory tasks conferred on the ECB.[330] Due to Treaty restrictions, the final decision-making power is reserved for the ECB's Governing Council.[331] The Supervisory Board proposes a complete draft decision to the Governing Council, which then adopts the decision. This draft decision is adopted if the Governing Council does not object within a certain time period.[332] The draft decision is also passed to the national competent authorities of the Member States concerned.

The decisions of the Supervisory Board are taken by a simple majority of the members with each member having one vote. In case of a tie, the Chair has a casting vote.[333] The Commission

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[326] Ohler, *Bankenaufsicht,* § 5 para 30.
[327] Article 26(1) SSM Regulation.
[328] Article 25 SSM Regulation. For more information regarding the separation of monetary and supervisory policy see ECB, 'Decision on the Implementation of Separation Between the Monetary Policy and the Supervisory Functions' ECB/2014/39. See also Ferran and Babis, 'The European Single Supervisory Mechanism', 12 et seq; Ohler, *Bankenaufsicht,* § 5, para 53-55; Kaufhold, 'Bankenunion', 26.
[329] Articles 26(5), 25(4) SSM Regulation.
[330] Article 26(8) SSM Regulation.
[331] The Governing Council is the ECB's main decision-making body. It consists of the members of the ECB's Executive Board and the governors of the National Central Banks of the euro area, see Article 283 TFEU.
[332] See Article 26(8) SSM Regulation.
[333] Article 26(6) SSM Regulation. An exception is stated in Article 26(7) SSM Regulation: For decisions on the adoption of regulations pursuant to Article 4(3), the Supervisory Board takes decisions on the basis of a qualified majority of its members, as defined in Article 16(4) TEU and in Article 3 of Protocol No 36 on transitional provisions attached to the TEU and to the TFEU, for the members representing the participating Member State's authorities. Each of the four representatives of the ECB shall have a vote equal to the median vote of the other members.

can send a representative to participate as an observer in the meetings of the Supervisory Board.[334]

Pursuant to Article 19(1) SSM Regulation, the ECB as well as the national competent authorities acting within the SSM act independently. Even though the independence of the ECB is already ensured with Article 130 TFEU since the supervisory competence of the ECB is conferred on it by the Treaties and finds its legal basis in Article 127(6) TFEU. For the Supervisory Board, Article 19 SSM Regulation extends this guarantee of independence.[335] It guarantees the members of the Supervisory Board act freely from any influence or instruction from the institutions or bodies of the European Union, from any government of a Member State or from any other public or private body. Moreover, the Chair and the Vice-Chair enjoy personal independence as well.[336]

Regarding the implementation of the SSM Regulation, the ECB is accountable to the European Parliament and to the Council.[337] When submitting the report provided for in Article 20(2) SSM Regulation, the ECB also forwards the report to the national parliaments of the participating Member States. The national parliaments then can issue a statement on that report.[338]

What should be stressed here is the independence guaranteed to the national competent authorities according to Article 19(1) SSM Regulation. This guarantee of independence goes much further than the independence of the heads of the authorities when participating in the Governing Council. Article 19 SSM Regulation comprises the national competent authority as a whole and not only the heads of the authorities and ensures that all actions within the scope of the SSM are secured from any kind of political influence to ensure a uniform supervisory practice.[339]

2.2.1.2 The Joint Supervisory Teams

For the supervision of each significant supervised entity or each significant supervised group in participating Member States, the ECB establishes one JST.[340] JSTs are composed of staff members from the ECB and the national competent authorities. The head of each JST is a

[334] Article 26(11) SSM Regulation.
[335] Ohler, *Bankenaufsicht*, § 5, paras 82-86.
[336] Articles 26(3), (4) SSM Regulation.
[337] Article 20(1) SSM Regulation.
[338] Article 21(1) SSM Regulation.
[339] Ohler, *Bankenaufsicht*, § 5, para 90.
[340] Article 3(1) SSM Framework Regulation.

designated ECB staff member (JST coordinator) accompanied by one or more national competent authorities' sub-coordinators. With this arrangement, the existing knowledge of the national competent authorities is preserved, and the relationship of the national competent authorities with the financial institutions is maintained. The JST coordinator has to coordinate the work within the JST, and the members of the JST have to follow the instructions of the JST coordinator.[341]

JSTs are always acting as part of the ECB and therefore within the legal sphere of the European Union. They execute all the supervisory tasks regarding significant supervised entities but are not able to adopt final decisions. The final decision-making power only lies with the ECB's Governing Council. This and the fact that the JST coordinator has to be a designated ECB staff member ensures the consistent supervision of significant supervised entities and groups in the euro area.[342]

2.2.2 The SRM

The SRM is the second pillar of the Banking Union. It entered into force on 19 August 2014 with the Board being fully responsible for resolutions starting on 1 January 2016.[343] The SRM Regulation establishes a European institutional framework for the resolution of financial institutions which fall within the scope of the SRM Regulation.

The SRM as the euro area's single resolution mechanism applies to banks covered by the SSM and finds its legal basis in Article 114 TFEU. With the SRM, the resolution (and with the establishment of the Single Resolution Fund also the liability) and supervision of the respective financial institutions are now in line and concentrated at the same (European) level.[344] This will ensure consistency regarding the supervision of the respective financial institutions as well as contribute to the above-mentioned break of the vicious cycle between banks and sovereigns.[345]

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[341] See Article 6(1) SSM Framework Regulation

[342] Stated in Article 3(2) SRM Framework Regulation. See Ohler, *Bankenaufsicht*, § 5, paras 70-72.

[343] See Moloney, 'Banking Union', 1612.

[344] For more information see Deutsche Bundesbank, 'Die neuen europäischen Regeln zur Sanierung und Abwicklung von Kreditinstituten' (2014) Deutsche Bundesbank Monatsbericht, Juni 2014, 31, 47 <https://www.bundesbank.de/Redaktion/DE/Downloads/Veroeffentlichungen/Monatsberichtsaufsaetze/2014/2014_06_europ_regeln_sanierung_ki.pdf?__blob=publicationFile> accessed 01.10.2017; Moloney, 'Banking Union', 1619 , 1627, 1629, 1638; Jens-Hinrich Binder and Christos Gortsos, *The European Banking Union* (Nomos 2016), 6; Kaufhold, 'Bankenunion', 22.

[345] For more information on bank recovery and resolution mechanisms see Christoph Thole, 'Bank Crisis Management and Resolution – Core Features of the Bank Recovery and Resolution Directive' (2014), 1 et seq <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2469807> accessed 01.10.2017.

In addition, it will also support competition in and the better functioning of the internal market.[346]

2.2.2.1 The Board

According to Article 42 SRM Regulation, the central decision-making body of the SRM is the Board. It ensures the effective and consistent functioning of the SRM together with the Council, the Commission and the national resolution authorities.[347] The Board is established as a European Union agency and with that has its own legal personality. It is composed of a Chair, four full-time members and a member appointed by each participating Member State representing their national resolution authorities.[348] The Board operates in plenary and executive sessions. Representatives of the Commission and the ECB can participate in both meetings as observers.

In the Board's plenary sessions all members of the Board participate.[349] The plenary session is responsible for basic decisions of the Board, as for example, to adopt the annual work program, the annual budget and to decide on investments of the Fund.[350] Moreover, it is responsible for decisions in case of individual bank resolution if the support of the Fund in that specific resolution action exceeds the threshold of 5.0 billion euro. Decisions in plenary sessions are generally taken by simple majority with each member having one vote, and in the event of a tie the Chair has the deciding vote.[351] Exemptions from this rule can be found in Articles 52(2) and 52(3) SRM Regulation.[352]

Decisions pursuant to Article 52(2) SRM Regulation are taken by a simple majority of the Board's members, representing at least 30% of the contributions. Decisions in case of external financing beyond the Funds capital have to be taken by a two-thirds majority of the Board members, representing at least 50% of the contributions during the eight-year transitional period until the Fund is fully mutualized and by a two-thirds majority of the Board members,

[346] See Moloney, 'Banking Union', 1638.
[347] See Article 7(1) SRM Regulation.
[348] See Article 43(1) a)-c) SRM Regulation.
[349] See Article 49 SRM Regulation.
[350] See Article 50(1) a), b), f) SRM Regulation.
[351] See Article 52(1) SRM Regulation.
[352] In case of uses of the Fund above the threshold and the mutualization of national financing arrangements limited to the use of the financial means available in the Fund as well as in cases where external financing beyond the Fund's resources becomes necessary.

representing at least 30% of the contributions from then on.[353] These provisions ensure that, despite the principle of one member one vote, the contributions of the Member States are, at least partially, taken into account and reflected in the final decision.

In its executive sessions, the Board is composed of the Chair and its four full-time members.[354] Representatives of the national resolution authorities can participate in the session but have no voting rights. When deliberating on a group that has subsidiaries or significant branches in a non-participating Member State, the Board can invite further observers, including national resolution authorities of non-participating Member States. In these executive sessions, the Board prepares decisions to be adopted by the Board in its plenary session and takes operational decisions on the resolution of individual banks.[355]
In cases of deliberating of an entity referred to in Article 2 SRM Regulation, the member appointed by that Member State has to participate in the deliberations and in the decision-making process.[356] In this scenario, the decision-making process is highly relevant. When deliberating on an individual entity or a group established only in one participating Member State, the Chair, the four full-time members and the member representing the respective national resolution authority are to reach a joint agreement by consensus. If such a joint agreement is not concluded within the deadline set by the Chair, the Chair and the four full-time members take a decision by simple majority, pursuant to Article 55(1) SRM Regulation. In the event of a tie, the Chair has the deciding vote.[357]

When acting within the scope of the SRM Regulation, the Board and the national resolution authorities act independently and in the general interest of the European Union.[358] The Board is accountable to the European Parliament, the Council and the Commission for the

[353] See Article 52(3) SRM Regulation.
[354] See Article 53(1) SRM Regulation.
[355] See Article 54(1) SRM Regulation.
[356] See Article 53(3) SRM Regulation. In case of cross-border groups the representative appointed by the Member State in which the group-level resolution authority is situated, as well as the members appointed by the Member States in which a subsidiary or entity covered by consolidated supervision is established have to participate in the deliberations and the decision-making process, see Article 53(4) SRM Regulation.
[357] See Article 55(3) SRM Regulation. The same procedure applies in case of deliberating on a cross-border group. Here the Chair, the four full-time members and the representatives referred to in Article 53(4) SRM Regulation are to reach a joint agreement by consensus within a deadline set by the Chair. If such an agreement is not reached, the Chair and the four full-time members take the decision by a simple majority, with the Chair having a casting vote, if a simple majority is not reached, Article 55(2), (3) SRM Regulation.
[358] See Article 47(1) SRM Regulation.

implementation of the SRM Regulation.[359] It submits an annual report to the European Parliament, the national parliaments of participating Member States, the Council, the Commission and the European Court of Auditors. Pursuant to Article 46(1) SRM Regulation, national parliaments of the participating Member States can request that the Board replies in writing to any observation or question submitted by the national parliament, due to the specific tasks performed by the Board.

According to Article 58(1) SRM Regulation, the Board has an autonomous budget which is not part of the European Union's budget. In addition, the funding of the Board's budget as well as its resolution activities under the SRM have to be separated, and the Board is not allowed to engage the budgetary liability of the Member States.[360]

2.2.2.2 The Fund

The Board is financed by the Fund. It was established by an IGA with the approval of the Commission and the European Parliament.[361] This was necessary because it is rather doubtful whether the European Union has the competence to dispose over national funds in such a far-reaching way. With the ratification of the IGA, a mutualization of the Fund's funds and with that a mutualization of the liability of banks takes place.[362]

The Fund is the second main element of the SRM. As stated in Recital 19 SRM Regulation: "A single resolution fund ('Fund') is an essential element without which the SRM could not work properly. If the funding of resolution were to remain national in the longer term, the link between sovereigns and the banking sector would not be fully broken, […]." The SRM

[359] See Article 45(1) SRM Regulation.

[360] See Articles 57(2), 58(1) SRM Regulation.

[361] See Article 67 et seq. SRM Regulation. 26 EU member states, all except the UK and Sweden, have signed the intergovernmental "Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund", http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208457%202014%20INIT. As of September 2017, 21 member states have ratified the agreement, <http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=2014031> accessed 01.10.2017; Hellwig, 'Yes Virginia, There is a European Banking Union! But it may not make your wishes come true', 13. Regarding the question if EU Member States can still conclude international agreements, see Article 2(1), (2) of the Agreement of the Single Resolution Fund and the Court of Justice's decision on the ESM Treaty, Case C-370/12 *Pringle* (ECJ, 27 November 2012), para 92 et seq. See also Paul Craig, 'The Stability, Cooperation and Governance Treaty: Principles, Politics and Pragmatism' (2012) 37, European Law Review, 231.

[362] See Deutsche Bundesbank, 'Die neuen europäischen Regeln zur Sanierung und Abwicklung von Kreditinstituten', 52.

Resolution establishes the Fund as well as the modalities of its use, cf. Recital 7 IGA, Article 67(1) SRM Regulation.[363]

The owner of the Fund is the Board, which also administers the Fund.[364] The Fund is filled (primarily) with ex ante and ex post contributions of the institutions levied by the national resolution authorities of the participating Member States at the national level. According to Article 67(4) SRM Regulation, they then have to transfer these contributions to the Fund.[365] For the participating Member States, the Fund replaces their national resolution mechanisms.

The use of the Fund is contingent upon the IGA.[366] Moreover, expenses and losses of the Fund are strictly limited to the Fund's assets and properties. The European Union budget or the national budgets must under no circumstances be held liable for expenses or losses of the Fund.[367] If the Board finds that a contracting party has failed to comply with its obligation to transfer contributions, it has to set a deadline for the respective party to take the necessary measures. If the respective party does not put an end to that breach within the set timeframe, the use of compartments of all the contracting parties as laid down in Article 5(1)(b) IGA is excluded in relation to the resolution of institutions authorized in the contracting party concerned.[368]

The individual ex ante contributions from each entity are raised at least annually according to the conditions stated in Article 70(1) SRM Regulation.[369] According to Article 3(2) IGA, the

[363] See Article 9(2) of the Agreement of the Single Resolution Fund states that if the rules concerning resolution, Article 9(1) of the Agreement of the Single Resolution Fund, are repealed or amended against the will of any contracting party, the party can invoke its rights under public international law regarding a fundamental change of circumstances. Any other contracting party can request the Court of Justice to verify the existence of a fundamental change of circumstances, Article 14 of the Agreement of the Single Resolution Fund.

[364] See Articles 67(3), 75(1) SRM Regulation.

[365] For a detailed list see Article 60 SRM Regulation. The general criteria to determine the fixing and calculation of ex ante and ex post contributions of institutions necessary for the financing of the Fund are laid down by BRRD and the SRM Regulation. The participating Member States which raise the contributions on the institutions located in their respective territories according to the BRRD and the SRM Regulation remain competent to transfer those contributions to the Fund. The obligation to transfer the contributions raised at national level to the Fund is only established by the of the Agreement of the Single Resolution Fund, see Article 1(2) of the Agreement of the Single Resolution Fund.

[366] See Article 77 SRM Regulation.

[367] See Article 67(2) SRM Regulation. Furthermore, Article 15(1) SRM Regulation determines that the Contracting Parties have to reimburse jointly, promptly and with interest non-participating Member States for the amounts paid by those non-participating Member States in own resources corresponding to the use of the general budget of the EU in cases of non-contractual liability and costs related thereto, in respect of the exercise of powers by the institutions of the EU under the SRM Regulation.

[368] See Article 10(2) of the Agreement of the Single Resolution Fund. These decisions have to be taken by the Board by simple majority of the Chair and the other four full-time members referred to in Articles 43(1)(b), 56 SRM Regulation, Article 10(3) of the Agreement of the Single Resolution Fund.

[369] For a detailed description regarding the calculation see Binder and Gortsos, *The Banking Union*, 65 et seq.

contracting parties have to transfer the ex ante contributions corresponding to every year by June 30 of that year at the latest. The Board calculates the individual contributions each year, after consulting the ECB or the national competent authority and in close cooperation with the national resolution authorities.[370]

If the available financial means are not sufficient to cover the losses, costs or other expenses incurred by the use of the Fund in resolution actions, extraordinary ex post contributions from the institutions authorized in the territories of participating Member States have to be raised to cover the additional amounts.[371] The Board has to defer an institution's payment, on its own initiative, after consulting with the respective national resolution authority, or upon proposal of the respective national resolution authority, if it is necessary to protect its financial position.[372] The entity has to make up those contributions at a later time, when the payment no longer jeopardizes its position.

The Fund can establish internal resolution teams composed of its own staff and the staff of national resolution authorities as well as observers from non-participating Member States' resolution authorities. For these teams, the Board has to appoint coordinators from its own staff according to Articles 83(3), (4) SRM Regulation.

2.2.3 Distribution of Competences in the Banking Union

With the founding of the SSM one could gain the impression of a clear division of responsibilities between the European level (the ECB) and the national level (the national competent authorities of the participating Member States), but even though a division of responsibilities has been carried out, the SSM still consists of a highly differentiated system of cooperation and, in many cases, the national competent authorities act as ancillary actors to the ECB.[373]

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[370] See Article 70(2) SRM Regulation.
[371] See Article 71(1) SRM Regulation.
[372] See Article 71(2) SRM Regulation.
[373] See Article 6(1) SSM Regulation: "The ECB shall carry out its tasks within a single supervisory mechanism composed of the ECB and national competent authorities. The ECB shall be responsible for the effective and consistent functioning of the SSM.", and Article 6(2) SSM Regulation: "Both the ECB and national competent authorities shall be subject to a duty of cooperation in good faith, and an obligation to exchange information." To organize the practical arrangements for the implementation of this article on the cooperation within the SSM, the ECB adopts a framework, in consultation with the national competent authorities, Article 6(7) SSM Regulation. For more information see Haar, '6. Organizing Regional Systems', 180 et seq.

The distribution of tasks in the SSM takes place according to significant and less significant supervised entities.[374] However, the ECB is exclusively competent for the authorization and the withdrawal of authorization as well as notifications of the acquisition and disposal of qualifying holdings in credit institutions.[375]

Besides these exclusive competences, the supervisory powers of the ECB can be distinguished regarding direct supervision of significant supervised entities and indirect supervision of less significant supervised entities. The ECB directly supervises all significant credit institutions, financial holding companies and mixed financial holding companies of the participating Member States as well as the branches of credit institutions in participating Member States of non-participating Member States (hereinafter financial institutions).[376] The national competent authorities have to assist the ECB with the preparation and implementation of any acts relating to the tasks referred to in Article 4 SSM Regulation regarding all financial institutions, and have to follow the instructions given by the ECB when performing the tasks mentioned in Article 4, Article 6(3) SSM Regulation.

The division of competence in the SRM runs parallel to the SSM. The SRM Regulation is only applicable to financial institutions that fall within the purview of the SSM Regulation.[377] The additional establishment of the SRM is of great importance for the system of financial supervision in the euro area because now banking resolution no longer depends on national resolution authorities' interventions and thereby contributes to the credibility of the SSM.[378]

Article 2 SRM Regulation determines the scope of the SRM. According to Article 2 SRM Regulation, the SRM Regulation applies to three different kinds of entities (hereinafter financial institutions): Credit institutions established in a participating Member State according to Article 4(1) SRM Regulation; parent undertakings, including financial holding companies and mixed financial holding companies, established in a participating Member State where they are subject

[374] See Article 6(4) SSM Regulation.

[375] See Article 4(1)(a), (c) SSM Regulation. Those competences are exclusively exercised by the ECB for all credit institutions, Article 6(6) SSM Regulation.

[376] See Articles 4(1), 6(4) SSM Regulation. The definitions of the terms credit institution, financial holding companies and mixed financial holding companies come from substantive EU supervisory law, see Article 2 No. 3, 4, 5 SSM Regulation that refers to Article 4(1) No 1, 20 Regulation (EU) No 575/2013 and Article 2 No. 15 Directive 2002/87/EC. The limitation on the ECB's competences can be traced back to the regulations' legal basis, Article 127(6) TFEU, which prohibits the ECB's comprehensive competence regarding all financial entities. Ohler, *Bankenaufsicht,* § 5, paras 30-34.

[377] See Deutsche Bundesbank, 'Die neuen europäischen Regeln zur Sanierung und Abwicklung von Kreditinstituten', 46.

[378] See Haar, '6. Organizing Regional Systems', 180 et seq.

to consolidated supervision carried out by the ECB in accordance with Article 4(1)(g) SSM Regulation; investment firms and financial institutions established in a participating Member State where they are covered by the consolidated supervision of the parent undertaking carried out by the ECB in accordance with Article 4(1)(g) SSM Regulation. Within the SRM, uniform rules and procedures for the resolution of these financial institutions apply. These uniform rules and procedures have to be applied by the Board, the Council, the Commission and the national resolution authorities within the framework of the SRM.[379]

Due to the SSM's and SRM's complex division of tasks between the European and the national level, this division of competence will be analysed first before the individual supervisory activities are scrutinized in Chapter 3. Articles 4(1), (2) and 5 SSM Regulation determine the ECB's competences within the SSM, Articles 2, 7 SRM Regulation those of the Board in the SRM. The competences stated in Articles 4(1), (2), and 5 SSM Regulation and Articles 2, 7 SRM Regulation are final and cannot be extended by the ECB or the Board.[380]

2.2.3.1 Distribution of Competences in the SSM: Direct and Indirect Supervision

The ECB exercises direct supervision over all significant financial institutions.[381] This includes the power to take supervisory decisions which are directly applicable to national competent authorities as well as to the supervised financial institutions. For the exercise of direct supervision, JSTs, which consists of members of the ECB and the national competent authorities, are established.[382] For every supervised institution, one JST is responsible for acquiring and assessing information. JSTs fulfil the day-to-day and ongoing supervisory tasks. But they do not have the competence to take decisions. This competence lies solely with the ECB's Governing Council. The JSTs carry out the day-to-day supervision, the ECB's Supervisory Board prepares the draft decision, and the ECB's Governing Council takes the final decision.

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[379] See Binder and Gortsos, *The Banking Union*, 46.

[380] See Articles 4 and 5 SSM Regulation are mainly referring to regulatory concepts of substantive supervisory banking law in EU secondary law. This includes the authorization of credit institutions and the exercise of measures related to the internal market through the national competent authority of the home Member State. These tasks relate to the core supervisory tasks of monitoring of equity capital (solvency) and liquidity, large-scale loans, debt limits, the fit and proper requirements for the management as well as the internal rules of corporate governance, including risk management. See Ohler, *Bankenaufsicht*, § 5, paras 30, 124-126.

[381] Significant institutions are negatively defined in Article 6(4) subparas. 2-5 SSM Regulation.

[382] See Article 3 SSM Framework Regulation.

However, the different national competent authorities are also involved in the supervision of significant supervised entities. They have to assist the ECB by performing its supervisory tasks over significant supervised entities.[383] For this the national competent authorities have to submit draft decisions to the ECB, if requested and in accordance with Article 6(3) SSM Regulation, regarding the exercise of tasks referred to in Article 4 SSM Regulation for the ECB's consideration.[384] The national competent authority can also, on its own initiative, submit such a draft decision through the respective JST.[385] Moreover, the respective national competent authority has to assist the ECB in preparing and implementing any acts relating to the exercise of the tasks regarding the SSM, including assisting in verification activities and the day-to-day assessment of a significant supervised entity's situation.[386] In addition, they have to assist the ECB in enforcing decisions, using when necessary the powers referred to in Articles 9(1) subpara. 3, 11(2) SSM Regulation.[387] Very importantly, when assisting the ECB, the respective national competent authority has to follow the ECB's instructions.
Furthermore, the ECB exercises direct supervision with regard to less significant entities when it comes to the authorization and the withdrawal of authorization as well as notifications of the acquisition and disposal of qualifying holdings in credit institutions.[388] Besides these exclusive competences, the ECB only exercises indirect supervision regarding less significant entities according to Article 6(5) SSM Regulation. For the remaining tasks, the national competent authorities are responsible, cf. Articles 6(6), (4) subpara. 1, 4(1)(b), (d) - (g) SSM Regulation.

Regarding less significant supervised entities, the ECB exercises indirect supervision while direct supervision is still exercised by the national competent authorities of the respective Member States, with respect to the supervisory tasks stated in Article 4(1)(b), (d)–(g) SSM

[383] See Article 90(1) SSM Framework Regulation.
[384] See Article 6(7)(b) SSM Regulation, Article 91(1) SSM Framework Regulation. According to Article 95 SSM Framework Regulation, a significant supervised entity has to address to the ECB all its requests, notifications or applications relating to the exercise of the tasks conferred to the ECB. The ECB will then make the request, notification or application available to the national competent authority concerned and can request the national competent authority prepare the above-mentioned draft decision in accordance with Article 91 SSM Framework Regulation.
[385] See Article 91(2) SSM Framework Regulation.
[386] See Article 90(1)(b) SSM Framework Regulation.
[387] According to Article 9(1) subpara. 3 SSM Regulation, the ECB can, to carry out its tasks and where the regulation does not confer such powers on the ECB, require national competent authorities, by way of instructions, to make use of their powers under and in accordance with the conditions set out in national law. The national competent authorities have to fully inform the ECB about the exercise of those powers.
[388] See Article 4(1)(a), (c) SSM Regulation.

Regulation.[389] The national competent authorities have to report to the ECB on a regular basis regarding their performance of activities.[390] The ECB can request additional information regarding the performance of the tasks carried out by them.[391]
Moreover, the ECB can require national competent authorities to report to the ECB on a regular basis on the measures they have taken and on the performance of the tasks they are to carry out.[392] The national competent authority has to submit to the ECB an annual report on less significant supervised entities according to Article 100 SSM Framework Regulation. Pursuant to Article 6(5) SSM Regulation, the ECB can issue regulations, guidelines or general instructions to national competent authorities on how to perform their supervisory tasks and how to adopt supervisory decisions.

It becomes clear that indirect supervision of less significant entities is mainly exercised by the ECB by supervising, monitoring and instructing national competent authorities.[393] However, the ECB still has the competence to decide to step in and to exercise directly all the relevant powers towards less significant supervised entities if it is necessary to ensure consistent application of higher supervisory standards.[394] This includes in particular cases where financial assistance has been requested or received indirectly from the EFSF or ESM.
The ECB can take this decision either on its own initiative, after consulting with the respective national competent authority, or upon request by a national competent authority, according to Article 68 SSM Framework Regulation.[395] The national competent authorities have to inform the ECB if the situation of a less significant supervised entity deteriorates rapidly and significantly, especially if it could lead to a request for direct or indirect financial assistance from the ESM.[396]

[389] See Article 6(6), (4) subpara. 1 SSM Regulation.
[390] See Article 6(6) subpara. 3 SSM Regulation.
[391] See Article 97(3) SSM Framework Regulation.
[392] See Article 99 SSM Framework Regulation.
[393] See Ohler, *Bankenaufsicht*, § 5, paras 153-159.
[394] See Article 6(5)(b) SSM Regulation, Articles 67 et seq. SSM Framework Regulation.
[395] If the ECB wants to take a decision according to Article 6(5)(b) SSM Regulation on its own initiative, it can request a national competent authority to provide a report setting out the supervisory history and risk profile of a less significant supervised entity or group, Article 69 SSM Framework Regulation, before consulting with the national competent authority as to whether supervision of the less significant supervised entity by the ECB is necessary.
[396] See Article 96 SSM Framework Regulation.

In addition, the ECB has to exercise oversight over the functioning of the system. To enable the ECB to exercise oversight over the functioning of the system, national competent authorities have to provide the ECB with all the necessary information regarding material national competent authority supervisory procedures concerning less significant supervised entities.
In addition, the ECB can request information on an ad hoc or continuous basis from the national competent authorities on the performance of the tasks carried out by them with regard to the supervision of less significant entities. Furthermore, the national competent authorities have the obligation to inform the ECB of any other national competent authority supervisory procedure which they consider material or which may negatively affect the SSM.[397]
The national competent authorities have to send draft supervisory decisions to the ECB if the supervisory decisions concern less significant supervised entities for which the ECB believes, due to their risk situation and potential impact on the domestic financial system, that the information has to be reported to it.[398] The ECB can also determine that it is appropriate to involve staff members from one or more national competent authorities in the supervisory team of a national competent authority, and it can require the national competent authority to involve staff members of such other national competent authorities.[399]

2.2.3.2 Distribution of Competences in the SRM

The division of tasks between the Board and the national resolution authorities of the participating Member States is stated in Article 7 SRM Regulation. The Board is responsible for drawing up resolution plans and adopting all decisions relating to the resolution of the financial institutions mentioned in Article 7(2), (4)(b), (5) SRM Regulation.[400] For all other financial institutions or groups according to Article 7(3) SRM Regulation, the respective national resolution authorities are responsible for the tasks stated in Article 7(3)(a)-(f) SRM Regulation.[401]

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[397] See Article 97(4) SSM Framework Regulation.
[398] See Article 98 SSM Framework Regulation.
[399] See Article 7 SSM Framework Regulation.
[400] This includes all financial institutions according to Article 2 SSM Regulation that are not part of a group and groups which are considered to be significant in accordance with Article 6(4) SSM Regulation; or in relation to which the ECB has decided in accordance with Article 6(5)(b) SSM Regulation to exercise directly all of the relevant powers as well as other cross-border groups.
[401] This includes: (a) adopting resolution plans and carrying out an assessment of resolvability in accordance with Articles 8 and 10 and with the procedure laid down in Article 9; (b) adopting measures during early intervention in accordance with Article 13(3); (c) applying simplified obligations or waiving the obligation to draft a resolution plan, in accordance with Article 11; (d) setting the level of minimum requirement for own funds and eligible

When taking any of those measures stated in Article 7(3)(a)-(f) SRM Regulation, the national resolution authorities have to inform the Board and have to closely coordinate it with the Board. If it is necessary to ensure the consistent application of high resolution standards and the Board considers that the draft decision with regard to any entity or group referred to in Article 7(3) SRM Regulation does not comply with the SRM Regulation or with its general instructions (guidelines and recommendations according to Article 31(1)(a) SRM Regulation), the Board can even issue a warning to the relevant national resolution authority.[402]

If the respective national resolution authority does not appropriately address the warning, the Board can decide, after consulting this national resolution authority, to directly exercise all its powers under the SRM Regulation with regard to any entity or group, including financial institutions referred to in Article 7(3) SRM Regulation.[403] Moreover, if a resolution action requires the use of the Fund, only the Board can adopt the resolution scheme.

Furthermore, the Board can, at any time, decide on its own initiative, after consulting the national resolution authority concerned, or upon request from the national resolution authority concerned, to exercise directly all of the relevant powers under the SRM Regulation with regard to any entity or group, including financial institutions referred to in Article 7(3) SRM Regulation.[404] In addition, participating Member States can decide that the Board shall exercise all of the relevant powers and responsibilities conferred on it by the SRM Regulation in relation to entities and groups established in their territory other than those referred to in Article 7(2) SRM Regulation.

According to Article 30(2), 31(1) SRM Regulation, the Board and the national resolution authorities as well as the national competent authorities have to cooperate closely when exercising their responsibilities, and the Board has to perform its tasks in close cooperation with the national resolution authorities. To promote this, the Board, in cooperation with the national resolution authorities, approves and makes public a framework to organize the practical

liabilities, in accordance with Article 12; (e) adopting resolution decisions and applying resolution tools referred to in this Regulation, in accordance with the relevant procedures and safeguards, provided that the resolution action does not require any use of the Fund and is financed exclusively by the tools referred to in Articles 21 and 24 to 27 and/or by the DGSD, in accordance with Article 79, and with the procedure laid down in Article 31; (f) writing down or converting relevant capital instruments pursuant to Article 21, in accordance with the procedure laid down in Article 31.

[402] See Article 7(4)(a) SRM Regulation.

[403] See Article 7(4)(b) SRM Regulation.

[404] See Article 7(5) SRM Regulation. The Board (as the superordinated authority here) has the power to step in and to take over the execution process carried out by a national competent authority (a subordinate authority) *(Eintrittsbefugnis)*.

arrangements for the implementation. The Board can further issue guidelines and general instructions to national resolution authorities on how the tasks have to be performed and resolution decisions have to be adopted.[405] In addition, national resolution authorities have to submit their draft decisions on which the Board can express its views, and, in particular, indicate the elements of the draft decision that do not comply with the SRM Regulation or with the Board's general instructions.[406]

3. Conclusion

As this overview shows, the personal capacities of the Authorities are limited. The ESFS is constituted as an integrated network with a decentralized structure, where the day-to-day supervision is still carried out by the national competent authorities which are closer to the financial markets and institutions. The differentiation between participating Member States and non-participating Member States in the voting arrangements of the Authorities' Boards of Supervisors tries to ensure the right balance between the interests of the euro area Member States and the interests of the other European Union Member States, which in the case of financial supervision are not always in line. It is also noteworthy that the voting members of the principal decision-making body are the heads of the national competent authorities and their influence on the work of the Authorities should not be underestimated.

The comparison of the Authorities' institutional structure with the institutional structure of the SSM and the SRM shows that the supervisory organization of the ESFS follows a much more decentralized approach than in the case of the Banking Union.[407] In the Banking Union, with the SSM and the SRM, much greater centralization has taken place. The limitation of the Banking Union to the euro area banking sector can, on the one hand, be explained with the allocation of the European Union's competences (exclusive competence in the Monetary Union vs. shared competence regarding the internal market). On the other hand, it reflects the particular danger and importance of the banking sector for modern states' economies and the fiscal risk to the Member States as it was shown by the financial crisis as well as the special requirements that apply in a Monetary Union.[408]

[405] See Article 31(1)(a) SRM Regulation.
[406] See Article 31(1)(d) SRM Regulation.
[407] See Moloney, *EU Securities and Financial Markets Regulation*, 943.
[408] Which distinguishes the banking sector from the field of financial markets as well as insurance companies and pension funds. Ibid.

In the ESFS, financial supervision is still very much in the hands of the Member States' national competent authorities regarding the day-to-day supervision of financial institutions. Even though the main source of financial market regulation is European legislation, often based on international standards,[409] the national competent authorities and the principle of institutional and procedural autonomy of Member States still result in a decentralized administrative structure in Europe.[410]

In contrast, with the establishment of the Banking Union, supervision and resolution of banks within the euro area can now take place in a uniform way and by one deciding body with the advantage of greater consistency and a better information flow. With the SSM and the SRM, both supervision and liability have been moved to the European level.

[409] Such as the CRD IV which implements the Basel III capital requirements for banks. See Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung, 'Jahresgutachten 2012/13', no 262 et seq. For more information on international cooperation in financial supervision see Christoph Ohler, 'Internationale Regulierung im Bereich der Finanzmarktaufsicht', in Christoph Möllers, Andreas Voßkuhle and Christian Walter (eds), *Internationales Verwaltungsrecht, Eine Analyse anhand von Referenzgebieten* (Mohr Siebeck 2007), 259 et seq.

[410] See Huber, '§ 45 Überwachung', para 80.

Chapter 3: Supervisory Activities in European Financial Supervision

According to Recital 9 EBA Regulation, the ESFS was established as an integrated network of European Union agencies and the national competent authorities. It aims to ensure that rules applicable to the financial sector in the European Union are adequately implemented, that financial stability is preserved and that confidence in the financial system as a whole and sufficient protection for the customers of financial services are guaranteed.[411]
In contrast to the ESFS, supervisory activities in the Banking Union only take place with regard to banking supervision in the euro area. The Banking Union has to ensure that the European Union's policy relating to the prudential supervision of credit institutions is implemented in a coherent and effective manner.[412]

In this chapter, the supervisory activities in the Authorities' as well as in the SSM's and SRM's founding regulations will be examined.[413] The three different areas of supervision (the acquisition and the exchange of information, preventive and accompanying supervisory measures and repressive and corrective actions) are scrutinized with regard to the different supervisory instruments. This will also include an analysis of the execution of the supervisory instruments by and the cooperation of the different supervisory actors. Special attention will be paid to the actors involved, the different cooperation mechanisms and the final decision-making power. In addition, due to the various competences of ESMA and its wide-ranging delegation of tasks and powers within the ESFS regarding credit rating agencies and short selling, the Regulation on Credit Rating Agencies as well as the Short Selling Regulation will also be taken into account in each supervisory area.[414]
While at present the SSM and SRM are only applicable in the euro area, it is possible for the other Member States to join the SSM as well as the SRM by establishing a close cooperation according to Article 7 SSM Regulation, Article 106 et seq. SSM Framework Regulation. However, this part will not further investigate supervision with regard to close cooperation in

[411] See Article 2 EBA Regulation.
[412] See Recital 12 SSM Regulation.
[413] Possible overlap between the two supervisory systems, mainly with regard to the ECB's an EBA's supervisory activities, will be examined in Chapter 4 (1.4).
[414] For deeper insights on ESMA's direct supervisory and enforcement powers, see Elizabeth Howell, 'The Evolution of ESMA and Direct Supervision: Are there Implications for EU Supervisory Governance?' (2017) 54, Common Market Law Review, 1027; see also Steffen Augsberg, 'Hybride Regulierungsinstrumente im Finanzmarktrecht - Grundkonzept, aktuelle Anwendungsfälle und Entwicklungspotential' (2016) 49, Die Verwaltung, 369, 390 et seq.

the Banking Union even though this area is very interesting in terms of cooperation structures between the ECB and the national competent authorities of participating Member States whose currency is not the euro, inter alia because the ECB does not have directly applicable powers in those Member States, cf. Article 139(2)(e) TFEU, Article 107(2) SSM Framework Regulation. But the establishment of a close cooperation is a special (and exceptional) case and does not reflect standard cooperation mechanisms in financial supervision. Moreover, so far it is not foreseeable and rather unlikely that one of the Member States whose currency is not the euro will enter into such a close cooperation with the ECB.

1. Acquisition and Exchange of Information

To have and use information is one of the most important prerequisites of administration in general and supervision in particular. Information forms the basis for all administrative as well as supervisory actions.[415] In a system of multilevel governance like the European Union with its great number of actors, an effective exchange of information is even more important.[416]
In the recitals of the Authorities' founding regulations, insufficient information exchange is named as one of the deficiencies of financial market supervision, and it is emphasized that a particular focus of the Authorities' actions should be on the smooth flow of all relevant information among competent authorities.[417] In addition, the acquisition of information is stressed several times in the SSM and SRM Regulations.[418] Because of its particular significance, the acquisition and exchange of information will be examined separately, even though (acquiring) information is a process that underlies every administrative activity.

[415] See Huber, '§ 45 Überwachung', paras 126-128; Kahl, '§ 47 Kontrolle', paras 154-156; Kaufhold, 'ESRB', 44; Ohler, *Bankenaufsicht*, § 5, para 219.
[416] See Wolfgang Weiß, *Der Europäische Verwaltungsverbund: Grundfragen, Kennzeichen, Herausforderungen* (Duncker & Humblot 2010), 32 et seq.
[417] See Recitals 8 and 42 EBA Regulation. According to Recital 8 EBA Regulation: "The Union has reached the limits of what can be done with the present status of the Committees of European Supervisors. The Union cannot remain in a situation [...]; where there is insufficient cooperation and information exchange between national supervisors; [...]. The [ESFS] should be designed to overcome those deficiencies and provide a system that is in line with the objective of a stable and single Union financial market for financial services, linking national supervisors within a strong Union network."
[418] See Recital 47 SSM Regulation and Recitals 93, 94 SRM Regulation.

1.1 The ESFS

There are several provisions in the Authorities' founding regulations that deal with the acquisition and exchange of information.[419] The supervisory activities with regard to information can be differentiated into activities concerning the acquisition and those focused on the exchange of information.

Different legal bases and scenarios exist with regard to the acquisition of information. Regarding supervisory activities of the Authorities, Article 35 EBA Regulation is the main legal basis that transfers the power to the Authorities to collect the necessary information to be able to carry out their tasks by requesting it from the respective national competent authority.[420]
If complete or accurate information is not made available by the national competent authorities, the Authorities can, in a second step, request it from other national authorities or, if that is not effective and the necessary information is not received in a timely manner, even from the financial institutions directly.[421] To ensure the proper functioning of the ESFS, the Authorities have to inform the respective national competent authority of such a request. If necessary, the Authorities can request a national competent authority to assist them to collect the information they need pursuant to Article 35(6) subpara. 4 EBA Regulation. If an addressee of such a request does not provide clear, accurate and complete information, the Authority has to inform the ECB (where applicable) and the relevant authorities in the Member States concerned. The national authorities have to cooperate with the Authority and ensure full access to the information and to any originating documents, books or records to which the addressees have legal access in order to verify the information.[422]

Furthermore, it is the Authorities' task to facilitate the work of the colleges of supervisors by collecting the necessary information.[423] According to Article 32(1) EBA Regulation, it is also

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[419] Already in Article 8 EBA Regulation it is stated that it is the Authority's task to publish on its website, and to update regularly, information relating to its field of activities […], on registered financial institutions in order to ensure information is easily accessible by the public, Article 8(1)k) EBA Regulation, and to provide a centrally accessible database of registered financial institutions in the area of its competence where specified in the acts referred to in Articles 1(2), 8(2) j) EBA Regulation.
[420] To avoid the duplication of reporting obligations, the Authorities have to take account of any existing statistics produced and disseminated by the European Statistical System and the ESCB, see Article 35(4) EBA Regulation.
[421] This includes: Other supervisory authorities, the ministry responsible for finance, national central banks, statistical offices of the Member States, Article 35(5) EBA Regulation.
[422] See Article 35(7a) EBA Regulation.
[423] See Article 21(2)(a) EBA Regulation. Colleges of supervisors have to be established for each cross-border group to ensure supervision on a consolidated basis, see Art. 116 CRD IV. In these colleges of supervisors all or most of the national supervisors of the group participate. For more information see Eddy Wymeersch, '9. The

the Authorities' task to monitor and assess market developments in the area of their competences with regard to micro-prudential trends, potential risks and vulnerabilities. For this purpose, they have to initiate and coordinate Union-wide assessments of the resilience of financial institutions to adverse market developments.

In addition, they have to develop common methodologies to assess the effects of economic scenarios on an institution's financial position and of particular products or distribution processes on an institution as well as for asset evaluation for the purpose of stress testing. For these assessments, the Authority can request information directly from those financial institutions. Moreover, it can require national competent authorities to conduct specific reviews or even to carry out on-site inspections. If the respective Authority deems it necessary, it can participate in these on-site inspections in order to ensure comparability and reliability of methods, practices and results.[424]

ESMA, with its specific tasks and extensive supervisory powers regarding credit rating agencies and short selling, has different obligations and powers to collect information. Regarding credit rating agencies, ESMA can request, or by decision require, credit rating agencies or other actors involved in credit rating activities to provide all information necessary in order to carry out its duties under the Regulation on Credit Rating Agencies.[425] For an effective system of coordination, ESMA has to send a copy of the request or the decision to the national competent authority of the Member State where the respective actor is domiciled or established.

Furthermore, pursuant to the Short Selling Regulation, there are several notification duties regarding net short positions as well as uncovered positions in sovereign credit default swaps of natural and legal persons, towards national competent authorities and the public.[426] Natural or legal persons who have significant net short positions in shares, or in sovereign debt, or uncovered positions in sovereign credit default swaps, have to notify the respective national competent authority. This national competent authority then has to forward the information to

European Financial Supervisory Authorities or ESAs', in Eddy Wymeersch, Klaus J. Hopt and Guido Ferrarini (eds), *Financial Regulation and Supervision: A post-crisis analysis* (Oxford University Press 2012), paras 9.187 et seq; see also Moloney, 'EU Financial Market Regulation', 1370.

[424] See Art. 32(3a) EBA Regulation.

[425] See Article 23b(1) Regulation on Credit Rating Agencies.

[426] See Articles 5 and 6 Short Selling Regulation regarding net short positions in shares; Article 7 Short Selling Regulation regarding net short positions in sovereign debts and notification duties regarding uncovered positions in sovereign credit default swaps and Article 8 Short Selling Regulation. Regarding net short positions in sovereign debts, ESMA has to publish on its website the notification thresholds for each Member State.

ESMA in summary form. ESMA can at any time request additional information from the relevant national competent authority.[427]

Last but not least, with the financial crisis, the functioning of the financial system and the danger of systemic risk came to the fore. This is also reflected by various provisions with regard to the acquisition of information. The Authorities play an important role in collecting the necessary information with respect to systemic risk. According to Article 22(1) EBA Regulation, the Authorities have to duly consider systemic risk and address any risk of disruption in financial services. They are competent – on their own initiative or upon a request from a national competent authority, the European Parliament, the Council or the Commission – to conduct an inquiry into a particular type of financial institution, product or conduct, in order to assess potential threats to the stability of the financial system and to make appropriate recommendations for action to the national competent authorities concerned.[428]
Moreover, due to the specific hazards of short selling for the functioning of the financial system, according to Article 31 Short Selling Regulation, ESMA can on its own initiative or upon request from the national competent authorities, the European Parliament, the Council or the Commission, conduct an inquiry into a particular issue or practice relating to short selling or relating to the use of credit default swaps to assess whether that issue or practice poses any potential threat to financial stability or market confidence in the European Union. ESMA has to publish a report setting out its findings and any recommendations relating to the issue or practice within three months from the end of any such inquiry.

Besides the acquisition of information, the exchange of information (especially in a system of multilevel governance) is equally important. In the ESFS, the Authorities play the central coordinating role regarding the exchange of information among the different supervisory actors. This is particularly important in situations where, due to adverse developments, the functioning and integrity of the financial markets or the stability of the financial system in the European Union could be at stake. The Authorities' task is to promote a coordinated European Union response by facilitating the exchange of information among the national competent authorities. They have to determine the scope and to verify, if necessary, the reliability of information that should be made available to all national competent authorities concerned.

[427] See Article 11 Short Selling Regulation.
[428] See Article 22(4) EBA Regulation.

In addition, they have to centralize information received from national competent authorities and make it available to the other national competent authorities.[429] They also have the duty to promote an effective bilateral and multilateral exchange of information among national competent authorities and to provide, upon request, the information necessary for the national competent authorities to carry out their tasks.[430] In the case of colleges of supervisors, the Authorities have to share the collected and relevant information in cooperation with the national competent authorities and establish and manage a central system to make such information accessible to the respective national competent authorities in the college.[431]

With regard to credit rating agencies and short selling, the national competent authorities have the obligation to cooperate with each other and with ESMA as well as with the sectoral competent authorities. This means in particular that they have the obligation to supply each other with the information required to be able to carry out their duties under the respective regulation and other relevant sectoral legislation.[432]

Furthermore, ESMA has to set up various websites to publish information with regard to credit rating agencies and short selling. First of all, it has to set up a website to publish information on structured finance instruments as well as a website for individual credit ratings submitted to ESMA by registered or certified credit rating agencies (European rating platform).[433] This European rating platform includes a central repository which contains information on the historical performance data, including the ratings transition frequency, and information about credit ratings issued in the past and on their changes, of registered or certified rating agencies, as required by Article 11(2), 11a(2) subpara. 2 Regulation on Credit Rating Agencies.

In addition, ESMA has to publish summary information on the main developments observed as well as a list of registered credit rating agencies, indicating their total market share and the types

[429] See Article 31 subpara. 2(a), (b), (f) EBA Regulation.
[430] See Articles 29(1)(b), Article 35(3) EBA Regulation
[431] See Article 21(2)(a) EBA Regulation.
[432] See Article 27(1) Regulation on Credit Rating Agencies and Articles 35, 36 Short Selling Regulation. Article 32 Short Selling Regulation states that each Member State has to designate one or more national competent authorities for the purpose of this regulation. If a Member State designates more than one national competent authority, it clearly has to determine their respective roles and designate one authority that is responsible for coordinating the cooperation and the exchange of information with the Commission, ESMA and the other national competent authorities. Regarding confidential information, ESMA can also transmit to central banks, the ESCB, the ECB, to the ESRB, and where appropriate, to other public authorities responsible for overseeing payment and settlement systems, confidential information necessary for the performance of their tasks. In return, those authorities have to communicate to ESMA information that ESMA needs to carry out its duties under this regulation.
[433] See Articles 8b(1), 11a(2) Regulation on Credit Rating Agencies.

of credit ratings issued on an annual basis according to Article 8d(2) Regulation on Credit Rating Agencies. Last but not least, ESMA has to publish a link on its own website to the central website operated or supervised by the relevant national competent authority with information regarding public disclosure of significant net short positions in shares according to Article 6 Short Selling Regulation. Moreover, every two years, ESMA has to publish a list of shares for which the principal trading venue is located in a third country.[434]

1.2 The Banking Union

Article 10 SSM Regulation is the main legal basis for the acquisition of information in the SSM. According to this provision, the ECB can directly require legal and natural persons, listed in Article 10(1)(a)-(f) SSM Regulation, to provide all the information necessary so that the ECB is able to carry out its task as a supervisory authority.[435] Pursuant to Article 6(3) SSM Regulation, the ECB can instruct the national competent authorities to provide further information. A similar provision exists with Article 34 SRM Regulation for the SRM. Here the Board can, through the national resolution authorities or directly, after informing the respective national resolution authority, require the financial institutions, employees of these institutions as well as third parties to whom these institutions have outsourced functions or activities to provide all of the information necessary to perform the tasks conferred on it by the SRM Regulation.

According to Article 10 SSM Regulation, Article 139(1) SSM Framework Regulation and Article 34 SRM Regulation, the ECB and the Board first have to take account of information already available to national competent authorities and national resolution authorities as well as to make full use of all of the information available to the ECB, before collecting information from supervised legal or natural persons. This approach requires a permanent and well-organized exchange between the two levels. If the ECB or the Board obtains the information

[434] The respective national competent authority notifies ESMA of such shares, Article 16(2) Short Selling Regulation.

[435] These legal and natural persons are: Credit institutions, financial holding companies, mixed financial holdings companies and mixed-activity holding companies, all which have to be established in participating Member States, as well as persons belonging to those entities and third parties to whom those entities have outsourced functions or activities. The SSM Regulation does not determine which kind of legal instrument the ECB has to use to acquire the necessary information. With regard to Articles 132(1) TFEU, 4(4) subpara. 2 SSM Regulation, the ECB can at least take decisions as well as adopt regulations. Article 10 SSM Regulation applies to significant as well as less significant financial entities, Article 6(5)(d) SSM Regulation.

directly from the respective legal or natural person, it has to make the information available to the national competent authority or national resolution authority concerned.[436]

The acquisition of information regarding significant supervised entities in the SSM is exercised through the JSTs. For every supervised institution, one JST is responsible for the acquisition and the assessment of information. Furthermore, in the SSM, reporting duties of supervised entities exist. Significant supervised entities have to report to the ECB while less significant entities report to the respective national competent authority.[437]

However, unless provided for otherwise, the supervised entities have to communicate and submit this information to the respective national competent authority which then has to perform the initial data checks and make the information available to the ECB. The ECB has to organize the process relating to collection and quality review of data reported by the supervised entities.[438] This procedure also applies to additional supervisory reporting duties at recurring intervals according to Article 142(1), (2) SSM Framework Regulation. Further requirements as well as limits regarding the scope of the acquisition of information can result from substantial supervisory law, as for example Articles 36(3)(a), 40 CRD IV.[439]

Regarding indirect supervision of less significant entities, the national competent authorities have to report to the ECB regarding their performance of activities on a regular basis.[440] Furthermore, the ECB can, on an ad hoc or continuous basis, request additional information about the performance of the tasks carried out by them under Article 6 SSM Regulation.[441] Moreover, the national competent authorities have the obligation to inform the ECB of any other supervisory procedure by a national competent authority which they consider material or may negatively affect the SSM.[442]

In the SRM, national resolution authorities have to inform the Board and to closely coordinate with the Board when taking any of the measures stated in Article 7(3)(a)-(f) SRM Regulation according to Article 7(3) subpara. 5 SRM Regulation.

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[436] See Article 10(3) SSM Regulation, Article 34(3) SRM Regulation. Furthermore, the ECB has to provide national competent authorities with regular access to updated information necessary for national competent authorities to carry out their tasks related to prudential supervision, Article 21(3) SSM Framework Regulation.
[437] See Article 140(2) SSM Framework Regulation.
[438] See Article 140(3), (4) SSM Framework Regulation.
[439] See Ohler, *Bankenaufsicht*, § 5, para 222.
[440] See Article 6(6) subpara. 3 SSM Regulation. This enables the ECB to carry out oversight over the functioning of the system.
[441] See Article 6(5)(e) SSM Regulation, Article 97(3) SSM Framework Regulation.
[442] See Article 97(4) SSM Framework Regulation.

The Board can request, on an ad hoc or continuous basis, information from national resolution authorities on the performance of the tasks carried out by them under Article 7(3) SRM Regulation.[443]

Pursuant to Article 6(2) SSM Regulation, the ECB and national competent authorities are subject to a duty of cooperation in good faith, and an obligation to exchange information exists. This provision emphasizes the national competent authorities' obligation to provide the ECB with all information necessary to carry out its tasks conferred by the SSM Regulation.

Also, Article 30(2) SRM Regulation emphasizes the general obligation of the different actors within the SRM, the Board, the Council, the Commission, the ECB, the national resolution authorities and the national competent authorities, to provide each other with all information necessary for the performance of their tasks. In case of Article 10 SSM Regulation as well as Article 34 SRM Regulation, if the ECB or the Board obtained the information directly from the respective supervised entity or person, it has to make the information available to the national competent authority or national resolution authority concerned.

To simplify the exchange of information within the SRM the Board, the ECB, the national competent authority and the national resolution authority can draw up a memorandum of understanding (MoU) to establish a procedure concerning the exchange of information.[444] National competent authorities, the ECB, where relevant, and national resolution authorities have to cooperate with the Board in order to verify whether some or all of the information requested is already available. Where such information is available, national competent authorities, the ECB, where relevant, or national resolution authorities have to provide that information to the Board.[445]

When supervising significant supervised entities, if there is a serious indication that those supervised entities can no longer be relied on to fulfil their obligations towards their creditors or depositors, the ECB and the national competent authorities have to exchange all the relevant information relating to this significant entity.[446]

Also, with regard to banking resolution, obligations exist regarding the exchange of information. National resolution authorities have to submit to the Board all the necessary

[443] See Article 31(1)(c) SRM Regulation.
[444] See Article 34(5) SRM Regulation.
[445] See Article 34(6) SRM Regulation.
[446] See Article 92 SSM Framework Regulation.

information so that the Board can draw up and implement the resolution plans as well as update the resolution plan. Moreover, they have to submit the relevant information and prepare for the possible resolution of the institution as well as for the valuation of the institution's assets and liabilities in accordance with Article 20(1) - (15) SRM Regulation.[447]

If there is an impending resolution, the Board has the obligation to closely monitor the execution of the resolution scheme by the national resolution authorities according to Article 28(1) SRM Regulation. To achieve that, the national resolution authorities have to cooperate with and assist the Board in performing its monitoring duty. They have to provide to the Board the necessary information on the execution of the resolution scheme, the application of the resolution tools and the exercise of the resolution powers, as requested by the Board.

2. Preventive and Accompanying Supervisory Measures

Preventive and accompanying supervisory measures are supervisory measures that are installed to ensure the supervised system functions well and to (possibly) prevent any systemic crisis. This includes, inter alia, measures to check beforehand who is allowed to take up activities and participate in the market, as for example through registration or authorization of (financial) institutions, or investigatory powers to secure the proper functioning of the system.[448]

Due to the particular objectives of the ESFS to ensure that the rules applicable to the financial sector are adequately implemented, to preserve financial stability and to ensure confidence in the financial system as a whole and sufficient protection for the customers of financial services, the Authorities' tasks and responsibilities in this area of supervision are, with some exceptions regarding ESMA, more of a coordinating and harmonizing nature and differ considerably from the tasks and powers of the ECB and the Board.[449] Because of that these powers of the Authorities will be scrutinized first and separately.

2.1 ESFS

There are several provisions in the Authorities' founding regulations which set up obligations for the different actors to cooperate. Article 29 EBA Regulation states different activities the Authorities have to carry out to play an active role in building a common European supervisory

[447] See Articles 13(2) subpara. 3, Article 8(4) SRM Regulation.
[448] See Huber, '§ 45 Überwachung', paras 101 et seq; Thiele, *Finanzaufsicht*, 201 et seq.
[449] See Article 2(1) EBA Regulation.

culture and a consistent supervisory practice, as well as to ensure uniform procedures and consistent approaches throughout the European Union. Besides the already mentioned exchange of information, Authorities have to provide opinions to national competent authorities and European Union institutions, review the application of the relevant regulatory and implementing technical standards issued by the Commission as well as of the guidelines and recommendations issued by themselves.[450]

Where appropriate, they have to propose amendments as well as contribute to the development of high-quality and uniform supervisory standards. In addition, they have to contribute to the establishment of sectoral and cross-sectoral training programs, to facilitate personnel exchanges and encourage competent authorities to intensify the use of secondment schemes and other tools in accordance with Article 29(1) EBA Regulation. To promote common supervisory approaches and practices, the Authorities can develop new practical instruments and convergence tools.[451]

For the purpose of building a common supervisory culture, EBA has to develop and maintain a European supervisory handbook on the supervision of financial institutions for the European Union as a whole.[452] The European supervisory handbook sets out supervisory best practices for methodologies and processes. The Authorities have to promote, within the scope of their powers, convergence of the supervisory review and evaluation processes in accordance with the CRD IV in order to bring about strong supervisory standards in the European Union.[453]

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[450] One kind of act which has not been mentioned here so far is the Authorities' possibility to provide opinions to national competent authorities to build a common European supervisory culture. Since those opinions are of a mere advisory nature and there is also no political pressure, they are not analysed here.

[451] See Article 29(2) EBA Regulation.

[452] This European supervisory handbook, see Article 8(1)(aa) EBA Regulation, contains administrative regulations *(Verwaltungsvorschriften)* which are not legally binding, but their effect and influence on supervisory activities of the national competent authorities should not be underestimated. For more information on the European supervisory handbook, see Wymeersch, '9. ESAs', paras 9.162 et seq; Groß, *Die polyzentrale EU-Verwaltung,* 13 et seq; for more informatin on tertiary Community legislation see Thomas Groß, 'Exekutive Vollzugsprogrammierung durch tertiäres Gemeinschaftsrecht?' (2004) 57, Die Öffentliche Verwaltung, 20, 20 et seq. The European supervisory handbook should not be confused with the so called "Single Rulebook". The Single Rulebook was established after a European Council recommendation in June 2009 as a set of legislative texts with which all financial institutions in the EU have to comply with to establish a unified regulatory framework for the Union's financial sector. For this, EBA has to develop draft technical standards, which have then to be formally adopted by the Commission, see Article 10 et seq. EBA Regulation. The Single Rulebook includes prudential regulation aspects as well as a framework for the recovery and resolution of credit institutions and investment firms. Its legislative texts are the CRD IV and Regulation (EU) No 575/2013, the DGSD and the BRRD. For more information regarding the Single Rulebook see Valia Babis, 'Single Rulebook for Prudential Regulation of Banks: Mission Accomplished?' (2014) University of Cambridge Faculty of Law Research Paper No 37/2014 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2456642> accessed 01.10.2017; Schammo, '16. Differentiated Integration and the SSM', 8.

[453] See Article 20a EBA Regulation.

Furthermore, and pursuant to Articles 9(2), 16 EBA Regulation, the Authorities have to monitor new and existing financial activities and can adopt guidelines and recommendations addressing national competent authorities and financial institutions to promote the safety and soundness of markets and convergence of regulatory practice.

To further strengthen consistency in supervisory outcomes, they have to (periodically) organize and conduct peer reviews of the national competent authorities' activities.[454] The Authorities make the best practices that can be identified from those peer reviews publicly available.[455] In the event that a financial activity poses a serious threat to the objectives laid down in Article 1(5) EBA Regulation, they can even issue warnings to the respective national competent authorities according to Article 9(3) EBA Regulation. To achieve a coordinated approach to the regulatory and supervisory treatment of new or innovative financial activities and to provide advice for the Authorities to present to the European Parliament, the Council and the Commission, they have to establish a Committee on financial innovation which brings together all relevant national competent authorities.

In cases of prudential assessments of mergers and acquisitions which according to Directive 2006/48/EC, as amended by Directive 2007/44/EC, require consultation among national competent authorities from two or more Member States, the Authorities can, upon the request of one of the national competent authorities concerned, issue and publish an opinion on a prudential assessment. The opinion has to be issued promptly and in any event before the end of the assessment period.[456]

The Authorities' coordination role between national competent authorities is emphasized particularly where adverse developments could potentially jeopardize the orderly functioning and integrity of financial markets or the stability of the financial system in the European Union. In those cases, the Authorities have to carry out non-binding mediation if needed, and take all appropriate measures in case of developments which may jeopardize the functioning of the

[454] See Article 30(1) EBA Regulation. Based on this peer review they can issue guidelines and recommendations, see Article 16 EBA Regulation, to national competent authorities and financial institutions, see Article 30(3) EBA Regulation. The national competent authorities have to strive to follow those guidelines and recommendations.
[455] All other results of peer reviews may be disclosed publicly, subject to the agreement of the national competent authority, see Article 30(4) EBA Regulation.
[456] See Article 34(2) EBA Regulation.

financial markets with a view to the coordination of actions undertaken by the relevant national competent authorities.[457]

Last but not least, national competent authorities can, with the consent of the delegatee, delegate tasks and responsibilities to the Authorities or other competent authorities. The Authorities task is it to stimulate and facilitate such a delegation of tasks and responsibilities between national competent authorities. They have to identify those tasks and responsibilities that can be delegated or jointly exercised to promote best practices.[458]
However, Member States can limit the scope of delegation to what is necessary for the effective supervision of cross-border financial institutions or groups as well as set out specific arrangements that have to be complied with before entering into such a delegation agreement.[459] National competent authorities have to inform the Authorities of all delegation agreements which they intend to enter. The Authorities then have the possibility to give their opinion on the intended agreement and to publish any such delegation agreement as concluded by the respective national competent authorities.[460]

2.1.1 Executive Rulemaking

The Authorities are involved in executive rulemaking.[461] Executive rulemaking as it is understood here contains the Authorities' powers to adopt draft regulatory and implementing technical standards as well as issue guidelines and recommendations.[462] Even though the

[457] See Article 31 EBA Regulation.
[458] See Article 28(2) EBA Regulation.
[459] See Article 28(1) EBA Regulation.
[460] See Article 28(4) EBA Regulation.
[461] For more information on executive rulemaking see Matthias Ruffert, '§ 17 Rechtsquellen und Rechtsschichten des Verwaltungsrechts', in Wolfgang Hoffmann-Riem, Eberhardt Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts Band I: Methoden, Maßstäbe, Aufgaben, Organisation* (2nd edn, C.H. Beck 2012), paras 81 et seq; Matthias Ruffert, 'The Many Faces of Rulemaking in the EU' (2014), 13 et seq <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592092> accessed 01.10.2017; Wolfgang Weiß, 'Dezentrale Agenturen in der EU-Rechtsetzung' (2016) 51, Europarecht, 631, 631 et seq.
[462] See Article 10 EBA Regulation for draft regulatory technical standards and Article 15 EBA Regulation for draft implementing technical standards. They are further mentioned in Article 21(3), regarding colleges of supervisors, Article 25(3) regarding recovery and resolution procedures and Article 26(3) EBA Regulation (only EBA and ESMA). See Moloney, who refers to it as "horizontal rulemaking". Moloney, 'EU Financial Market Regulation', 1344 et seq. For more information on regulatory and implementing technical standards see Thomas van Rijn and Karl-Philipp Wojcik, 'II. Rechtsquellen des europäischen Bankaufsichtsrecht', in Simon G. Grieser and Manfred Heemann (eds), *Europäisches Bankaufsichtsrecht* (Frankfurt School Verlag 2016), 35 et seq. For more information on guidelines and recommendations and the impact of this soft law on the EU as a legal and administrative union see Thorsten Wörner, *Rechtlich weiche Verhaltenssteuerungsformen Europäischer Agenturen als Bewährungsprobe der Rechtsunion* (Mohr Siebeck 2017).

Authorities cannot adopt rules that are generally applicable, their influence on European Union supervisory practice through their involvement in the Commission's regulatory and implementing technical standards, through their draft versions and their power to adopt soft law by issuing guidelines and recommendations is vast.[463] These powers are especially important because they allow the Authorities to influence and shape the system of supervision without needing to have any direct rulemaking powers themselves.

What is especially interesting is the involvement of national actors in the executive rulemaking process. Draft regulatory and draft implementing technical standards are adopted by the respective Authority's Board of Supervisors, which consists of the different heads of the national competent authorities.[464] Both draft standards serve as a model for the Commission's regulatory and implementing technical standards. The special feature of these draft standards is that the Commission cannot easily deviate from the draft versions, but has to carefully consider them. It can only endorse the draft regulatory and implementing technical standard in part or amend it, if the European Union's interests require that.[465]

If the Authorities do not resubmit or amend the draft version in a way that is consistent with the amendments of the Commission, the Commission can adopt the regulatory and implementing technical standards with the amendments it considers relevant. However, what is very important in this process and for the importance or the role of the Authorities is the fact that the Commission cannot change the draft versions without prior coordination with the respective Authority.

Furthermore, the Authorities can issue guidelines and recommendations which they can address to national competent authorities or financial institutions, cf. Article 16 EBA Regulation. Even though guidelines and recommendations are not of a binding nature, their impact on the supervisory practice should not be underestimated due to a complex mechanism of "comply or explain" as well as "naming and shaming".[466]

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[463] For more information on delegated and implementing acts see Deirdre Curtin and Tatevik Manucharyan, '5. Legal Acts and Hierarchy of Norms in EU Law', in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015), 111 et seq; see also Moloney, 'EU Financial Market Regulation', 1345 et seq.

[464] See Article 40 EBA Regulation.

[465] See Articles 10(1) subpara. 5, 15(1) subpara. 4 EBA Regulation.

[466] For more information on the impact of guidelines and recommendations, see Thomas Papadopoulos, 'European System of Financial Supervision', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2014), para 20. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2638620> accessed 01.10.2017; Binder and Gortsos, *The Banking Union*, 47.

The respective national competent authorities have to make every effort to comply with the guidelines and recommendations and have to confirm whether they are in compliance.[467] If they do not comply, they have to state the reasons ("comply or explain") and it will be published by the respective Authority ("naming and shaming").

When addressing financial institutions, the situation is different. Financial institutions only have to report whether they comply with that guideline or recommendation if so required by that guideline or recommendation itself.

2.1.2 Colleges of supervisors

Colleges of supervisors play an important role in the supervision of cross-border financial institutions, cf. Recital 36 EBA Regulation.[468] Colleges of supervisors are to ensure a common and harmonized supervisory practice and strengthen the cooperation between the national competent authorities of the home and host Member State. The Authorities have to contribute to the functioning of the colleges of supervisors and foster the coherence of the application of Union law among them as well as converge supervisory best practices. They take a leading role in ensuring a consistent functioning of colleges of supervisors for cross-border institutions in the European Union, taking into account systemic risk posed by financial institutions, and, where appropriate, convene a meeting of the college.[469]

To achieve this, the Authorities have to promote joint supervisory plans and joint examinations. In addition, staff from the Authorities can participate in the activities of the colleges of supervisors, including on-site examinations, carried out jointly by two or more national competent authorities.[470] They can initiate and coordinate Union-wide stress tests ensuring that a consistent methodology is applied and, where appropriate, address a recommendation to the national competent authority to correct issues identified in the stress test.

Furthermore, the Authorities can promote effective and efficient supervisory activities. This includes evaluating risks to which financial institutions are or might be exposed as determined in the supervisory review process or in stress situations. They have to oversee the tasks carried

[467] See Article 16(3) EBA Regulation.

[468] See Colleges of supervisors have to be established for each cross-border group to ensure supervision on a consolidated basis, see Art. 116 CRD IV. In these colleges of supervisors all or most of the national supervisors of the group participate. For more information see Wymeersch, '9. ESAs', paras 9.187 et seq; see also Moloney, 'EU Financial Market Regulation', 1370.

[469] See Article 21(2) EBA Regulation.

[470] See Article 21(1) EBA Regulation.

out by the national competent authorities and request further deliberations of a college in any cases in which it considers that the decision would result in an incorrect application of Union law or would not contribute to the objective of convergence of supervisory practices. The Authorities can also require the consolidating supervisor to schedule a meeting of the college or add a point to the agenda. They even have a legally binding mediation role to resolve disputes between national competent authorities and take supervisory decisions directly applicable to the institutions concerned in accordance with Articles 19, 21(4) EBA Regulation.

2.1.3 Systemic Risk and Resolution of Financial Institutions

The Authorities have also been assigned certain tasks regarding the prevention of systemic risk and the resolution of financial institutions. Pursuant to Article 22 EBA Regulation, the Authorities have to consider systemic risk and address any risk of disruption in financial services.

In collaboration with the ESRB, the Authorities develop a common set of quantitative and qualitative indicators (risk dashboard) to identify and measure systemic risk as well as an adequate stress-testing regime to help identify financial institutions that may pose systemic risk. These financial institutions will be subject to strengthened supervision, and where necessary, to the recovery and resolution procedures referred to in Article 25 EBA Regulation.[471] In addition, the Authorities have to draw up, if necessary, additional guidelines and recommendations for financial institutions to take account of the systemic risk posed by them.[472]

The Authorities have the task of contributing to and participating actively in the development and coordination of effective, consistent and up-to-date recovery and resolution plans for financial institutions.[473] According to Article 25(1) EBA Regulation, they have to further assist in developing procedures in emergency situations and preventive measures to minimize the systemic impact of any failure.

Furthermore, the Authorities can identify best practices aimed at facilitating the resolution of failing financial institutions and especially cross-border groups in ways which avoid contagion,

[471] See Article 22(2) EBA Regulation.
[472] See Article 22(3) EBA Regulation.
[473] These recovery and resolution plans are drawn up by the respective national resolution authorities or, if applicable, by the Board. For more information on recovery and resolution plans see this Chapter 2.6.1.

ensuring that appropriate tools, including sufficient resources, are available and allow the financial institution or the group to be resolved in an orderly, cost-efficient and timely manner.

The Authorities are further supposed to strengthen the European system of national deposit guarantee schemes (EBA) and the European system of national Investor Compensation schemes (ESMA) as well as to develop a European network of national insurance guarantee schemes (EIOPA).[474]
Furthermore, EBA and ESMA have to contribute to developing methods for the resolution of failing financial institutions, especially those posing a systemic risk, and key financial market participants.[475] In addition, they have to contribute to the work on the level playing field issues and cumulative impacts of any systems of levies and contributions on financial institutions that may be introduced to ensure fair burden-sharing and incentives to contain systemic risk as a part of a coherent and credible resolution framework.
In contrast, the Commission can request that EIOPA contributes to the assessment referred to in Article 242 of Directive 2009/138/EC, in particular regarding the cooperation of supervisory authorities within and the functionality of colleges of supervisors.[476]

2.2 Registration and Authorization

Registration and authorization of financial institutions before being able to take up any activity is a typical supervisory instrument in financial supervision.[477] It allows supervisory authorities to verify whether the respective entity meets the relevant requirements and can so prevent the entities from posing a risk to the financial system beforehand.

2.2.1 Registration and Withdrawal of Registration of Credit Rating Agencies

Credit rating agencies that want to take up business in the European Union have to apply for registration according to Article 14 Regulation on Credit Rating Agencies. The application for

[474] See Article 26(1) EBA Regulation, Article 26(1) ESMA Regulation and Art 26(1) EIOPA Regulation. For this, EBA has to ensure the correct application of Directive 94/19/EC (in case of ESMA Directive 97/9/EC) to ensure that national deposit schemes are adequately funded by contributions from the respective financial institutions or the concerned financial market participants. They can also adopt guidelines and recommendations addressed to national competent authorities and financial institutions or financial market participants, see Article 16 EBA Regulation, regarding deposit guarantee schemes and investor-compensation schemes, Article 26(2) EBA Regulation.
[475] See Article 27(1) EBA Regulation, Article 27(1) ESMA Regulation.
[476] See Article 27(1) EIOPA Regulation.
[477] See Thiele, *Finanzaufsicht,* 208.

registration has to be submitted by the credit rating agency to ESMA, which will then examine the application and adopt a fully reasoned decision to register or refuse to register the credit rating agency.[478] Such a registration adopted by ESMA is effective for the entire territory of the European Union,[479] and ESMA publishes a list of credit rating agencies registered in accordance with the Regulation on Credit Rating Agencies on its website.

ESMA has to withdraw the registration of a credit rating agency if the credit rating agency expressly renounces the registration, if it has not provided any credit ratings for the preceding six months, if it obtained the registration by making false statements or by any other irregular means, or if it no longer meets the conditions under which it was registered.

A national competent authority of a Member State which considers that one of the named conditions is met and in which credit ratings issued by the credit rating agency concerned are used, can request that ESMA examine whether the conditions for the withdrawal of the registration are met. If ESMA decides not to withdraw the registration, it has to provide full reasons to the respective national competent authority.[480] Pursuant to Article 18(2) Regulation on Credit Rating Agencies, ESMA has to communicate to the Commission, EBA, EIOPA and the national competent authorities any decision regarding the examination of the application for registration or the withdrawal of such a registration taken under Articles 16, 17 or 20 Regulation on Credit Agencies.

2.2.2 Authorization and Withdrawal of Financial Institutions' Authorization

The ECB is exclusively competent for the authorization according to Article 14(1) SSM Regulation, and the withdrawal of financial institutions' authorizations according to Article 14(5) SSM Regulation.[481] The respective national competent authorities participate in these cases only according to Articles 14, 15 SSM Regulation.

Any entity that wants to take up a business of a financial institution, has to submit its application for authorization to the national competent authority of the Member State where the financial institution is to be established. In a first step, the national competent authority has to examine whether the applicant complies with all conditions of authorization set out in the relevant

[478] See Articles 15(1), 16 Regulation on Credit Rating Agencies.
[479] See Article 14(2) Regulation on Credit Rating Agencies.
[480] See Article 20(2) Regulation on Credit Rating Agencies.
[481] See Articles 4(1)(a), 6(4) SSM Regulation.

national law of the respective Member State.[482] If it does comply, the national competent authority takes a draft decision and proposes it to the ECB. If it does not comply, the national competent authority has to reject the application.

The draft decision is considered to be adopted if the ECB does not object to the draft within ten working days. The ECB can only object to a draft decision where the conditions set out in relevant Union law are not met.[483] The decision of rejection according to Article 14(2) SSM Regulation as well as the ECB's final decision according to Article 14(3) SSM Regulation have to be sent to the applicant by the national competent authority after being notified by the ECB of its decision.[484] Attention should be paid to the fact that in this authorization process, the auditing duty regarding national law still lies with the national competent authorities, and only the auditing duty of Union law lies with the ECB even though it is the ECB's exclusive competence to authorize financial entities to take up the business of a credit institution.[485]

More precise guidelines regarding the cooperation between the national competent authorities and the ECB can be found in Articles 73-79 SSM Framework Regulation. There it is stated, inter alia, that a national competent authority has to inform the ECB within 15 working days of receiving an application. If a national competent authority rejects an application, it must inform the ECB of its decision. Furthermore, in its draft decision, the national competent authority can propose attaching recommendations, conditions and/or restrictions in accordance with national and Union law.

Pursuant to Article 14(5) SSM Regulation, the ECB can withdraw the authorization on its own initiative, following consultations with the respective national competent authority, or on a proposal of a national competent authority in the cases set out in the relevant Union law. The consultation process has to ensure the exchange of information and the joint assessment of all the legal conditions and actual facts as well as to give the respective national competent authority sufficient time to decide on the necessary remedial actions, including possible resolution measures, and to take these into account.[486]

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[482] See Article 14(2) SSM Regulation.
[483] See Article 14(3) SSM Regulation.
[484] See Article 14(4) SSM Regulation, Article 88(2)(a), (3)(d) SSM Framework Regulation.
[485] See Ohler, *Bankenaufsicht*, § 5, paras 211-212.
[486] See Article 14(5) SSM Regulation. This second argument only holds true for less significant institutions since for significant institutions it is the ECB's competence to take supervisory measures, see Article 16(2) SSM Regulation.

In cases of less significant institutions, when the reasons for the withdrawal stem from national law, only the respective national competent authority has the power to initiate such a procedure. The ECB only has the power to give instructions according to Article 6(3) SSM Regulation, to investigate the possibility of a withdrawal of authorization.

In cases where the national competent authority itself considers it necessary for an authorization to be withdrawn, it prepares a draft decision which it submits to the ECB.[487] The ECB then assesses the draft withdrawal decision and takes a decision.[488] In cases where the ECB becomes aware of circumstances that may warrant the withdrawal of an authorization, it has to assess, on its own initiative, if the authorization has to be withdrawn in accordance with the relevant Union law.[489] The ECB can consult with the respective national competent authority and also has to coordinate with the respective national resolution authority.[490] Furthermore, it has to inform the national competent authority immediately after contacting the respective national resolution authority and to take a decision on the withdrawal of an authorization without undue delay.[491] The ECB notifies the parties and the relevant national competent authority of the decision to withdraw an authorization.[492]

According to Article 14(6) SSM Regulation, the withdrawal of an authorization must not lead to financial instability. Because of that, the ECB has to coordinate its actions with the respective national resolution authorities (in case of significant financial institutions with the Board). If a national authority believes that a withdrawal would lead to financial instability, it has to notify the ECB of its objections. The ECB then has to abstain from the withdrawal proceedings for an agreed period of time.[493]

After the expiry of the time limit, the ECB has to consult with the respective national competent authority and national resolution authority. The national competent authority has to inform the ECB of all the measures taken.[494] If the ECB finds that proper actions necessary to maintain financial stability have not been implemented by the national authorities, the withdrawal of the authorization applies immediately.[495]

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[487] See Article 80(1) SSM Framework Regulation.
[488] See Article 14(5) subpara. 2 SSM Regulation and Article 81(1) SSM Framework Regulation
[489] See Article 82(1) SSM Framework Regulation.
[490] See Article 82(2) SSM Framework Regulation.
[491] See Articles 82(4), 83(1) SSM Framework Regulation
[492] See Article 88 SSM Framework Regulation
[493] See Article 83(1) SSM Framework Regulation.
[494] See Article 83(2) SSM Framework Regulation.
[495] See Article 14(6) SSM Regulation. Ohler, *Bankenaufsicht,* § 5, para 216.

2.3 Investigatory Powers

ESMA as well as the ECB and the Board have certain investigatory powers to carry out their supervisory tasks.

2.3.1 General Investigations

According to Article 23c Regulation on Credit Rating Agencies, ESMA can conduct all necessary investigations of credit rating agencies, persons involved in credit rating activities, rated entities or related third parties, third parties to whom the credit rating agencies have outsourced operational functions or activities and persons otherwise closely and substantially related or connected to credit rating agencies or credit rating activities. However, before the investigation takes place, it has to inform the national competent authority of the Member State where the investigation is to be carried out. Upon ESMA's request, officials of the national competent authority have to assist ESMA's authorized persons in carrying out their tasks. The national competent authority can also request that its officials attend the investigation.[496]
If a request for records of telephone or data traffic requires authorization from a judicial authority according to national rules, such authorization has to be applied for. However, the national judicial authority cannot review the necessity of the investigation. The lawfulness of ESMA's decision can only be subject to review by the Court of Justice of the European Union.[497]

The regime on the investigatory powers of the Board is similar to that of the ECB. To be able to perform their tasks, the ECB and the Board through the national resolution authorities or directly, after informing them, can conduct all necessary investigations of any person referred to in Article 10(1) SSM Regulation and Article 34(1) SRM Regulation.[498] For this the ECB and the Board can require the submission of documents, examine books and records as well as take copies or extracts from the books or records, obtain written or oral explanations from any of these legal or natural persons or their representatives or staff as well as interview any other

[496] See Article 23c(4) Regulation on Credit Rating Agencies.
[497] See Article 23c(6) Regulation on Credit Rating Agencies.
[498] See Article 11 SSM Regulation, Article 35 SRM Regulation.

natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation.

The investigations take place on the basis of an ECB or a Board decision. If a person obstructs the investigation, the national competent authority or national resolution authority of the Member State where the respective financial institution is located has to afford the necessary assistance *("Amtshilfe")* so that the ECB or the Board can carry out its investigation.[499] In the case of the SSM, the ECB only has the competence to enforce its general investigatory powers regarding companies.[500] Otherwise, it has to instruct the national competent authorities to assist with its national enforcement powers according to Articles 6(2), 9(1) subpara. 3 SSM Regulation.[501]

2.3.2 On-Site Inspections

Pursuant to Article 12 SSM Regulation, the ECB has the power to conduct all necessary on-site inspections at the business premises of the legal persons referred to in Article 10(1) SSM Regulation as well as any other undertaking included in supervision on a consolidated basis where the ECB is the consolidating supervisor. To conduct an on-site inspection, the ECB appoints on-site inspection teams with the involvement of the respective national competent authorities.[502] The ECB designates the head of the on-site inspection team from among ECB and national competent authority staff members. The ECB and the national competent authority have to consult with each other and agree on the use of national competent authority resources with regard to the on-site inspection teams.[503]

In the case of the Board and ESMA, the situation is similar. The Board and ESMA can, in cooperation with the national resolution authorities or national competent authorities, conduct all necessary on-site inspections at the business premises of the natural or legal persons referred to in Article 34(1) SRM Regulation or of the legal persons referred to in Article 23b(1) Regulation on Credit Rating Agencies.[504]

The ECB, the Board and ESMA can carry out the on-site inspection without prior announcement to those legal persons if the proper conduct and efficiency of the inspection

[499] See Article 11(2) subpara. 2 SSM Regulation and Article 35(2) subpara. 2 SRM Regulation.
[500] See Article 18(7) SSM Regulation, Article 132(3) TFEU.
[501] See Ohler, *Bankenaufsicht*, § 5, paras 66-68.
[502] See Articles 143, 144(1) SSM Framework Regulation.
[503] See Article 144(2), (3) SSM Framework Regulation.
[504] See Article 36 SRM Regulation and Article 23d Regulation on Credit Rating Agencies.

require it. Before conducting any on-site inspections, the ECB, the Board and ESMA have to notify the respective national competent authority or national resolution authority.[505] The officials and other persons authorized by the ECB, the Board and ESMA to conduct on-site inspection have all the powers stipulated in Article 11 SSM Regulation, Article 35(1) SRM Regulation, Article 23d Regulation on Credit Rating Agencies.

The ECB's, the Board's and ESMA's officials as well as other authorized persons are, under their own supervision and coordination, assisted by officials and other accompanying persons authorized by the respective national competent authority or national resolution authority.[506] Actions by the officials and other accompanying persons authorized by the national competent authorities or national resolution authorities are attributed to and considered as the ECB's, the Board's or EMSA's action since these investigative actions are within the ECB's, the Board's or ESMA's competence.[507]

If a person opposes such an on-site inspection, the respective national competent authority or national resolution authority has to afford the ECB's, the Board's or ESMA's officials the necessary assistance in accordance with its national law.[508] This can include the sealing of any business premises as well as books or records.

If according to national rules an on-site inspection or the assistance of such an on-site inspection requires authorization by a judicial authority, such authorization has to be applied for.[509] However, the national judicial authority's controlling powers are limited and it is not allowed to review the necessity for the inspection or demand to be provided with the information on the ECB's, the Board's or ESMA's file. The lawfulness of the ECB's decision can only be subject to review by the Court of Justice of the European Union according to Article 13(2) SSM Regulation, Article 37(2) SRM Regulation and Article 23d(8), (9) Regulation on Credit Rating Agencies.

Moreover, ESMA has the power to delegate specific supervisory tasks to a national competent authority in accordance with the guidelines issued pursuant to Article 16 ESMA Regulation if

[505] See Article 12(1) SSM Regulation, Article 145(1) SSM Framework Regulation, Article 36(1) SRM Regulation and Article 23d Regulation on Credit Rating Agencies.
[506] See Article 12(4) SSM Regulation, Article 36(4) SRM Regulation and Article 23d Regulation on Credit Rating Agencies.
[507] See Ohler, *Bankenaufsicht*, § 5, para 227.
[508] See Article 12(5) SSM Regulation, Article 36(5) SRM Regulation and Article 23d Regulation on Credit Rating Agencies.
[509] See Article 13 SSM Regulation, Article 37(1) SRM Regulation and Article 23d(8), (9) Regulation on Credit Rating Agencies.

it is necessary for the proper performance of a supervisory task.[510] Before delegating such a task ESMA has to consult with the relevant national competent authority and reimburse the respective national competent authority for the costs incurred as a result of carrying out such delegated tasks.[511] Such a delegation does not affect the responsibility of ESMA or limit ESMA's ability to conduct and oversee the delegated activity.[512]

In case of a request for on-site inspections or investigations of one national competent authority from another national competent authority, the requesting national competent authority has to inform ESMA according to Article 37 Short Selling Regulation. If the investigation or on-site inspection has any cross-border effects, ESMA can coordinate the investigation or inspection. The national competent authority that receives such a request can either carry out the on-site inspection or investigation itself, allow the requesting competent authority to participate in an on-site inspection or investigation, allow the requesting competent authority to carry out the on-site inspection or investigation itself, appoint auditors or experts to carry out the on-site inspection or investigation, or share specific tasks relating to supervisory activities with the other competent authorities.

2.4 Procedures for the Right of Establishment and Freedom to Provide Services within the SSM

Any supervised entity that wants to establish a branch within the territory of another participating Member State has to notify the national competent authority where its head office is located of its intention according to Article 11 SSM Framework Regulation. In the case of a significant supervised entity, the national competent authority concerned has to immediately inform the ECB of this notification. If the ECB does not take a decision to the contrary within two months, the supervised entity can establish its branch and commence its activities. The

[510] See Article 30(1) Regulation on Credit Rating Agencies, Article 37(3) Short Selling Regulation. According to Article 21(2) Regulation on Credit Rating Agencies, ESMA has to issue and update guidelines on the cooperation between ESMA, the national competent authorities and the sectoral competent authorities. These specific supervisory competences can, in particular, include the power to request information in accordance with Article 23b Regulation on Credit Rating Agencies and to conduct investigations and on-site inspections in accordance with Articles 23d(6), 30(1) Regulation on Credit Rating Agencies.

[511] See Article 30(2), (3) Regulation on Credit Rating Agencies.

[512] Supervisory responsibilities under this Regulation, including registration decisions, final assessments and follow-up decisions concerning infringements, shall not be delegated, Article 30(4) Regulation on Credit Rating Agencies.

ECB has to communicate this information to the national competent authority of the participating Member State where the branch will be established.

In the case of a less significant supervised entity, the branch can be established and commence its activities if the respective national competent authority does not take a decision to the contrary within two months. The national competent authority has to communicate this information to the ECB and to the national competent authority of the participating Member State where the branch will be established.

If a supervised entity wants to exercise the freedom to provide services by carrying on its activities within the territory of another participating Member State for the first time, this entity has to notify the national competent authority of the participating Member State where it has its head office.[513] The national competent authority has to inform the ECB and the national competent authority of the participating Member State in which the services will be provided.

2.5 Assessment of Acquisitions of Qualifying Holdings

Pursuant to Article 15(1) SSM Regulation, notifications of an acquisition of a qualifying holding in a financial institution established in a participating Member State or any related information has to be brought to the national competent authority where the financial institution is established.[514]

In a first step, the respective national competent authority has to assess this proposed acquisition according to the requirements set up in Article 23 of Directive 2013/36/EU as well as requirements of national law. In a second step, it has to forward the notification and draft decision whether to oppose the acquisition or not to the ECB and to assist the ECB in accordance with Articles 6, 15(2) SSM Regulation and Article 86 SSM Framework Regulation. In a third step, the ECB decides whether it opposes the acquisition or not, whereby it can only oppose the acquisition according to criteria set out in relevant Union law.[515] Finally, the ECB notifies the parties and the national competent authority of its decision on the acquisition of a qualifying holding in a credit institution.[516]

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[513] See Article 12 SSM Framework Regulation.

[514] The national competent authority has to inform the ECB of this notification and inform the ECB by when it must notify the applicant of the decision to oppose or not to oppose this acquisition pursuant to the relevant national law, see Article 85(1) SSM Framework Regulation.

[515] See Article 15(3) SSM Regulation.

[516] See Article 88(1)(b), (2)(c) SSM Framework Regulation.

2.6 Resolution Planning and Early Intervention

The Board is responsible for drawing up resolution plans and adopting all decisions relating to resolution for the financial institutions stated in Article 7(2) SRM Regulation.[517] The national resolution authorities are responsible for the other financial institutions regarding the tasks stated in Articles 7(3)(a)-(f), 9 SRM Resolution, inter alia adopting the resolution plans and measures during early intervention. Resolution plans are drawn up before financial institutions are under resolution. They have to provide for the resolution actions which the Board may take if a financial institution or a group meets the conditions for resolution.

2.6.1 Resolution Plans

Pursuant to Article 8(1) SRM Regulation the Board has to draw up and adopt resolution plans for the financial institutions after consulting the ECB or the relevant national competent authorities as well as national resolution authorities.[518] The Board can require the respective national resolution authority to prepare and submit draft resolution plans and the group-level resolution authority to prepare and submit a draft group resolution plan.[519]

To ensure effective and consistent application, the Board has to issue guidelines and address instructions to the national resolution authorities for the preparation of those draft resolution plans. According to Article 8(4) SRM Resolution, the national resolution authorities have to submit to the Board all information necessary to draw up and implement the resolution plans as obtained by them in accordance with Article 11 and Article 13(1) BRRD.[520]

Moreover, the Board can require institutions to assist in drawing up and updating the plans pursuant to Article 8(8) SRM Regulation. The resolution plans have to be reviewed and

[517] The resolution plan sets out options for applying the resolution tools and exercising resolution powers referred to in the SRM Regulation. It has to provide for the resolution actions which the Board can take if an entity or group meets the conditions for resolution, see Article 8(5), (6) SRM Regulation. Very importantly: The resolution plan cannot assume any extraordinary public financial support besides the use of the Fund, any central bank emergency liquidity assistance or any central bank liquidity assistance provided under non-standard collateralization, tenor and interest rate terms, see Article 8(6) subpara. 5 SRM Regulation. Financing the resolution of entities is one of the main problems of banking resolution, see Articles 8(9)(i), (10)(f), 10(1) SRM Regulation. For more information see Thole, 'Bank Crisis Management and Resolution – Core Features of the Bank Recovery and Resolution Directive', 7 et seq.

[518] For entities for which the Board is not responsible, the national resolution authorities have to draw up resolution plans, see Article 9 SRM Regulation, and submit them to the Board, see Article 4(3) subpara. 6 SRM Regulation.

[519] See Article 8(2) SRM Resolution.

[520] See Article 11 BRRD covers the acquisition of information for the purpose of resolution plans and cooperation from the institution, and Article 13 BRRD covers the acquisition regarding group resolution plans.

updated.[521] The institutions, the ECB or national competent authorities have to inform the Board of any change that necessitates such revision or update. The Board has to submit the resolution plan and any changes of the plan to the ECB or to the relevant national competent authority.[522] When drafting and updating resolution plans, the Board, after consulting the relevant competent authorities, conducts an assessment of the extent to which institutions and groups are resolvable.[523] The ECB or the relevant national competent authority has to provide the Board with a recovery plan or group recovery plan. The Board has to examine the recovery plan to identify any actions that can adversely impact the resolvability of an institution and make recommendations to the ECB or the national competent authorities on those matters according to Article 10(2) SRM Regulation.[524]

If the Board, after consulting the competent authorities, including the ECB, determines that there are substantive impediments to the resolvability of that entity or group, the Board has to prepare a report in cooperation with the competent authorities and address it to the institution or the parent undertaking. In this report, the Board analyses the substantive impediments to the effective application of resolution tools and the exercise of resolution powers. That report has to consider the impact on the institution's business model and recommend any proportionate and targeted measures that, in the Board's view, are necessary or appropriate to remove those impediments.[525] The financial institution has to propose to the Board possible measures to address or remove the substantive impediments identified in the report, which the Board communicates to the competent authorities as well as to EBA.[526]

The Board, after consulting the competent authorities, assesses whether the measures effectively address or remove the substantive impediments in question. If not, the Board takes a decision after consulting the competent authorities and, where appropriate, the designated macro-prudential authority, indicating that the measures are not sufficient to remove the impediments to resolvability, and instructs the respective national resolution authority to require the financial institution to take any of the measures listed in Article 10(11).

[521] See Article 8(12) SRM Regulation.
[522] See Article 8(13) SRM Regulation.
[523] See Article 10(1) SRM Resolution.
[524] If the Board is of the opinion that an institution or a group is not resolvable, it has to notify EBA in a timely manner, Article 10(3), (4) SRM Regulation.
[525] See Article 10(7) SRM Regulation.
[526] See Article 10(9) SRM Regulation.

The national resolution authority has to implement the instructions of the Board in accordance with Article 29 SRM Regulation by taking the necessary action. The respective national resolution authority has to fully inform the Board of the exercise of those powers, and their actions have to comply with the Board's decisions pursuant to this Regulation. If a national resolution authority does not apply or comply with the Board's decision or applies it in a way which poses a threat to any of the resolution objectives under Article 14 SRM Regulation or to the efficient implementation of the resolution scheme, the Board can order a financial institution under resolution to adopt any other necessary action to comply with the decision in question, but only if the measure significantly addresses the threat to the relevant resolution objective or to the efficient implementation of the resolution scheme.[527]

Before the Board decides to impose a measure, it has to notify the respective national resolution authority and the Commission. In this notification, the Board has to include reasoned details of the envisaged measures including when the measures are intended to take effect. The notification should not be made less than 24 hours before the measures are to take effect. The respective financial institution has to comply with the Board's decision which prevails over any previous decision adopted by the national resolution authority on the same matter.[528] If a national resolution authority takes further actions in relation to that issue, it has to comply with the Board's decision in accordance with Article 29(4) SRM Regulation.

The Board can, on its own initiative and after consulting with the competent national resolution authority or upon a proposal from a national resolution authority, apply simplified obligations regarding the drafting of resolution plans, and it can even waive the obligation of drafting these resolution plans.[529]

2.6.2 Minimum Requirement for Own Funds and Eligible Liabilities

According to Article 12(1) SRM Regulation, after consulting with the competent authorities including the ECB, the Board has to determine the minimum requirement for own funds and eligible liabilities which the financial institutions are required to meet at all times. The Board addresses its determination to the national resolution authorities. The national resolution authorities then implement the instructions of the Board in accordance with Article 29 SRM

[527] See Article 29(2) SRM Regulation.
[528] See Article 29(3) SRM Regulation.
[529] See Article 11(1) SRM Regulation.

Regulation.[530] The Board has to require that the national resolution authorities verify and ensure that institutions and parent undertakings maintain the minimum requirement for own funds and eligible liabilities.[531]

In addition, the Board informs the ECB and EBA of the minimum requirement for own funds and eligible liabilities that it has determined for each institution and parent undertaking and, where relevant, the requirements laid down in Article 12(11) SRM Regulation. The Board has to issue guidelines and to address instructions to national resolution authorities relating to specific financial institutions or groups to ensure the effective and consistent application of these provisions.

The Board, on its own initiative after consulting the respective national resolution authority, or upon the proposal of a national resolution authority, can decide that the minimum requirement for own funds and eligible liabilities is partially met on a consolidated or on an individual basis through contractual bail-in instruments, cf. Article 12(11) SRM Regulation.

2.6.3 Early Intervention

Early intervention measures are executed by the ECB or the national competent authorities. This division of task shows very clearly the coordination between the SSM and the SRM as well as the difficulties regarding the delineation of supervision and resolution.

According to Article 13(1) SRM Regulation, the ECB or the national competent authorities have to inform the Board of any early intervention measure that they require an institution to take or they take themselves.[532] Without prejudice to the powers of the ECB and national competent authorities, the Board must, when receiving this information, prepare for the resolution of the institution concerned.[533]

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[530] See Article 29 SRM Regulation requires that the respective national resolution authority has to take the necessary actions to implement the Board's decision. The national resolution authority has to fully inform the Board of the exercise of those powers, and their actions have to comply with the Board's decisions pursuant to the SRM Regulation. They have to inform the Board of the exercise of the powers. If the national resolution authority does not apply or comply with the Boards decision, the Board can, after notifying the respective national resolution authority, directly order a financial institution under resolution to adopt any other necessary action to comply with the decision in question if the measure significantly addresses the threat to the relevant resolution objective or to the efficient implementation of the resolution scheme.

[531] See Article 12(14) SRM Regulation. While the Board has to determine the minimum requirement for own funds and eligible liabilities which the financial institutions are required to meet at all times, the national resolution authorities have to implement these determinations towards the financial institutions according to the Board's instruction.

[532] This includes early intervention measures pursuant to Article 16 SSM Regulation, Articles 27(1), 28, 29 BRRD or Article 104 CRD IV.

[533] See Article 13(2) SRM Regulation. Binder and Gortsos, *The Banking Union*, 58.

On this account, the ECB and the relevant national competent authority have to closely monitor, in cooperation with the Board, the conditions of the institution or the parent undertaking and their compliance with any early intervention measure. This allows the Board to update the resolution plan and prepare for the possible resolution of the institution and for valuation of the assets and liabilities of the institution in accordance with Article 20(1) - (15) SRM Regulation. The ECB or the relevant national competent authority have to provide the Board with all the necessary information.[534]

The Board has the power to require the institution to contact potential purchasers in order to prepare for the resolution of the institution. Furthermore, it can require the relevant national resolution authority to draft a preliminary resolution scheme for the institution or group concerned as stated in Article 13(3) SRM Regulation.
The Board has to inform the ECB, the relevant national competent authorities and national resolution authorities of any action it takes. If the ECB or the national competent authority concerned wants to impose additional intervention measures, it has to inform the Board before imposing them according to Article 13(4) SRM Regulation. The Board, the ECB, the national competent authorities and the national resolution authorities have to ensure that these additional measures as well as any other action of the Board which aims at preparing for resolution under Article 13(2) SRM Regulation are consistent.[535]

3. Repressive and Corrective Actions

Repressive and corrective actions are actions taken when difficulties have already become visible and there is a need for supervisory authorities to intervene to ensure the functioning of the system. It is at this supervisory stage that it becomes most evident whether a supervisory system is effective.[536] It is also at this stage that the new powers of the Authorities, besides their competences regarding executive rulemaking, have drawn the most attention. However, the powers of the ECB and the Board to intervene and take actions deserve a closer examination, too.

[534] See Article 13(2) subpara. 3 SRM Regulation.
[535] See Article 13(5) SRM Regulation.
[536] See Thiele, *Finanzaufsicht,* 214.

3.1 The ESFS

There are three different scenarios where the Authorities have the power to take repressive and corrective actions towards national competent authorities as well as in a final step towards financial institutions. The different scenarios comprise the breach of Union law,[537] emergency situations,[538] and disagreements between different national competent authorities.[539]

3.1.1 The Breach of Union Law

In the case of (a possible) breach of Union law, the Authorities can first of all investigate the alleged breach on their own initiative after having informed the respective national competent authority or upon a request from a national competent authority, the European Parliament, the Council, the Commission or the relevant stakeholder group. For the investigation, the national competent authorities have to provide the Authorities with all information necessary. If the respective Authority finds that Union law has been breached, it has to issue a recommendation to the national competent authority concerned stating the actions it considers necessary to comply with Union law. According to Article 17(3) EBA Regulation, the national competent authority has to inform the Authority within 10 working days of the steps it has taken or intends to take to ensure compliance with Union law.

If the respective national competent authority refuses to comply with Union law, the Commission can issue a formal opinion requiring the national competent authority to take the necessary action. The Commission's formal opinion has to take into account the Authority's recommendation. Following the Commission's formal opinion, the national competent authority has to inform the Commission and the Authority concerned of the steps it has taken or intends to take to comply with the Commission's formal opinion.[540]

If a national competent authority still does not comply with the Commission's formal opinion, and if the circumstances make it necessary to remedy the non-compliance to be able to restore or maintain neutral conditions of competition in the market or to ensure the orderly functioning and integrity of the financial system, the Authorities can, in accordance with Article 17(6) EBA Regulation, adopt an individual decision addressed to a financial institution requiring the

[537] See Article 17 EBA Regulation.
[538] See Article 18 EBA Regulation.
[539] See Article 19 EBA Regulation.
[540] See Article 17(5) EBA Regulation.

necessary action including the cessation of any practice. In addition, for the Authority to take that decision, the relevant requirements of the acts referred to in Article 1(2) EBA Regulation have to be directly applicable to financial institutions and financial market participants.
Those decisions of the Authorities prevail over any previous decision taken by the national competent authorities on the same matter. For future actions of the national competent authority which are subject to a formal opinion or a decision of the Commission or an Authority, the national competent authority has to comply with the formal opinion or the decision.[541] Pursuant to Article 17(8) EBA Regulation, the respective Authority has to state in its annual report which national competent authorities and financial institutions have not complied with formal opinions or decisions ("naming and shaming"), Article 17(8) EBA Regulation.

3.1.2 Emergency Situations and Exceptional Circumstances

In emergency situations, the Authorities have to actively facilitate and when necessary, coordinate actions undertaken by the relevant national competent authorities according to Article 18(1) EBA Regulation. To be able to perform this task, the respective Authority has to be fully informed of any relevant developments. It has to be invited to participate as an observer in any relevant gathering by the respective national competent authorities.[542]
The existence of an emergency situation is determined by the Council, by adopting, in consultation with the Commission, the ESRB, and where appropriate with the Authorities, a decision addressed to the respective Authority. If the decision is not renewed at the end of a one-month period, it automatically expires.[543] If such an emergency situation has been declared by the Council and if coordinated action by the national competent authorities is necessary, Authorities can adopt individual decisions requiring national competent authorities to take the necessary action in accordance with the legislation referred to in Article 1(2) EBA Regulation. If a national competent authority does not comply with the Authority's decision, does not apply the legislative acts referred to in Article 1(2) EBA Regulation, or applies them in a way which appears as to be a breach of those acts, and urgent remedying is necessary, the Authority can, if the relevant requirements laid down in the legislative acts referred to in Article 1(2) EBA Regulation are directly applicable to financial institutions and financial market participants,

[541] See Article 17(7) Article EBA Regulation.
[542] See Article 18(1) subpara. 2 EBA Regulation.
[543] See Article 18(2) EBA Regulation.

adopt an individual decision addressed to a financial institution or financial market participant requiring the necessary action to comply with its obligation under that legislation, including the cessation of any practice.[544]

Pursuant to Article 9(5) EBA Regulation, the Authorities can temporarily prohibit or restrict financial activities in the cases specified in the legislative acts referred to in Article 1(2) EBA Regulation or in case of an emergency situation, if these financial activities threaten the orderly functioning and integrity of financial markets or the stability of the financial system in the European Union. If there is a need to prohibit or restrict certain types of financial activities permanently, the Authority concerned has to inform the Commission and the national competent authorities in order to facilitate the adoption of any such prohibition or restriction, Article 9(5) subpara. 4 EBA Regulation.[545]

With regard to supervising financial markets, chapter 5 of the Short Selling Regulation lists the different powers of intervention national competent authorities and ESMA have in case of exceptional circumstances or in case of a significant fall in price.[546] Articles 26, 27 and 28 Short Selling Regulation are of particular relevance for this work. While Articles 18, 19, 20, 21 and 23 Short Selling Regulation allow national competent authorities to take certain measures and restrictions, Article 26 and 27 govern the involvement of and the cooperation with ESMA and put ESMA in a facilitating and coordinating role.[547]
According to Art. 27(1) Short Selling Regulation ESMA first of all has to ensure that different national competent authorities take a consistent approach when taking their measures and restrictions, especially regarding the use of power of intervention, the nature of measures imposed and the commencement and duration of the measures taken. To ensure that, national competent authorities have to inform ESMA and the other national competent authorities before

[544] See Article 18(4) EBA Regulation.
[545] In contrast to these only temporarily intervention powers, ESMA has farther-reaching powers regarding intervention powers in exceptional circumstances, for this see Article 28 Short Selling Regulation.
[546] Exceptional circumstances exist if there are adverse events or developments which constitute a serious threat to financial stability or to market confidence in the Member State concerned or in one or more other Member States.
[547] See Articles 18, 19 Short Selling Regulation cover notification and disclosure duties of financial market actors (Article 18) and lenders (Article 19) regarding net short positions in exceptional circumstances; Article 20 Short Selling Regulation deals with restrictions on short selling and similar transactions in exceptional circumstances; Article 21 Short Selling Regulation covers restrictions on sovereign credit default swap transactions in exceptional circumstances; and Article 23 Short Selling Regulation contains the power to temporarily restrict short selling of financial instruments in case of a significant fall in price.

imposing or renewing any measure under Articles 18, 19, 20, 21 or 23 Short Selling Regulation.[548] ESMA has to issue an opinion within 24 hours on whether it considers the measure necessary to address the exceptional circumstances.[549] The opinion is published on ESMA's website.[550]

If ESMA considers it necessary for the other national competent authorities to take measures to address the threat, it has to state this in its opinion. ESMA has to review the measures regularly.[551] If a national competent authority wants to take measures contrary to ESMA's opinion or does not take measures recommended in ESMA's opinion, the national competent authority has to publish on its website within 24 hours a notice fully explaining its reasons for doing so. In such a case, ESMA itself can take actions and, if the conditions are satisfied and the case is appropriate, use its power under Article 28 Short Selling Regulation.

If a national competent authority wants to temporarily restrict short selling of financial instruments due to a significant fall of price, the respective national competent authority has to inform ESMA about the decision taken.[552] ESMA has to immediately inform the national competent authorities of the home Member States of venues which trade the same financial instrument.[553]

If a national competent authority disagrees with the action taken by another national competent authority on a financial instrument traded on different venues and regulated by different national competent authorities, ESMA can assist those national competent authorities in reaching an agreement in accordance with Article 19 ESMA Regulation. If the national competent authorities fail to reach an agreement within the conciliation phase, ESMA can take a decision in accordance with Article 19(3) ESMA Regulation. This decision has to be taken before the opening of the next trading day.

If financial activities address a threat to the orderly functioning and integrity of the financial markets or to the stability of the whole or part of the financial system in the European Union,

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[548] Furthermore, a national competent authority which wants to impose or renew a measure under Articles 18, 19, 20 or 21 in relation to a financial institution for which it is not the relevant national competent authority, can only do that with the consent of the relevant national competent authority, see Article 22 Short Selling Regulation.
[549] Issuing an opinion is not required if exceptional circumstances occur, see Article 28 Short Selling Regulation.
[550] In the opinion, ESMA has to state if it believes that adverse events or developments have arisen which constitute a serious threat to financial stability or to market confidence, if the measure is appropriate and proportionate to address the threat, and if the duration of the measure is justified, see Article 27(2) Short Selling Regulation.
[551] See Article 27(3) Short Selling Regulation.
[552] See Article 23 Short Selling Regulation.
[553] See Article 23(4) Short Selling Regulation.

ESMA can use its intervention powers stated in Article 28(1) Short Selling Regulation. According to Article 28(2)(a) Short Selling Regulation, and contrary to Article 18 EBA Regulation, ESMA has the power to decide if there is an emergency situation and if it has to take any actions.[554]

Further requirements for the use of the intervention power are that there have to be cross-border implications, and either none of the national competent authorities has taken any action to address the threat or one or more national competent authorities have taken measures that do not adequately address the threat, Article 28(2) Short Selling Regulation. If those conditions are met, ESMA can, in accordance with Article 9(5) EBA Regulation, (a) require natural or legal persons who have net short positions in relation to a specific financial instrument or class of financial instruments to notify a national competent authority or to disclose to the public details of any such position; or (b) prohibit or impose conditions on the entry by natural or legal persons into a short sale or a transaction which creates, or relates to, a financial instrument other than financial instruments referred to in point (c) of Article 1(1) where the effect or one of the effects of the transaction is to confer a financial advantage on such person in the event of a decrease in the price or value of another financial instrument.

Before taking a decision and imposing or renewing any measure, ESMA has to consult the ESRB and, if appropriate, other relevant authorities. Furthermore, ESMA has to notify the national competent authority concerned, first of the measure it proposes to take and second to inform the national competent authority concerned after deciding to impose or renew any one of the measures taken.[555] A measure adopted by ESMA under this Article prevails over any

[554] Pursuant to Article 30 Short Selling Regulation, the Commission has to adopt delegated acts specifying criteria and factors to be taken into account by the national competent authorities and by ESMA in determining in which cases the adverse events or developments referred to in Articles 18 to 21, Article 27 and the threats referred to in Article 28(2)(a) Short Selling Regulation arise. This question is one of the main issues the Court of Justice had to deal with in its short selling ruling, C-270/12, *Short selling* (Court of Justice 22 January 2014). In this judgement, the Court had to answer the question if Article 28 Short Selling Regulation is compatible with Primary Law. The UK wanted the Court to annul Article 28 Short Selling Regulation since it considered ESMA's powers as not being compatible with Primary Law. Pursuant to Article 28 Short Selling Regulation, ESMA has the power to determine if there is an emergency situation and furthermore can inter alia prohibit short sales in specific situations. According to the system of the Authority's founding regulation, only the Council has the power to determine the existence of an emergency situation, see Article 18(1) EBA Regulation. In case of emergency situations relating to sovereign debt or sovereign credit default swaps this still holds true and the regular procedure applies, see Article 29 Short Selling Regulation, and Articles 18 and 38 EBA Regulation apply. Here the Council decides if an emergency situation exists. The Court of Justice ruled that ESMA's powers do not imply elements of discretion but are merely of a technical nature and therefore Article 28 Short Selling Regulation is compatible with Union law. For more information on the judgement see Natalia Kohtamäki, 'Die ESMA darf Leerverkäufe regeln – Anmerkung zum Urteil des EuGH vom 22. Januar 2014' (2014) 49, Europarecht, 321; Christoph Ohler, 'Anmerkung - Rs. C-270/12' (2014) 69, Juristen Zeitung, 249.

[555] See Article 28(8) Short Selling Regulation.

previous measure taken by a national competent authority under Section 1, cf. Article 28(11) Short Selling Regulation.

Furthermore, ESMA is involved in the suspension of restrictions on uncovered short sales in sovereign debt according to Article 13 Short Selling Regulation and on uncovered sovereign credit default swaps according to Article 14 Short Selling Regulation. If a national competent authority wants to suspend restrictions regarding the uncovered short sales in sovereign debt or the restrictions on uncovered sovereign credit default swaps, it has to inform ESMA and the other national competent authorities about the proposed suspension. ESMA then has to issue an opinion within 24 hours which has to be published on its website.

3.1.3 Disagreements between Different National Competent Authorities

In case of a disagreement between different national competent authorities, the competent Authority can, at the request of one or more national competent authorities concerned, assist the national competent authorities in reaching an agreement according to the procedure set down Article 19 EBA Regulation. At this first stage, the respective Authority takes the role of a mediator. The Authority concerned sets a time limit for conciliation between the national competent authorities. If the national competent authorities fail to reach an agreement within this set timeframe, the national competent authorities involved enter stage two of the reconciliation process.

At this point, the respective Authority has the power to take a binding decision requiring the national competent authorities to take specific action or to refrain from action in order to settle the matter. If one or all national competent authorities do not comply with the Authority's decision and if that leads to failing to ensure that a financial institution or financial market participant complies with requirements directly applicable to it, the Authority concerned can adopt, as stage three, an individual decision addressed to the financial institution or financial market participant in which it requires the necessary action.

Those decisions prevail over any previous decision adopted by the national competent authority on the same matter, and any action taken by the national competent authority at a later stage in relation to issues which are subject to this decision has to be compatible with the decision. In

case of disagreements regarding colleges of supervisors, the Authorities have the same powers as listed in Article 19 EBA Regulation.[556]

3.1.4 Safeguards

In Article 38, the EBA Regulation contains safeguard measures regarding Articles 18 and 19 EBA Regulation. First of all, the Authorities have to ensure that none of their decisions adopted if there is a breach of Union law or in emergency situations impinge in any way on the fiscal responsibilities of the Member States.

In case of emergency situations, when a Member State believes that a decision taken pursuant to Article 18(3) EBA Regulation impinges on its fiscal responsibilities, this Member State can notify the respective Authority, the Commission and the Council within three working days so that the national competent authority concerned will not implement said decision.[557] The Authority's decision is suspended until the Council takes its decision on the matter. The Council has to decide (by a simple majority of its members) if it revokes the Authority's decision. If the Council does not revoke the Authority's decision, the suspension of that decision is terminated.[558]

If the Member State concerned still thinks that the decision of the Authority impinges upon its fiscal responsibility, the Member State can notify the Commission and the respective Authority and request the Council to re-examine the matter in accordance with Article 38(4) EBA Regulation. The Council can either confirm its decision or take a new decision according to Article 38(3) EBA Regulation.

In case of settlements of disagreements according to Article 19(3) EBA Regulation where a Member State believes a binding decision of the Authority impinges on its fiscal responsibility, the respective Member State can notify the Authority and the Commission that this decision will not be implemented by the national competent authority concerned. The decision of the Authority is suspended.[559] Within one month, the respective Authority has to inform the Member State whether it maintains its decision or whether it amends or revokes it. If the Authority maintains its decision, the Council has to take a decision by a majority of the vote

[556] See Article 21(4) EBA Regulation.
[557] This safeguard measure does not apply to individual decisions addressed to a financial institution or financial market participant pursuant to Article 18(4) EBA Regulation.
[558] See Article 38(3) EBA Regulation.
[559] See Article 38(2) EBA Regulation.

cast as to whether the Authority's decision is maintained. If the Council does not take a decision to maintain Authority's decision, this decision has to be terminated.[560]

3.1.5 ESMA's Supervisory Measures in Case of Infringements by Credit Rating Agencies

If a credit rating agency commits one of the infringements listed in Annex III[561] of Regulation on Credit Rating Agencies, ESMA's Board of Supervisors has the power to take supervisory measures in accordance with Article 24(1) Regulation on Credit Rating Agencies.[562] In addition, the Board of Supervisors can impose a fine in accordance with Article 36a Regulation on Credit Rating Agencies.[563]

Even before such an infringement is certain and there are only serious indications of the possible existence of an infringement listed in Annex III of the Regulation on Credit Rating Agencies, ESMA has the power to appoint an independent investigating officer within ESMA to investigate the matter further.[564] On the basis of the investigating officer's findings, ESMA's Board of Supervisors decides if the person who was the subject of the investigation has committed one of the infringements listed in Annex III of the Regulation on Credit Rating Agencies.

If, furthermore, ESMA finds that there are serious indications of the possible existence of facts liable to constitute a criminal offense, it has to refer the matter for criminal prosecution to the relevant national authority.[565] It has to refrain from imposing fines or periodic penalty payments if there has been an acquittal or a conviction regarding identical or substantially similar facts which acquired the force of res judicata as the result of criminal proceedings under national law.

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[560] See Article 38(2) subpara. 4-6 EBA Regulation.

[561] Infringements listed in Annex III of the Regulation on Credit Rating Agencies include infringements related to conflicts of interest, organizational or operational requirements, infringements related to obstacles to the supervisory activities and infringements related to disclosure provisions.

[562] Pursuant to Article 24(1) Regulation on Credit Rating Agencies, ESMA can take the following decisions: ESMA can (a) withdraw the registration of the credit rating agency, (b) temporarily prohibit the credit rating agency from issuing credit ratings with effect throughout the EU until the infringement has been brought to an end, (c) suspend the use, for regulatory purposes, of the credit ratings issued by the credit rating agency with effect throughout the EU until the infringement has been brought to an end, (d) require the credit rating agency to bring the infringement to an end and (e) issue public notices.

[563] See Article 23e(5) Regulation on Credit Rating Agencies. The Commission has to adopt the rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including provisions on rights of defense, temporal provisions, and the collection of fines or periodic penalty payments, and has to adopt detailed rules on the limitation periods for the imposition and enforcement of penalties, see also Article 23e(7) Regulation on Credit Rating Agencies.

[564] See Article 23e(1) Regulation on Credit Rating Agencies.

[565] See Article 23e(8) Regulation on Credit Rating Agencies.

Moreover, if a national competent authority finds that acts infringe or have infringed the Regulation on credit rating agencies, it has to inform ESMA. ESMA then has to take appropriate action and inform the notifying national competent authority of all significant developments and the specific outcome.[566] If a national competent authority believes that a registered credit rating agency whose credit ratings are used within the territory of that Member State breaches the obligations arising from this regulation and the infringements are sufficiently serious and persistent to have a significant impact on the protection of investors or on the stability of the financial system in that Member State, it can request that ESMA suspends the use of that credit rating agency's credit ratings. If ESMA thinks that the request is justified, it has to take the appropriate measures to resolve the case. Otherwise, it has to inform the respective national competent authority.[567]

3.2 The ECB's Supervisory Powers

The ECB's own supervisory powers towards significant supervised entities are stated in Article 16 SSM Regulation.[568] According to Article 16 SSM Regulation, the ECB has the power to require any significant supervised entity at an early stage to take the necessary measures to address the relevant problems in case the financial institution does not meet or is likely to breach the requirements of the acts referred to in Article 4(3) subpara. 1 SSM Regulation within the next 12 months. In addition, the ECB can require a financial institution to take the necessary measures, if the arrangements, strategies, processes and mechanisms implemented by the financial institution and the own funds and liquidity held by it do not ensure a sound management and coverage of its risks.[569] In these cases, the ECB can require the respective financial institution to take any of the actions stated in Art. 16(2) SSM Regulation.[570]

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[566] See Article 31(1) Regulation on Credit Rating Agencies.
[567] See Article 31(2) Regulation on Credit Rating Agencies.
[568] See Ohler, *Bankenaufsicht*, § 5, paras 229-234. These powers basically comply with Article 104 CRD IV, which states the supervisory powers of the national competent authorities.
[569] Such a decision by the ECB would be based on a determination in the framework of a supervisory review in accordance with Article 4(1)(f) SSM Regulation.
[570] According to Art. 16(2) SSM Regulation, these measures are: (a) to hold own funds in excess of the capital requirements laid down in the acts referred to in the first subparagraph of Article 4(3) SSM Regulation related to elements of risks and risks not covered by the relevant European Union acts, (b) to reinforce the arrangements, processes, mechanisms and strategies of the institution, (c) to present a plan to restore compliance with supervisory requirements pursuant to the acts referred to in the first subparagraph of Article 4(3) SSM Regulation and set a deadline for its implementation, including improvements to that plan regarding scope and deadline, (d) to apply a specific provisioning policy or treatment of assets in terms of own funds requirements, (e) to restrict or limit the business, operations or network of institutions or to request the divestment of activities that pose excessive risks to the soundness of an institution, (f) to reduce the risk inherent in the activities, products and systems of

These legal consequences capture all areas of the banking business and are, in part, significant interventions in the banking business. To exercise these competences, the ECB has to take a decision according to Article 22 SSM Regulation. When taking such a decision according to Article 22 SSM Regulation, the ECB has a considerable degree of leeway regarding the enforcement of secondary supervisory law.[571]

3.3 Banking Resolution

The Board disposes over different competences regarding banking resolution. The Board has the power to write down or convert relevant capital instruments if one of the conditions in Article 21(1)(a)-(e) SRM Regulation is met.[572] If the Board determines that one or more of the conditions are met but the conditions for resolution in accordance with Article 18(1) SRM Regulation are not met, it has to instruct the national resolution authorities to exercise the write-down or conversion powers in accordance with Articles 59 and 60 BRRD.[573]

Before national resolution authorities exercise the power to write down or convert relevant capital instruments, the Board has to ensure that a valuation of the assets and liabilities of this entity or group is carried out in accordance with Article 20 SRM Regulation. Pursuant to Article 21(10) SRM Regulation, the Board has to ensure that the national resolution authorities exercise the write-down or conversion powers without delay. The national resolution authorities have to implement the instructions of the Board and exercise the write-down or conversion of relevant capital instruments in accordance with Article 29 SRM Regulation, Article 21(11) SRM Regulation.

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institutions, (g) to limit variable remuneration as a percentage of net revenues when it is inconsistent with the maintenance of a sound capital base, (h) to use net profits to strengthen own funds, (i) to restrict or prohibit distributions by the institution to shareholders, members or holders of Additional Tier 1 instruments where the prohibition does not constitute an event of default of the institution, (j) to impose additional or more frequent reporting requirements, including reporting on capital and liquidity positions, (k) to impose specific liquidity requirements, including restrictions on maturity mismatches between assets and liabilities, (l) to require additional disclosures or (m) to remove at any time members from the management body of credit institutions who do not fulfil the requirements set out in the acts referred to in Article 4(3) subpara. 1 SSM Regulation.

[571] See Ohler, *Bankenaufsicht*, § 5, para 232.

[572] Write-down and the conversion of capital instruments are not resolution tools in a narrow sense. But in the BRRD it is stated as one possible resolution action of the NRAs and it has to be used prior to any bail-in. Before deciding on the exercise of the power to write down or convert relevant capital instruments, the Board has to ensure that a fair, prudent and realistic valuation of the assets and liabilities of an entity is carried out by a person independent from any public authority, see Article 20(1) SRM Regulation. Where such an independent valuation is not possible, the Board can carry out a provisional valuation, see Article 20(3) SRM Regulation.

[573] See Article 21(8) SRM Regulation. Binder and Gortsos, *The Banking Union*, 62.

In addition, when the Board decides to apply a resolution tool according to Article 22(2) SRM Regulation to a financial institution or group and when that resolution action would result in losses being borne by creditors or their claims being converted, the Board has to instruct the national resolution authorities to exercise the power to write down and convert relevant capital instruments before or together with the application of the resolution tool.

According to Article 18(1) SRM Regulation, the Board has to adopt a resolution scheme when it assesses, in its executive session, on receiving a communication by the ECB, or on its own initiative, that a financial institution is failing or is likely to fail. Moreover, it has to adopt a resolution scheme if there is no reasonable prospect that any alternative private sector measures or supervisory action, including early intervention measures, would prevent its failure within a reasonable timeframe or a resolution action is necessary in the public interest.
When adopting a resolution scheme, the Board, the Council and the Commission have to take into account and follow the resolution plan as referred to in Article 8 SRM Regulation unless the Board assesses that the resolution objectives will be achieved more effectively by taking actions which are not provided for in the resolution plan. The resolution scheme places the entity under resolution and states the details of the resolution tools which have to be applied to the institution under resolution by the national resolution authorities according to the respective national law.[574]
Furthermore, it determines the use of the Fund to support the resolution action.[575] In addition, it outlines the resolution actions that should be taken by the Board in relation to the Union parent undertaking or particular group entities established in the participating Member States.[576]
After the Board adopts the resolution scheme, it has to transmit it to the Commission, which

[574] Pursuant to Article 22(1) SRM Regulation, this includes the resolution tools referred to in Article 24(2) SRM Regulation (sale of business tools), Article 25(2) SRM Regulation (bridge institution tool), Article 26(2) SRM Regulation (asset separation tool) and Article 27(1) SRM Regulation (bail-in tool). Before deciding on resolution actions, the Board has to ensure that a fair, prudent and realistic valuation of the assets and liabilities of an entity is carried out by a person independent from any public authority according to Article 20(1) SRM Regulation. Where such an independent valuation is not possible, the Board can carry out a provisional valuation, see Article 20(3) SRM Regulation.
[575] See Articles 18(6), 23(1) SRM Regulation. If the resolution action involves the granting of state aid pursuant to Article 107(1) TFEU or of Fund aid, the resolution scheme cannot be adopted until the Commission has adopted a positive or conditional decision concerning the compatibility of the use of such aid with the internal market, see Article 19(1) SRM Regulation. This decision can lay down obligations on the Board, the national resolution authorities, Member States or beneficiaries to enable compliance with it and has to be addressed to the Board and to the national resolution authority or Member State concerned, see Article 18(3) subpara. 5, 6 SRM Regulation.
[576] Resolution actions are the decision to place an entity under resolution, see Article 18 SRM Regulation, the application of a resolution tool, or the exercise of one or more resolution powers, see Article 3(1)(10) SRM Regulation.

then can either endorse the resolution scheme or object to it with regard to the discretionary aspects of the resolution scheme in the cases not covered in Article 18(7) subpara. 3 SRM Regulation.[577] The resolution scheme can only enter into force if no objection has been expressed by the Council or by the Commission within 24 hours after its transmission by the Board. If there are any objections, the Board has to modify the resolution scheme in accordance with the reasons expressed.

If a resolution scheme is adopted, the Board has to ensure that the relevant national resolution authorities are taking the necessary resolution action to carry out the resolution scheme according to Article 18(9) SRM Regulation.[578] Because of that, the resolution scheme is addressed to the relevant national resolution authorities and instructs the national resolution authorities, which take the necessary measures to implement the resolution scheme by exercising resolution powers. The national resolution authorities are exercising their resolution powers on the basis of the Board's resolution scheme. They have to implement the necessary resolution action to carry out the resolution scheme in accordance with Article 29.[579]
The respective national resolution authority has to fully inform the Board of the exercise of those powers and their actions have to comply with the Board's decisions pursuant to the SRM according to Article 29(1) SRM Regulation. The Board has to closely monitor the execution of the resolution scheme by the national resolution authorities.[580] The national resolution authorities have to cooperate with and assist the Board in the performance of its monitoring duty and provide information on the execution of the resolution scheme, the application of the resolution tools and the exercise of the resolution powers that might be requested by the Board. They have to submit to the Board a final report on the execution of the resolution scheme.

[577] See Article 18(7) subpara. 3 SRM Regulation covers the grounds on which the Council can object (on proposition of the Commission). The Council can object to the resolution scheme on the ground that the resolution scheme adopted by the Board does not fulfil the criterion of public interest referred to in Article 18(1)(c) SRM Regulation or to approve or object to a material modification of the amount of the Fund provided for in the resolution scheme of the Board. If the Council objects to the placing of an institution under resolution on the ground that the public interest criterion is not fulfilled, the relevant entity has to be wound up in an orderly manner in accordance with the applicable national law. The Council thereby has the power to hand back the resolution procedure to the Member States' national authorities, see Article 8(8) SRM Regulation.
[578] The Board has the power to obtain from any person, in accordance with Articles 34 et seq. SRM Regulation, any information necessary for it to prepare and decide upon a resolution action, including updates and supplements of information provided in the resolution plans.
[579] See Article 18(9) SRM Regulation. This is similar to the procedure in Article 17(1) SRM Regulation regarding the application of a bail-in tool, where the decision on the exercise of the write-down and conversion powers is also taken by the Board and the respective NRA then has to exercise these powers.
[580] See Article 28(1) SRM Regulation.

Furthermore, the Board can give instructions to the national resolution authorities on any aspect of the execution of the resolution scheme and on exercising the resolution powers.[581]

If a national resolution authority does not apply or comply with the Board's decision or applies it in a way which poses a threat to any of the resolution objectives or to the efficient implementation of the resolution scheme, the Board can use resolution powers towards the financial institution under resolution. It can for this purpose order a financial institution under resolution to transfer to another person specified rights, assets or liabilities of an institution under resolution or to require the conversion of any debt instruments which contain a contractual term for conversion in the circumstances provided for in Article 21 SRM Regulation. Moreover, the Board can order the financial institution under resolution to adopt any other necessary action to comply with the decision in question, but only if the measure significantly addresses the threat to the relevant resolution objective or to the efficient implementation of the resolution scheme.[582]

Before the Board decides to impose a measure, it has to notify the respective national resolution authority and the Commission. It has to include reasoned details of the envisaged measures as well as information about when the measures are intended to take effect. The Board has to notify the respective national resolution authority and the Commission not less than 24 hours before the measures are to take effect. The respective institution has to comply with the Board's decision which prevails over any previous decision adopted by the national resolution authority on the same matter.[583] If a national resolution authority takes further actions in relation to that issue, these actions have to comply with the Board's decision according to Article 29(4) SRM Regulation.

Last but not least, when deciding on the application of resolution tools and the exercise of resolution powers, the Board has to instruct national resolution authorities to inform and consult employee representatives where appropriate.[584]

3.4 Fines and Penalties

If a financial institution breaches a requirement under relevant, directly applicable acts of Union law and administrative pecuniary penalties are available to national competent authorities under

[581] See Article 28(2) SRM Regulation.
[582] See Article 29(2) SRM Regulation.
[583] See Article 29(3) SRM Regulation.
[584] See Article 15(4) SRM Regulation.

Union law, the ECB can impose these administrative pecuniary penalties to the respective financial institution in accordance with Article 18(1) SSM Regulation.[585]
When deciding whether to impose a penalty and when determining which one would be the appropriate one, the ECB has to cooperate closely with the national competent authorities.[586]
Regarding significant entities in cases not covered by Article 18(1) SSM Regulation, the ECB can instruct national competent authorities to open proceedings with a view to taking actions in order to ensure that appropriate penalties are imposed. This is especially the case when the breaches take place with regard to national law transposing relevant directives.[587]
Regarding less significant entities, the relevant national competent authority has to notify the ECB on a regular basis of all administrative penalties imposed which the ECB then has to publish.[588]

When ECB regulations or decisions are breached, the ECB can impose sanctions in accordance with Council Regulation (EC) No 2532/98 and Article 18(7) SSM Regulation. While in the case of Article 18(1) SSM Regulation a breach of secondary legislation exists, in cases of Article 18(7) SSM Regulation, the breach of an individual decision, very often an ECB's supervisory decision, is in question. Regarding those sanctions, the ECB has only somewhat limited powers. The narrow framework can be traced to Article 132(3) TFEU which makes it possible for the ECB to impose fines and periodic penalty payments.[589] Those sanctions are imposed through a decision according to Article 22 SSM Regulation through the Supervisory Board and the ECB's Governing Council.[590]
In general, it is extraneous if the breach has been made by a significant or less-significant credit institution. But in the case of a less significant credit institution pursuant to Article 122(2)(b) SSM Framework regulation, the ECB can only impose fines and periodic penalty payments

[585] The ECB's competence to use Article 18(1) SSM Regulation is accessory to the legal requirements in EU secondary legislation. See Ohler, *Bankenaufsicht*, § 5, paras 237 et seq.
[586] See Articles 18(3), 9(2) SSM Regulation.
[587] See Article 18(5) SSM Regulation and Article 134 SSM Framework Regulation.
[588] See Article 18(6) SSM Regulation and Article 135 SSM Framework Regulation.
[589] See Article 2(1) Council Regulation (EC) No 2532/98.
[590] Pursuant to Article 26(8) SSM Regulation, the Supervisory Board carries out the preparatory work regarding the supervisory tasks and proposes to the Governing Council a complete draft decision. This draft decision is also transmitted to the national competent authorities concerned. The draft decision is adopted if the Governing Council does not object within a defined period (this period does not exceed 10 working days and in emergency situations it does not exceed 48 hours). See Ohler, *Bankenaufsicht*, § 5, paras 237 et seq.

according to Article 18(7) SSM Regulation if the relevant ECB regulations and decisions impose obligations on less significant entities vis-à-vis the ECB.

Because of the very few options to impose administrative penalties and sanctions, the ECB has to rely on the assistance of the national competent authorities if it wants to use other enforcement measures. Article 11(2) subpara. 2 and Article 12(5) SSM Regulation are applicable in these cases and oblige the respective national competent authority to provide the necessary assistance, always in conformity with its national law. Pursuant to Article 6(3) SSM Regulation, the ECB can give instructions which the national competent authorities have to follow. This possibility also exists in other areas where the ECB has the power to take supervisory decisions but does not have coercive powers to enforce them. The legal basis for these instructions is Article 6(2), 9(1) subpara. 3 SSM Regulation.[591]
In addition, if the ECB has reason to suspect that a criminal offence might have been committed, it has to request the relevant national competent authority to refer the matter to the appropriate authorities for investigation and possible criminal prosecution, in accordance with national law.[592]
Even though, according to Article 18(4) SSM Regulation, Council Regulation (EC) No 2532/98 is applicable, and this Council regulation is part of the competence of the ECB's monetary policy, the Supervisory Board and not the Executive Board is responsible for the administrative penalties and sanctions. Because of that, it is the Supervisory Board that prepares a draft decision and submits it to the ECB's Governing Council, cf. Article 127(8), (9) SSM Framework Regulation.[593]

Where the Board finds that a designated entity has intentionally or negligently committed one of the infringements listed in Article 38(2) SRM Regulation, the Board has to take a decision imposing a fine in accordance with Article 38(3) SRM Regulation.[594] In cases not covered by Article 38(2) SRM Regulation, the Board can recommend to national resolution authorities that

[591] The Party concerned can seek legal protection only against the supervisory decision of the national competent authority and not against the ECB's instruction. The instruction only takes effect in the inner-administration relationship between the ECB and the national competent authority concerned. Ibid., 162 et seq.
[592] See Article 136 SSM Framework Regulation.
[593] See Ohler, *Bankenaufsicht,* § 5, para 237.
[594] See Article 38(2) SRM Regulation lists the following infringements: First of all, not supplying the information requested in accordance with Article 34 SRM Regulation, second, not submitting to a general investigation in accordance with Article 35 SRM Regulation or an on-site inspection in accordance with Article 36 SRM Regulation; third, not complying with a decision addressed to them by the Board pursuant to Article 29 SRM Regulation.

they take action in order to ensure that appropriate penalties are imposed in accordance with Articles 110 to 114 of the BRRD and with any relevant national legislation.[595]
In addition, the Board can, by decision, impose a periodic penalty payment on a financial institution in order to compel either that financial institution to comply with a decision regarding the request of information or employees of that financial institution as well as third parties to whom that financial institution has outsourced functions or activities to supply complete information. Furthermore, the Board can impose such a periodic penalty payment to compel a person referred to in Article 35(1) SRM Regulation to submit to an investigation and to produce complete records, data, procedures or any other material required and to complete and correct other information provided in an investigation launched by a decision taken pursuant to Article 35 SRM Regulation, or a person referred to in Article 36(1) SRM Regulation to submit to an on-site inspection ordered by a decision taken pursuant to Article 36 SRM Regulation.

Pursuant to Article 41 Short Selling Regulation, ESMA has to adopt guidelines in accordance with ESMA Regulation to ensure that a consistent approach is taken by the Member States when they establish rules on penalties and administrative measures applicable to infringements of the Short Selling Regulation. The Member States have to inform the Commission and ESMA of the provisions and have to notify them without delay of any subsequent amendment affecting those provisions. ESMA publishes on its website a list of existing penalties and administrative measures applicable in each Member State. The Member States notify ESMA annually of the penalties and administrative measures imposed.
Moreover, ESMA has the power to adopt a decision imposing a fine according to Article 36a(2) Regulation on Credit Rating Agencies where, in accordance with Article 23e(5) Regulation on Credit Rating Agencies, ESMA's Board of Supervisors finds that a credit rating agency has, intentionally or negligently, committed one of the infringements listed in Annex III of the Regulation on Credit Rating Agencies.
Furthermore, ESMA's Board of Supervisors can impose a periodic penalty payment in order to compel a credit rating agency to put an end to an infringement; a person referred to in Article 23b(1) Regulation on Credit Rating Agencies to supply complete information which has been required by a decision pursuant to Article 23b Regulation on Credit Rating Agencies; a person

[595] See Article 38(8) SRM Regulation.

referred to in Article 23b(1) Regulation on Credit Rating Agencies to submit to an investigation and in particular to produce complete records, data, procedures or any other material required and to complete and correct other information provided in an investigation launched by a decision taken pursuant to Article 23c Regulation on Credit Rating Agencies; or a person referred to in Article 23b(1) Regulation on Credit Rating Agencies to submit to an on-site inspection.[596]

Fines and periodic penalty payments imposed pursuant to Articles 38, 39 SRM Regulation and Articles 36a, 36b Regulation on Credit Rating Agencies are of an administrative nature and are enforceable.[597] The enforcement is governed by the applicable procedural rules in force in the respective participating Member State. The order for its enforcement has to be appended to the decision with the verification of the decision's authenticity by the respective Member State's designated authority.

4. Conclusion

In the previous section, the existing supervisory instruments and powers of the different supervisory actors have been scrutinized and their execution and implementation have been outlined. The Authorities' founding regulations confer different supervisory powers to the Authorities and the national competent authorities. The powers of the Authorities are mainly of a coordinative nature. Only in a few cases do the Authorities have direct supervisory powers and the final decision-making power. The national competent authorities, besides their day-to-day supervisory tasks, have to carry out the "legwork". This is especially the case with regard to the acquisition and the exchange of information.

The special role of the Authorities regarding the exchange of information is highlighted in several provisions, cf. for example Articles 29(1)(b), 31 subpara. 2(a), (b), (f) EBA Regulation. In most of the cases, it is mainly the Authorities' task to ensure an adequate exchange between the different national competent authorities. However, sometimes they even have to verify the available information.
In addition, they also have to collect information from the respective national competent authorities according to Article 35 EBA Regulation. If it turns out that this is not sufficient, the

[596] See Article 24(1)(d) Regulation on Credit Rating Agencies.
[597] See Article 41(2), (3) SRM Regulation and Article 36d(2), (3) Regulation on Credit Rating Agencies.

Authorities can request information from the financial institutions and financial market participants. In that case, the Authority can request the national competent authority concerned to assist it in collecting the information. This shows the supporting role the national competent authorities play in certain situations. Last but not least, Authorities also play an important role regarding the acquisition and exchange of information with respect to systemic risk and the resolution of financial institutions.

With regard to ESMA, the acquisition and the exchange of information is also important. ESMA can request all the necessary information from the credit rating agencies directly or, pursuant to Article 31 Short Selling Regulation, conduct an inquiry into a particular issue or practice relating to short selling. Moreover, ESMA and the national competent authorities have to supply each other with all the information necessary or in certain cases have to pass on the information to ESMA.[598] In addition, ESMA has the task of publishing different kinds of information on its website according to Articles 8b(1), 8d(2), 11(2), 11a(2) Regulation on Credit Rating Agencies.

Regarding preventive and accompanying actions, the Authorities first and foremost play an active role in building a common European Union supervisory culture and consistent supervisory practice. In addition, it is their task to ensure uniform procedures and consistent approaches throughout the European Union, Article 29 EBA Regulation, by fulfilling a general coordination role between national competent authorities.

They fulfil these requirements by issuing opinions, recommendations, guidelines and in some cases even warnings which have to be respected and taken into account by the respective national competent authority. The national competent authorities have to make every effort to comply with the guidelines and recommendations. If they do not comply, they have to state the reasons ("comply or explain") and it will be published by the respective Authority ("naming and shaming").

But there are also three scenarios where the Authorities have direct supervisory powers. These scenarios are: the breach of Union law, emergency situations, and disagreements between different national competent authorities. In all three scenarios, the respective national competent authorities are still involved, and the Authorities' powers towards financial

[598] See Articles 23b(1), 27(1) Regulation on Credit Rating Agencies, Articles 35, 36 Short Selling Regulation for supplying the necessary information and Article 11 Short Selling Regulation for passing information to ESMA.

institutions only come into effect if there is a breach of Union law by the respective national competent authority.

In contrast, ESMA has some farther-reaching powers regarding credit rating agencies and short selling. First of all, it is responsible for the registration and the withdrawal of registration of credit rating agencies that want to take up business in the European Union. Moreover, it can conduct all necessary investigations of credit rating agencies and the respective persons as well as carry out on-site inspections at the business premises of the credit rating agencies. On request, the respective national competent authority has to assist. In case of cross-border effects of an investigation or an on-site inspection, ESMA can coordinate the investigation or inspection. ESMA even has the power to delegate specific supervisory tasks to a national competent authority.
It has also some farther-reaching powers regarding repressive and corrective actions in respect to credit rating agencies and short selling. If there are serious indications of the possible existence of infringements listed in the regulation on credit agencies, ESMA has investigative powers. Furthermore, in these cases it disposes over different supervisory measures and can impose fines.

But there are certain institutional limitations that were installed to restrict the decision-making power of the Authorities, especially with regard to the protection of national treasuries from any fiscal costs generated by Authorities' supervisory decision, cf. Article 38 EBA Regulation.[599] An exception to this are the direct and exclusive supervisory powers over individual financial market participants of ESMA transferred to it by the Regulation on Credit Rating Agencies and the Short Selling Regulation.[600]
However, fiscal neutrality "remains the defining characteristic of European Union-level supervision, and supervision, accordingly, remains decentralized"[601] even though the supervisory instruments of the Authorities exceed simple information rights and obligations. They include investigative powers and on-site inspections as well as the possibility of giving instructions to national competent authorities and to prohibit or mandate certain actions, as for

[599] See Moloney, *EU Securities and Financial Markets Regulation*, 944.
[600] It was only possible for the different Member States to agree on that due to the minimal fiscal impact of the particular financial market infrastructures and actors. Ibid.
[601] Ibid.

example certain notification duties, or to impose sanctions.[602] Although the Authorities do not have the power to adopt rules that are generally applicable, they still contribute a great deal to dissolving possible tensions between centralized rulemaking and local supervision through their executive rulemaking powers.[603]

With the establishment of the SSM and the SRM, a great deal of supervisory instruments and powers have been transferred to the ECB's Supervisory Board as well as to the Board. But the Member States' national competent authorities and national resolution authorities are still very much involved.

In the Supervisory Board, even though it is not the SSM's final decision-making body, representatives of the Member States' national competent authorities constitute the largest group. In addition, the day-to-day supervision of significant supervised entities is carried out by JSTs which, inter alia, consist of members of the national competent authorities. Moreover, the national competent authorities have to assist the ECB by performing its supervisory tasks over significant supervised entities, submitting draft decisions to the ECB and assisting the ECB in enforcing decisions where the SSM Regulation does not provide such powers to the ECB.

Regarding the authorization and the withdrawal of authorization, even though it is the ECB's exclusive competence, also here the national competent authorities are still very much involved. First of all, the ECB is only able to apply the SSM Regulation and Union law, while only the national competent authorities are competent to apply their respective national law.[604] This means with regard to the application of national law, the national competent authorities still have the final decision-making power. Furthermore, for the supervised entities, with the exception of the withdrawal of authorization, the national competent authorities, and not the ECB's Supervisory Board, are the point of contact.

When the acquisition of a qualifying holding in a credit institution is assessed, another exclusive competence of the ECB, the respective national competent authority has to assess this proposed acquisition in a first step and prepare a draft decision before the ECB decides whether it opposes the acquisition or not. The supervised financial institutions still have to submit the information to the national competent authorities when fulfilling their supervisory reporting obligations

[602] See Lühmann, 'Von der Staatsaufsicht zur Unionsaufsicht?', 755.
[603] See Haar, '6. Organizing Regional Systems', 175 et seq.
[604] See Ohler, *Bankenaufsicht,* § 5, para 211.

unless otherwise provided for, while the national competent authorities have to perform the initial data checks and make the information available to the ECB.

On the other hand, the ECB can issue regulations, guidelines and general instructions to national competent authorities on how to perform their supervisory tasks and how to adopt supervisory decisions. Moreover, several reporting and information obligations of the national competent authorities towards the ECB exist, and the ECB even has the competence to decide to step in and to exercise directly all the relevant powers for less significant supervised entities if it is necessary to ensure consistent application of high supervisory standards.

When using investigatory powers, there are several scenarios where the national competent authorities have either to afford the necessary assistance, to follow instructions from the ECB, to partake in the ECB's on-site inspection teams. Furthermore, the ECB does not have any disciplinary powers except for the power to impose administrative penalties and in very limited cases the power to impose sanctions.[605] When deciding whether to impose a penalty and which would be the appropriate penalty, the ECB has to cooperate very closely with the national competent authorities.

With regard to the SRM, the situation is somewhat different even though the division of competences between the Board and the national resolution authorities regarding the supervised entities corresponds to the SSM. Many cooperation obligations between the European and the national level exist, but here, since the range of tasks and responsibilities are narrower and only regard the exceptional situation of an entity's resolution and are thus not very involved with the day-to-day tasks of supervisory entities, there are fewer forms of cooperation between the two levels. However, some similarities exist. The Board can request information from national resolution authorities, and to simplify the exchange of information the Board, the ECB, the national competent authority and the national resolution authority can draw up a MoU to establish a procedure concerning the exchange of information.

Furthermore, the Board has different monitoring obligations and instruction powers towards the competent national resolution authority, for example regarding the execution of the resolution scheme as well as the exercise of resolution powers by the national resolution authorities, or regarding write-down and conversion powers. The Board has to issue guidelines and give national resolution authorities instructions to ensure the effective and consistent

[605] See Haar, '6. Organizing Regional Systems', 180 et seq.

application of certain provisions, for example a minimum requirement for own funds and eligible liabilities or when preparing draft resolution plans. When executing investigative powers (general investigations as well as on-site inspections), officials of national resolution authorities under the supervision and coordination of the Board have to actively assist the officials of the Board and in cases of obstruction must even afford the necessary assistance.

All these different forms of cooperation mechanisms in the different areas of the supervisory process show a very close interconnection between the European and the national level. While the division of competences between the Board and the national resolution authorities corresponds to the division in the SSM, due to the newly established Fund and its sole power of disposition of the Fund's resources, the Board has, a somewhat more detached and more independent position towards the different national authorities. Nonetheless, both bodies link the different national authorities as well as the national and European level much more closely together.

Chapter 4: The Effectiveness of the Supervisory Framework in Financial Supervision

After outlining the administrative structure and the execution of the supervisory instruments in the three different areas of supervision, this last part will evaluate the effectiveness of the administrative framework and its cooperation mechanisms with respect to its contributions to a common and consistent supervisory practice in the European Union.[606]

A common and consistent administrative practice and with that the uniform application of Union law is one of the central concerns of European integration.[607] Moreover, the lack of such a common and consistent administrative practice also turned out to be one of the major weaknesses of the European Union's previous system of financial supervision. Even though there is still no general opinion on which factors contribute best to the effectiveness and uniform application of Union law, horizontal and vertical forms of cooperation (and with that elements of composite administration) make a substantive contribution to a common and consistent administrative practice.[608]

The question which is explored in this last chapter is if the new administrative framework, and its different cooperation mechanisms, are an effective instrument to facilitate such a common and consistent administrative practice. In a first step the shortcomings of the initial structure of financial supervision with regard to a common and consistent supervisory practice are briefly outlined. In a second step the three different areas of supervision and their different cooperation mechanisms are analysed and examined with regard to their contribution to establishing a common and consistent supervisory practice. Last but not least I will take a closer look at the relationship between the euro area and the rest of the European Union due to the different scopes

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[606] For more information regarding the effectiveness of the ECB's supervisory powers see Alexander, 'The ECB and Banking Supervision', 467 et seq; Gerold Grasshoff and others, 'I. Stand und Kritik zur Reform des europäischen Bankaufsichtsrecht', in Simon G. Grieser and Manfred Heemann (eds), *Europäisches Bankaufsichtsrecht* (Frankfurt School Verlag 2016), 11 et seq; and for more information on the ESFS see Mona Philomena Ladler, *Finanzmarkt und institutionelle Finanzaufsicht in der EU* (Manz Verlag 2014).

[607] See Article 197(1) TFEU: "Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest." Whereby the term "effective implementation" includes different elements such as the uniform application of Union law in the different Member States as well as a legally correct and timely implementation by the Member States. See Christoph Ohler, 'Artikel 197 AEUV', in Rudolf Streinz (ed), *EUV/AEUV* (2nd edn, C.H. Beck 2012), para 2.

[608] Furthermore, one of the objectives of composite administration is to facilitate and enhance the uniform application of Union law. See Thorsten Siegel, *Entscheidungsfindung im Verwaltungsverbund* (Mohr Siebeck 2009), 372 et seq; Weiß, *Der Europäische Verwaltungsverbund*, 27 et seq; see also Martin Nettesheim, 'Der Grundsatz der einheitlichen Wirksamkeit des Gemeinschaftsrechts', in Albrecht Randelzhofer, Rupert Scholz and Dieter Wilke (eds), *Gedächtnisschrift für Eberhard Grabitz* (C.H. Beck 1995), 453 with further references.

of the ESFS and the Banking Union as well as carry out a comparison between the different areas of economic supervision. Both of these issues are of relevance for an assessment of the effectiveness of the European Union's administrative framework in financial supervision with regard to the establishment of a common and consistent supervisory practice.

Most of the initial institutional shortcomings which have been mentioned by the de Larosière report and many others can be traced back to the specificities of the European Union's multilevel administrative system with its indirect administration and nation-based supervision.[609] These shortcomings in the system of indirect administration in combination with a harmonized internal market for financial services led to the already mentioned "destructive imbalance in the regulatory and supervisory architecture" in the European Union.[610]

Deficiencies which had been identified with regard to the institutional structure were, inter alia, the shortcomings in cross-border supervision due to home and host Member States' control with an unclear distribution of tasks and limited powers of the host national competent authority,[611] poor coordination and cooperation among the different national competent authorities, no conflict resolution mechanism in case of national competent authorities' disagreements and the different options in financial regulation.[612] Furthermore, the existing supervisory structure with its level three committees was not well equipped to ensure supervisory convergence and cooperation.[613] Last but not least, inadequate crisis resolution mechanism as well as no resolution at the European level resulted in inconsistencies in Member States' practices as well as in their intervention and rescue powers.[614] These deficiencies contributed to the collapse of the financial system.

[609] See Moloney, 'EU Financial Market Regulation', 1319; Ladler, *Finanzaufsicht in der EU,* 4, 273.
[610] See Moloney, 'EU Financial Market Regulation', 1318.
[611] Ibid., 1324, 1364; Pierre Schammo, 'EU Day-to-Day Supervision or Intervention-based Supervision: Which Way Forward for the European System of Financial Supervision?' (2012) 32, Oxford Journal of Legal Studies, 771, 774 et seq; Moloney, 'Banking Union', 1617.
[612] See Moloney, 'EU Financial Market Regulation', 1319; Kohtamäki, *Die Reform der Bankenaufsicht,* 92, 94; Ohler, 'Verwaltungsverbund und Finanzaufsicht', 320.
[613] According to the de Larosière Report, due to their network-based, fragile soft-law-orientated powers "[t]he existing level 3 committees have clearly reached their limits in terms of informal cooperation methods". De Larosière Group, 'De Larosière Report' (2009), Annex IV, 77. The strengthening of the Level three committees with respect to supervisory convergences is therefore mentioned by many see inter alia Moloney, 'EU Financial Market Regulation', 1319; Moloney, 'Banking Union', 1613; Kämmerer, 'ESFS', 1282 et seq; Ohler, 'Verwaltungsverbund und Finanzaufsicht', 318.
[614] See Moloney, 'EU Financial Market Regulation', 1319; Kohtamäki, *Die Reform der Bankenaufsicht,* 92; Schammo, 'ESFS', 774 et seq; Moloney, 'Banking Union', 1617.

Furthermore, in the euro area, the financial crisis deepened due to the close interconnection of the banking system and the national supervisors in a European Union monetary union. Because of that the euro area required further reforms to break the vicious cycle between the banks and the sovereigns and to ensure a common implementation of the Union legislation in the euro area.[615] The need for a more effective administrative supervisory framework and an enhancement of indirect administration came to the fore.

Effective institutional governance in European Union financial supervision is not easily designed and there is no "best practice template" for operational supervision.[616] In the European Union, different public authorities, an internal market and the euro area as well as cross-border activities and cross-border financial institutions have to be considered.
For the new system to be effective and to resolve the weaknesses of the old system, there is a need for more centralization as well as more cooperation and coordination. It does not mean that only more centralization is the answer to the inherent weaknesses of indirect administration. This would fall short on the European Union's special characteristics and is neither politically wanted nor feasible.[617]
Instead, the competences of the Member States and the European Union have to be rebalanced and clearly defined. Certain tasks which need to be centralized have to be worked out and transferred to the European level, and an adequate system of cooperation and coordination has to be put in place.

1. Cooperation Mechanisms in the Three Areas of Supervision

With the ESFS and the Banking Union, two systems have been established to bring the European and the national level of financial supervision in line. Both systems still differentiate

[615] See Ferran and Babis, 'The European Single Supervisory Mechanism', 30 et seq; Hellwig, 'Yes Virginia, There is a European Banking Union! But it may not make your wishes come true', 4, 13; Moloney, 'Banking Union', 1622, 1629.
[616] For more information on the weaknesses of the ESFS see Carmine Di Noia and Maria Chiara Furlò, '7. The New Structure of Financial Supervision in Europe: What' Next?', in Eddy Wymeersch, Klaus J. Hopt and Guido Ferrarini (eds), *Financial Regulation and Supervision: A post-crisis analysis* (Oxford University Press 2012), 7.54 et seq; see also Moloney, '4. Supervision in the Wake of the Financial Crisis', para 4.03; Moloney, 'Banking Union', 18.
[617] The application of law is still very much part of the Member States' sovereignty, and in case of financial supervision the close interconnection of supervisory control and fiscal responsibility intensifies the Member States' defensive position. Last but not least, there are also certain advantages of indirect administration like the local proximity of the national competent authorities and their knowledge and practical experience which should be preserved. See also Wymeersch, '9. ESAs', paras 9.18 et seq.

between national and European actors, but they consist of many different forms of cooperation and coordination mechanisms.

To assess whether the new system is effective in respect to a common and consistent supervisory practice, the three different areas of financial supervision are evaluated in detail regarding the degree of centralization, the kind of cooperation (procedural or institutional), the form of cooperation (vertical or horizontal) and the degree of intensity when interacting with each other (binding or only of an advisory nature).

What will be of interest now is in which areas centralization took place and where and what kind of cooperation mechanisms have been installed. The respective cooperation mechanisms have different impacts and effects on the uniform and consistent application of Union law. Institutional cooperation, which has a great deal in common with centralization, means that a new body is established where the two levels work together. This exists for example in the Management Board of European agencies or in the Authorities' Boards of Supervisors. This form of cooperation ensures a great deal of uniformity and consistency especially if the body can also adopt binding administrative acts and does not only issue acts of an advisory nature.

Procedural cooperation assures a certain degree of uniformity and consistency, although to a lesser degree than institutional cooperation. Procedural cooperation exists when the different levels and Member States' authorities work together in one administrative decision-making process. This can take place in a horizontal or in a vertical manner. While horizontal mechanisms only allow an informal way of collaboration between the different actors, vertical mechanisms involve a hierarchical element which allows one level to use binding mechanisms to influence the decision-making process. For the evaluation of effectiveness, it is relevant when cooperation takes place in the administrative process, for example in the decision-making process or only regarding decisions that have already been taken, and here it is also important whether the other actors dispose over decision-making authority.

Furthermore, the form of cooperation, vertical or horizontal, is of great relevance since vertical cooperation has a hierarchical element to it, and thus ensures more uniformity and consistency, while horizontal cooperation with its coordinative element guarantees more independence for the individual actors and with that for national particularities. Last but not least, whether the cooperation mechanisms are of an advisory nature or whether they are legally binding is important for the system’s effectiveness since this is crucial for the influence of the different mechanisms.

1.1 Acquisition and Exchange of Information

The effective acquisition and the exchange of information are of great importance for every administrative system. In multilevel governance, an effective framework for the exchange of information is of even more relevance for the proper functioning of the system.
In the European Union, which does not have its own administrative actors at the national level but has to work together with national authorities, it is essential that the European level receives all the information in situations in which the interest of the European Union or the functioning of the internal market are affected. In addition, it is also important for the national authorities to receive all the information which is necessary for them to carry out their administrative tasks.[618] In terms of economic efficiency, it is important that public authorities first have to fall back on information which is already known or available before requesting information from private parties.

With the establishment of the Authorities, centralization and institutional cooperation at the European level has taken place, also with regard to the acquisition and exchange of information.[619] Even though EBA, ESMA and EIOPA were built on the already existing level three committees CEBS, CESR and CEIOPS, with the Authorities' establishment, new tasks and powers have been transferred to the European level. Moreover, with the Boards of Supervisors a new form of institutional cooperation has been installed.
When the ESFS was established, a strong focus was put on the exchange of information and many cooperation mechanisms were put in place. The three Authorities are now the relevant authorities for collecting and facilitating information exchange even though the national competent authorities are still mainly acquiring the information. Already from a merely practical point of view this is the only way manageable in the European Union since the European Union does not have the capacity to actually acquire all the necessary information.

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[618] See Armin von Bogdandy, '§ 25 Informationsbeziehungen innerhalb des Europäischen Verwaltungsverbundes', in Wolfgang Hoffmann-Riem, Eberhardt Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts Band II: Informationsordnung, Verwaltungsverfahren, Handlungsformen* (2nd edn, C.H. Beck 2012), paras 3, 10 et seq.
[619] See 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, 3.

In addition, the Authorities also decide on the scope and the reliability of information that should be made available to the national competent authorities. They also play an important coordination role in the case of colleges of supervisors and, in cooperation with the national competent authorities, the Authorities have to share the collected information and they have to establish and manage a central system to make the information accessible to the respective national competent authorities in the respective college.

What contributes to the Authorities' special position is their power to collect the necessary information themselves as well as to request it from national competent authorities. In a final step, they can request it from other national authorities or from financial institutions directly. Even though it is just a simple request, it puts the respective Authority in a superordinate position. This becomes clear in two scenarios: First of all, the Authorities can ask the respective national competent authority for its support when collecting the information from a financial institution and second, if a financial institution does not provide the Authority with the requested information, the national competent authorities have to cooperate with the Authority to ensure full access to the information. ESMA, in comparison with EBA and EIOPA, has even more powers to acquire information directly from market participants and even more publication obligations regarding credit rating agencies and short selling. This again shows ESMA's unique position.

With the establishment of the Authorities, there is now one institution in each of the three financial supervisory areas where all the information which is important for the European Union as a whole as well as the internal market for financial services comes together. The Authorities have a superordinate position towards the national competent authorities and are responsible for gathering and distributing the necessary information. Now a mechanism has been put in place even in cases in which the necessary information is not available to or not made available by the national competent authorities. The Authorities have the power to actually collect it themselves. This makes the system much more effective since it puts the European level in charge of administering the area of information. Furthermore, there is now a vertical element in the cooperation model.

In addition, with a vertical, superordinate European level the two levels are brought closer together. The Authorities can now interact with other national authorities as well as with private market participants. This strengthens the Authorities' position to protect the European Union's financial system as a whole and leads to a more effective system of information exchange and

acquisition. What further strengthens the European Union's financial system is the fact that now the information runs together at one place. In addition, there is only one authority responsible for the exchange of information and with that there is one (known) contact partner for a national competent authority to get information.
With institutional and procedural cooperation mechanisms put in place as well as an element of vertical cooperation and a clear distribution of competence, the acquisition and exchange of information in the ESFS promise to remove a great deal of the Lamfalussy model's deficiencies.

In the Banking Union, the ECB and the national competent authorities (SSM) as well as the Board and the other actors involved in the resolution process (SRM) are subject to a duty of cooperation in good faith. In addition, they have an obligation to exchange information. But even though this sounds similar to the ESFS, the situation is quite different since a greater degree of centralization took place at the European level. In the Banking Union, the ECB and the Board are in charge of collecting the necessary information from the private market participants either by themselves or through the respective national authorities. In addition, the exchange of information mainly takes place between the European level and the respective national authorities and not so much among the different national authorities. Furthermore, the ECB's request to the national competent authorities for additional information is of a binding nature. A clear vertical form of cooperation exists and puts the ECB and the Board in a superordinate position. If the ECB or the Board obtains the information directly from the respective legal or natural person, it has to make the information available to the national competent authority or national resolution authority concerned.
Even though the ECB is responsible for the supervision of significant entities, the significant entities have to report the information to the respective national competent authority which then has to perform the initial data check and make the information available to the ECB. In the SSM, the national competent authorities act as auxiliary authorities to the ECB. Since the ECB and the Board have to first take account of information already available to the national authorities, a horizontal element is included. For this system to work properly, a permanent and well-organized exchange between the different levels is required.
What is of particular relevance in the SSM is the cooperation between the ECB and the national competent authorities in case of supervision of less significant financial institutions. In these cases, the ECB only carries out indirect supervision. The national competent authorities have

to provide the ECB with information continually regarding their performance of activities so that the ECB is well aware of the state of the euro area banking system as a whole.
In the Banking Union, centralization took place to a greater degree, and the ECB and the Board have a clearly superordinate position towards the national authorities. The national authorities have to take on a lot of the leg work regarding the collection of information. They can be understood as the agent of the European (principal) level. In these situations, the cooperation is more of a procedural one. However, since the predominant cooperation elements are of a vertical nature and the ECB disposes over instruction powers towards the national competent authorities, this system of the acquisition and exchange of information has effective mechanisms in place.

1.2 Preventive and Accompanying Measures

1.2.1 Convergence of Supervisory Practice

One of Authorities' primary tasks is to play an active role in building a common and consistent supervisory practice as well as to ensure uniform procedures and consistent approaches throughout the European Union. One way to achieve this is the Authorities' involvement in executive rulemaking. The Authorities can develop draft regulatory and draft implementing technical standards as well as issue guidelines and recommendations. Even though the Authorities only prepare the draft versions of the regulatory and implementing technical standards which are adopted by the Commission, the Authorities' influence should not be underestimated.
The Commission cannot easily deviate from the draft versions (it cannot change the draft versions without prior coordination with the respective Authority and has to substantiate it with a European Union interest), but has to carefully consider them, so that the technical expertise of the Authorities is respected and always taken into account.[620] In addition, even though the draft versions themselves are not of a binding nature, the significance of the agencies' work in general is further strengthened by the courts' willingness to take the agencies' reasoning into account and to review their findings due to their special expertise.[621]

[620] The power of the Authorities to only prepare draft versions solves the Meroni doctrines problem and responds to sensitive institutional interests. This also hardens the initial level three committees' powers which were only of an advisory nature. Moloney, 'EU Financial Market Regulation', 1348; Ohler, 'Verwaltungsverbund und Finanzaufsicht', 328.
[621] See Craig, *EU Administrative Law,* 150 et seq.

Through their involvement in executive rule-making, the Authorities are in a good position to improve law-making regarding efficiency and expertise in European financial regulation. This development can already be observed in standard-setting by other European agencies.[622] The power of the Authorities to prepare draft versions will lead towards the establishment of a rather massive European single rule book.[623]

The Authorities' developing of draft regulatory and implementing technical standards leads to a centralization at the European level. It involves a strong, indirect vertical element since the final implementing and technical standards are of a binding nature. Through these draft implementing and technical standards, the national competent authorities are controlled and disciplined.[624] Because of that, the degree of intensity when interacting is high.

However, besides this hierarchical element, there is also institutional cooperation involved. The potential influence of the Member States has to be kept in mind: The Authorities' main decision-making body, its Board of Supervisors, which adopts the draft technical standards, consists of the different heads of the national competent authorities, which can therefore influence the Board of Supervisor's decision-making. The downside of this is that it enables the national competent authorities to pursue and include their national interests in this European decision-making process.

The Authorities' decision-making structure is one of the most criticized aspects. Concerns are raised that the Authorities might not be able to represent European interests but might be exposed to some national interests.[625] However, there are also some benefits to this structure. It allows the supervisors to fall back to the national competent authorities' expertise and experience. This is highly relevant since the national competent authorities are closest to the markets and supervised entities and have extensive experience. However, there are now some reform proposals by the Commission to "pave the way for further financial integration" and to actually change the composition of the Authorities' Boards of Supervisors so that the

[622] See Moloney, 'EU Financial Market Regulation', 1349.

[623] See Commission, 'Annex to the 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, Annex 1, 4; see also Moloney, 'EU Financial Market Regulation', 1355; Nicolas Raschauer, 'Europäische Behördenkooperation in der Finanzmarktregulierung', in Michael Holoubek and Michael Lang (eds), *Verfahren der Zusammenarbeit von Verwaltungsbehörden in Europa* (Linde 2012), 206; Haar, '6. Organizing Regional Systems', 176 et seq.

[624] See Kämmerer, 'ESFS', 1283.

[625] See 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, 9.

Authorities could take their decisions more independently from national interests.[626] But all in all, the Authorities' involvement in the regulatory and implementing technical standards process is positive, since they have the expertise and their involvement leads to high-quality regulatory and implementing technical standards.[627]

Another new feature that leads to more convergence in the different Member States' supervisory practices are the Authorities' powers to issue guidelines and recommendations. They can address these guidelines and recommendations to national competent authorities or financial institutions to promote the safety and soundness of markets and convergence of regulatory practices regarding colleges of supervisors as well as regarding systemic risk.
Even though the guidelines and recommendations are of a non-binding nature, the national competent authorities have to make every effort to comply with the guidelines or recommendations. The national competent authorities have to confirm whether they comply and state the reasons if they do not comply, which will then be published by the respective Authority. Even though the guidelines and recommendations are non-binding, this system of "comply or explain" in combination with "naming and shaming" leads, through its political pressure, to a de facto binding effect of the regulations and guidelines and can therefore be classified as a form of vertical cooperation with "quasi" binding effects.[628] It will therefore help to remove national differences in the supervisory framework and contribute a great deal to more convergence as well as consistency in European Union's supervisory practice.[629]
The Authorities' involvement in executive rulemaking redresses the weaknesses of the different national interpretations and implementations of Union supervisory law. In this respect, it distinguishes the Authorities from other agencies and the former level three committees.[630] One disadvantage of the guidelines and recommendations is that "comply or explain" and "naming and shaming" only leads to political pressure. In normal circumstances, this will urge national competent authorities to comply with the guidelines and recommendations. But it remains to

[626] See Commission, 'Creating a Stronger and More Integrated European Financial Supervision for the Capital Markets Union' Press release, Brussels, 20 September 2017.
[627] See Commission, 'Annex to the 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, Annex 1, 4.
[628] See 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, 6; see also Thomas Schmitz-Lippert, 'Die neue europäische Finanzaufsicht', BaFin Journal 12/10, 10, 12; Hänle, *ESMA,* 108; Papadopoulos, 'ESFS', para 20; Binder and Gortsos, *The Banking Union,* 47.
[629] See Ohler, 'Verwaltungsverbund und Finanzaufsicht', 327.
[630] See Moloney, 'EU Financial Market Regulation', 1345 et seq; Ladler, *Finanzaufsicht in der EU,* 279.

be seen how national competent authorities will react in unusual circumstances since the Authorities do not have the power to actually enforce their guidelines and recommendations, and the success and convergence of European Union financial supervisory law therefore depends on the national competent authorities' willingness to comply with the guidelines and recommendations

Another element that is of great importance regarding the convergence of supervisory practice and a common supervisory culture is the establishment of sectoral and cross-sectoral training programs and the Authorities' facilitating of personnel exchanges as well as its encouraging of national competent authorities to intensify the use of secondment schemes and other tools. This will strengthen horizontal cooperation, improve the exchange and understanding among different national competent authorities, and will therefore lead to a more uniform and consistent supervisory culture and practice. Many problems with regard to administrative cooperation can only be met and removed at the personnel level. These training programs and the personnel exchange will contribute a great deal to harmonizing and converging national supervisory practices.[631]

Moreover, also the Authorities' involvement in the colleges of supervisors is of great importance.[632] Colleges of supervisors will contribute to removing some of the weaknesses of the home/host competence allocation which made supervision of cross-border activities difficult. With the colleges, the links between the competent authorities will be intensified, consolidated supervision through the home national competent authority will be simplified and the host national competent authorities are more integrated and involved.[633]
Here, the Authorities task is to contribute to the functioning of the colleges of supervisors and to foster the coherence of the application of Union law among them as well as to converge supervisory best practices. Even though these are non-binding powers, the Authorities have extensive convergence and coordination powers.[634] However, one weakness of these colleges

[631] See Bernd Holznagel, '§ 24 Informationsbeziehungen in und zwischen Behörden', in Wolfgang Hoffmann-Riem, Eberhardt Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts Band II: Informationsordnung, Verwaltungsverfahren, Handlungsformen* (München, 2nd edn, C.H. Beck 2012), paras 1-7; Ladler, *Finanzaufsicht in der EU*, 280.
[632] See 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, 7.
[633] See Ohler, 'Verwaltungsverbund und Finanzaufsicht', 325.
[634] See Kohtamäki, *Die Reform der Bankenaufsicht,* 197; Moloney, 'Banking Union', 1621.

is that the colleges, as an internal forum of public authorities, cannot issue binding decisions towards the supervised entities. Their decisions need to be implemented by a national competent authority. So again, there is an intermediate step necessary. Moreover, the colleges have no enforcement powers to actually ensure proper and quick implementation.[635]
With regard to colleges of supervisors, only horizontal elements of cooperation were installed, but with an element of institutional cooperation. This allows for better cooperation between the home and the host national competent authorities and, because of that, leads to a more effective supervision of cross-border supervision even though the colleges could have been equipped with some form of binding and direct supervisory power.

Other horizontal cooperation powers which further strengthen consistency in supervisory outcomes are the Authorities' powers to (periodically) organize and conduct peer reviews of the activities of the national competent authorities and to identify best practices and make them publicly available.[636] In addition, the establishment of a Committee on financial innovation which brings together all relevant national competent authorities to achieve a coordinated approach to the regulatory and supervisory treatment of new or innovative financial activities contributes to a common and consistent supervisory practice in the future.

As this analysis shows, the establishment of the ESFS did not radically reshape the organization of supervisory governance. The national competent authorities still have the main supervisory powers within the ESFS even though they are now subject to more sophisticated coordination requirements.[637] This distribution of powers is sensible since the national competent authorities are closest to the markets and supervised entities, and this structure makes use of their knowledge and experience.
However, with the Authorities, three authorities were established which have a quasi-superordinate position and which can orchestrate the different forms of cooperation. Regarding preventive and accompanying supervisory measures, it is the Authorities' main supervisory task to coordinate the different national competent authorities and to provide for convergence in

[635] See Ladler, *Finanzaufsicht in der EU,* 276.
[636] Conducting peer review is central to the development of supervisory convergence and with Article 30 EBA Regulation, peer review which was developed by CESR, is further strengthened. See Moloney, '4. Supervision in the Wake of the Financial Crisis', paras 4.60-4.61.
[637] See Moloney, 'Banking Union', 1621.

supervisory practice.[638] Even though the Authorities do not have extensive direct supervisory powers over significant cross-border actors, their cooperation and coordinating powers are not limited.[639] These new forms of cooperation and a certain degree of centralization reflects the efficiency attractions of decentralization as well as the very significant political, fiscal, operational, and legal complexities of more centralized supervision.

The main weaknesses here are, first of all, the sectoral divisions of the Authorities supervisory powers with regard to rule making, so a great deal will depend on the Joint Supervisory Committee.[640] Second, the many different kinds of legal acts the Authorities can adopt. So far it is not clear how these acts will interact.[641] And third, the composition of the Authorities' Boards of Supervisors. Especially this last point has to be stressed. In the Boards of Supervisors, the heads of the national public authorities dominate the decision-making process.[642] However, the combination of their organizational structure and their powers is a novelty in the European Union's administrative system and so far, the Authorities fulfil their tasks quite effectively.[643]

1.2.2 Centralization of Supervision

Besides these coordinating powers, in the case of ESMA and the Baking Union, centralization of supervision has also taken place in this area of supervision. One has to mention first of all ESMA's registration powers towards credit rating agencies and the ECB's authorization powers towards financial institutions. Registration and authorization are one of the most important preventive measures supervisors (can) have, and in case of the European Union with its internal market, it is very important that this task is handled consistently and uniformly. The advantages of centralized authorization and registration are a uniform and consistent application as well as a stronger focus on the needs of the European Union and the internal market as a whole. Furthermore, the registration and authorization are effective for the entire territory of the European Union.

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[638] See De Larosière Group, 'De Larosière Report' (2009), paras 184 et seq; Moloney, 'Banking Union', 1621; Ohler, 'Verwaltungsverbund und Finanzaufsicht', 325.
[639] See Moloney, 'Banking Union', 1621. Haar, '6. Organizing Regional Systems', 176. Who is of another opinion and thinks that ESAs coordinating powers are rather limited.
[640] See Moloney, 'EU Financial Market Regulation', 1355.
[641] Ibid., 1354.
[642] See Craig, *EU Administrative Law*, 173.
[643] Ibid.; 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, 3.

However, there is still a very close linkage between the national competent authorities and the ECB in the authorization process and in the withdrawal of authorization process with a clear vertical cooperation mechanism. National competent authorities have to draft the ECB's decision, and they have to inform the applicant of the decision. Furthermore, in a first step, national competent authorities have to check the application's compliance with the respective national law. In a second step, the ECB checks if the application complies with Union law. This means that even though the national competent authorities are subordinate to the ECB and carry out auxiliary work, they can still shape the ECB's decision-making. Moreover, they are the ones who are acting towards the public.[644]

This close interconnection between the European and the national level is on the one hand very positive because it combines the national and the European perspective and leads to a constant exchange and a very close connection of the two different levels. On the other hand, it underlines the still existing limits of the European Union supervisory system and the strong national influence which can be opposed to the European internal market interest as well as contradict common and consistent supervisory practice in the European Union.

In case of a withdrawal, consultations between the ECB, the respective national competent authority and if necessary even the national resolution authority have to take place. This is especially important so that the national competent authority can think about remedial actions (for example resolution measures). If a national competent authority considers that a withdrawal would lead to financial instability, it has to notify the ECB of its objections. As a consequence, the ECB has to abstain from the withdrawal proceedings for an agreed period of time.

This provision protects the financial interests of the Member States, but in cases where the ECB finds that the proper actions necessary to maintain financial stability have not been implemented, the withdrawal of the authorization applies immediately, so the European interest and the functioning of the internal market is protected and superordinated to the national interest. In the case of authorization and registration, a great degree of centralization has taken place. This allows for an effective application and implementation of the authorization and registration procedures which are relevant for the European Union's internal market.

Other new features which have to be mentioned regarding preventive measures and on-going supervision are the JST regarding significant supervised entities as well as general

[644] See Moloney, 'Banking Union', 1648.

investigations and on-site inspections.[645] With the introduction of JSTs for significant supervised entities, centralization and institutional cooperation at the European level takes place. Every JST consists of different European and national representatives, and general investigations and on-site inspections can be carried out with the collaboration of national competent authorities' representatives.

This structure allows it to further use the existing knowledge of the national competent authorities but at the same time to strengthen the European perspective and to ensure a common and consistent supervisory practice. The coordinators of the JSTs, who are European representatives, have the power to instruct the Member States' representatives. This puts them in a vertical-hierarchical position. It also neutralizes the national perspective to some degree. Because of that, JSTs are not some kind of "international" authority but part of the ECB's supervisory team. JST's actions (and the actions of its representatives) are always attributable to the ECB.[646]

The same holds true in the case of general investigations and on-site inspections by the Board or ESMA. The actions by the officials and other accompanying persons authorized by the national competent authorities or national resolution authorities are always attributed to and considered to be the Board's or EMSA's action since these investigative actions are within the Board's or ESMA's competence.[647] Even though a vertical-hierarchical element exists, it shows once more that a clear distinction between national and European actors (at least in a functional sense) is no longer possible. In cases where there has been a centralization at the European Union level, the two levels start to converge when carrying out supervisory activities. With regard to a common and consistent European Union supervisory practice this is to be welcomed, but with regard to accountability and legitimacy this development is highly problematic.

Another positive aspect of the close interconnection of the two levels with regard to the JSTs is the fact that the close form of cooperation regarding the day-to-day supervision of significant supervised entities might lead to positive spillover effects regarding national competent authority supervision of less significant financial institutions.[648]

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[645] See Ohler, 'Verwaltungsverbund und Finanzaufsicht', 334 et seq.
[646] Ibid.
[647] See Ohler, *Bankenaufsicht*, § 5, para 227. Who in his book refers to the ECB's investigatory powers. But since the ECB's investigatory powers are almost identically to the investigatory powers of the Board and ESMA his remarks can be transferred to the Board's and ESMA's investigatory powers.
[648] See Moloney, 'Banking Union', 1648.

However, there are more mechanisms put in place to ensure an effective cooperation between the ECB and the national competent authorities regarding the supervision of less significant supervised entities. National competent authorities have different reporting obligations regarding material supervisory decisions taken by them concerning less significant institutions. This leads to a close interconnection and a constant exchange between the two levels. In addition, a vertical element exists since the ECB can instruct the national competent authorities to perform and execute different supervisory duties. This also guarantees a common and consistent supervisory practice with regard to less significant supervised entities.[649] This last vertical cooperation mechanism contributes a great deal to a common and consistent supervisory practice in the Banking Union as a whole.

In contrast to the Authorities, which can only converge the supervisory practice through its involvement in executive rulemaking, the ECB has a comprehensive range of supervisory and investigatory powers to execute and support supervision. Due to its direct and binding supervisory powers towards national competent authorities, the ECB can instruct them and directly influence supervisory outcomes. In addition, in individual cases, the ECB can take over direct supervision over less-significant entities if this is necessary for a consistent and coherent supervisory standard. The SSM's operating framework with its cooperation requirements, the ECB's rule-making and quasi rule-making powers and last but not least its right to instruct national competent authorities mitigates the coordination risks to a great deal.[650] This leads to a much stronger form of harmonization, and especially in a monetary union this is necessary for an effective supervisory system.

1.2.3 Resolution Planning and Early Intervention

Resolution planning and early intervention had not been Europeanized before the crisis. The new structure in the banking sector with its clear centralization at the European level represents an enormous change in this area. Resolution plans for financial institutions, falling within the scope of the SRM Regulation, are now drawn up by the European level (the Board), while the Member States, through consultations and their task to prepare draft resolution plans if requested, are still very much involved.

[649] Ibid., 1647 et seq.
[650] Ibid.

On the one hand, this ensures that the respective (national) characteristics are included in the resolution plans and the expertise and knowledge of the national resolution authorities are still used. On the other hand, it also means that the resolution plans are still drawn up by different national authorities. To ensure effective and consistent application, the Board has to issue guidelines and address instructions to the national resolution authorities for the preparation of those draft resolution plans. This contributes, at least partly, to a more common and consistent supervisory approach, but it cannot cancel out the differences in these draft resolution plans completely.

Furthermore, the Board has a central position with regard to the resolvability of the financial institutions. As a final step, it can take a decision and instruct the respective national resolution authority to require a financial institution to take the necessary measures to remove the impediments to resolvability. If a national resolution authority does not comply with the Board's decision, the Board can oblige the financial institution directly to take the necessary actions.

With regard to the minimum requirements regarding own funds and eligible liabilities, the Board again holds the central position. The Board determines the minimum requirements and the national resolution authorities have to implement the Board's instructions. Article 29 SRM Regulation plays a central role regarding the Board's instruction powers. According to Article 29 SRM Regulation, national resolution authorities have to take the necessary actions to implement the Board's decision. If a national resolution authority does not apply or comply with the Boards decision, the Board can step in and order an institution under resolution to adopt the necessary actions.

Furthermore, a close horizontal connection between the Board and the ECB or the national competent authorities has been established. The ECB or the national competent authorities have to inform the Board of any early intervention measures that they require an institution to take or they take themselves. In addition, they have to ensure that all the measures are consistent. This ensures that the Board is well aware of any challenging situation a financial institution might be facing. It allows the Board to prepare for the resolution of the institution concerned and to instruct the respective national resolution authority to draft a preliminary resolution scheme for this institution.

With regard to possible adverse developments in the financial system or individual financial institutions in the banking sector, a great deal of harmonization has taken place. While the national resolution authorities are still involved in the early resolution stages (as for example in

resolution planning and early interventions), in many cases they are now auxiliary actors of the Board. This ensures a more consistent and converging approach regarding the resolution of banks and will therefore contribute to a more stabilized euro area. With the SRM, bank resolution is now carried out by the Board and resolution is supported by the Fund.[651] This more effective management of resolution contributes a great deal to "breaking the vicious circle" between the Member States and their banks.[652]

1.3 Corrective Actions

The effectiveness of a supervisory system depends to a very large extent on the possibility to take corrective actions and to actually impose and enforce sanctions.[653] Especially the issue of enforcement as a sovereign power is highly problematic in case of the European Union and its multilevel system.

In many instances the different procedural steps are not executed by one authority, but by different national authorities or even by the two different levels.[654] In financial supervision, the importance of corrective measures and enforcement instruments became particularly obvious in the case of insolvent banks. Even the most professional supervisor is helpless if it has no power or supervisory instrument to deal with those banks that are having difficulties.[655] But in the new financial supervisory framework, there are a great deal of interesting corrective actions besides bank resolution which have to be examined.

One characteristic of the Authorities' direct supervisory powers in the ESFS is that they only exist in certain well-defined situations. The Authorities have direct supervisory powers towards national competent authorities and financial institutions in three situations. For the Authorities to be able to use their direct supervisory powers towards financial institutions, national competent authorities first have to infringe Union law.[656]

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[651] Ibid., 1612.

[652] Ibid., 1629; Hellwig, 'Yes Virginia, There is a European Banking Union! But it may not make your wishes come true', 4.

[653] See Huber, '§ 45 Überwachung', para 91; Christian Waldhoff, '§ 46 Vollstreckung und Sanktionen', in Wolfgang Hoffmann-Riem, Eberhardt Schmidt-Aßmann and Andreas Voßkuhle (eds), *Grundlagen des Verwaltungsrechts Band III: Personal, Finanzen, Kontrolle, Sanktionen, Staatliche Einstandspflichten* (2nd edn, C.H. Beck 2013), para 1.

[654] See Waldhoff, '§ 46 Vollstreckung und Sanktionen', para 213.

[655] See Hellwig, 'Yes Virginia, There is a European Banking Union! But it may not make your wishes come true', 16.

[656] So far, the Authorities did not issue binding decisions under Articles 17-19 EBA Regulation. They only made use of their non-binding mediation powers and suasions. Stakeholders see the reason for this in the current

The Authorities can use their direct supervisory powers in case there is a breach of Union law, in emergency situations or in other "exceptional circumstances" (only ESMA), as well as in situations in which there is a disagreement between different national competent authorities.[657] Moreover, ESMA has direct supervisory powers over credit rating agencies and can even restrict short-selling.[658]Within these situations, the Authorities have effective supervisory powers.

In case of emergency situations and disagreements between different national competent authorities, the Authorities can instruct national competent authorities and in a final step can even step in and exercise all rights themselves. In this final step, they can take binding decisions towards financial institutions. The Authorities' supervisory measures prevail over every previous decision adopted by national competent authorities and the national competent authorities are bound by this decision and have to align every future action in this field with it.[659]

In addition, ESMA disposes over intervention powers in cases where financial activities address a threat to the orderly functioning and integrity of the financial markets or to the stability of the whole or part of the financial system in the European Union. In contrast to the other Authorities' intervention powers in emergency situations, ESMA here has the power to decide itself if there is an emergency situation and if it has to take any actions. Furthermore, in situations where there is a significant fall in price and a national competent authority disagrees with the action taken by another national competent authority, ESMA can take the respective decision if the national competent authorities fail to reach an agreement within the conciliation phase.

Moreover, ESMA has extensive supervisory powers over credit rating agencies and it can take supervisory measures in cases where a credit rating agency commits one of the infringements listed in Annex III of Regulation on Credit Rating Agencies and impose fines and periodic penalty payments in certain cases.

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governance structure which does not favor decisions against national authorities. 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, 7.

[657] See Ohler, 'Verwaltungsverbund und Finanzaufsicht', 329.

[658] These direct supervisory powers over ESMA are considered to be carried out in a rather effective and efficient way. For more information, see 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, 11.

[659] See Kämmerer, 'ESFS', 1284.

The three situations in which the Authorities dispose over direct supervisory powers have in common that these are situations in which a common and consistent supervisory practice is at stake. The past has shown that these are situations in which it is crucial for a financial system to have a common and consistent supervisory practice. To ensure this, the Authorities have been put in place as the central decision-making authorities which are equipped with certain binding supervisory powers in these situations.[660] Here centralization and, due to the binding decision-making powers, a very strong vertical element of cooperation has been set up. With regard to ESMA centralization has taken place to an even greater extent and in case of credit rating agencies ESMA even undertakes the role of being the sole supervisory authority. With regard to facilitating a common and consistent supervisory practice, ESMA's extensive supervisory powers are very effective.

But there are several downsides to the effectiveness of the Authorities' direct supervisory powers. With regard to supervisory actions in emergency situations, the Authorities depend on the Council to actually declare such an emergency situation and with that they depend on representatives of the Member States to trigger their direct supervisory powers.[661] This shows very clearly that in emergency situations the actual decision-making power still lies with the Member States.[662] On the one hand, it is understandable that the Member States wanted to have a say in this since emergency situations might often involve their fiscal responsibility. On the other hand, it opens the system up to national influence and national bias and with that leaves too much room for Member State interests which possibly do not take into account the internal market perspective. In addition, this procedure is time consuming in a situation in which fast actions are required.

If there is a breach of Union law or disagreements between different national competent authorities, a formal procedure must also be undergone before the Authorities can actually take those binding decisions. If Union law is breached, the Commission is interposed and has to issue a formal opinion first before an Authority can take its binding decision towards financial institutions. When settling disagreements between national competent authorities, the

[660] See Ohler, 'Verwaltungsverbund und Finanzaufsicht', 328.
[661] With regard to ESMA's powers in exceptional circumstances, in the Short Selling Regulation the situation is different. There, ESMA decides if an emergency situation exists. See ibid., 329.
[662] See Thiele, *Finanzaufsicht,* 511 et seq.

Authorities first have to try to settle the disagreement and require the national competent authorities themselves to take the necessary actions.

A further disadvantage regarding the effectiveness of the Authorities' intervention powers is the fact that there is also some uncertainty as to the extent to which Authorities can impose a decision on a national competent authority. If there are different opinions of national competent authorities as to how a provision has to be implemented, it is rather doubtful that an Authority can impose a decision on a national competent authority if the national competent authority claims that it is lawfully exercising discretion – particularly as Recital 32 of the 2010 EBA Regulation seems to protect the ability of national competent authorities to lawfully exercise discretion. The Authorities' supervisory powers are therefore limited to actual legal infringements.

Furthermore, the Authorities' powers to take individual decisions towards financial market participants is only possible if the requirements of the acts referred to in Article 1(2) EBA Regulation are directly applicable and the respective national competent authority's behaviour infringes Union law. However, the legal acts mentioned in Article 1(2) EBA Regulation are mostly directives and hence are not directly applicable.[663] So far, the Authorities do not have that many opportunities where they can actually adopt binding supervisory decisions towards financial institutions. But this might change in the future. According to Recital 29 EBA Regulation and following the general trend from directives to regulations, future Union legislation in financial supervision will very likely have the form of Union regulations.[664]

Another problematic issue concerns the question of the enforceability of the Authorities' direct decisions. There is always the possibility for the Commission to act under Article 258 TFEU, but this procedure takes time, is directed towards Member States and not towards the private market participant, and also involves another actor (the Commission).[665] Another obstacle to an effective common and consistent supervisory practice in the EU is Article 38 EBA Regulation. National competent authorities still have the competence to plead fiscal implications, and this relieves them from applying the respective Authorities' decisions.[666]

[663] See Kämmerer, 'ESFS', 1284.
[664] Ibid., 1286.
[665] See Moloney, 'EU Financial Market Regulation', 1368.
[666] Ibid., 1326.

Moreover, the Authorities do not have extensive direct supervisory powers over systemically significant cross-border actors.[667] In addition, besides those three situations, the Authorities' supervisory power over national competent authorities is rather limited.[668] Last but not least, the Authorities' decision-making structure, which is based on a qualified majority voting, weakens the Authorities' position and powers because in the future, blocks of national supervisors could bring their national positions into the decision-making process and with that obstruct the Authorities' decision-making and quasi-regulatory rule-making activities.[669]

But there are also some positive developments with regard to the Authorities and their structure and supervisory powers. Even though the Authorities' decision-making can be influenced by representatives of national authorities through their Board of Supervisors, these representatives are not, as is usual in agencies' Management Boards, common middle-level technocrats but the heads of the respective national public authorities (e.g. national central banks (EBA) or the head of the national public authority with responsibility for credit institutions (ESMA)).[670] This makes the Authorities' input and decisions much more relevant.

Furthermore, in critical situations such as those disclosed by the crisis, in which the consistent and common supervisory practice in the European Union is at stake, national competent authorities can be surrogated through Authorities or as a milder action can be disciplined by these Authorities through administrative cooperation or technical standards.[671]

The powers of the Authorities when Union law is breached harden the soft powers of the former level three committees to a significant degree and Article 18 EBA Regulation, even if it might be only rarely used, shows and stresses the centrality of Authorities to crisis resolution.[672]

In contrast to the Authorities, the ECB disposes over an extensive range of supervisory powers regarding significant supervised entities. Transferring supervisory competence to the European level leads to a more effective and coherent supervisory practice in the euro area's banking sector, "unfettered by non-prudential considerations" of national authorities.[673] This contributes

[667] See ibid., 1333.
[668] See Kämmerer, 'ESFS', 1284.
[669] Moloney, 'EU Financial Market Regulation', 1350.
[670] See Craig, *EU Administrative Law,* 173.
[671] See Kämmerer, 'ESFS', 1283.
[672] See Moloney, 'EU Financial Market Regulation', 1368.
[673] See Moloney, 'Banking Union', 1630; see also Gianni Lo Schiavo, 'From National Banking Supervision to a Centralized Model of Prudential Supervision in Europe? The Stability Function of the Single Supervisory Mechanism' (2014) 21, Maastricht Journal, 110-140, 110 et seq.

greatly to a more stable European financial system.[674] Early signs allow us to draw the conclusion that the institutional structure of the SSM and SRM is robust and has the authority and credibility to promote integration and diminish cross-border fragmentation.[675]

Another benefit of the Banking Union in contrast to the ESFS is that the ECB and the Board deal with "the entire bank supervision lifecycle".[676] A wide range of prudential supervisory powers are exercised by the same actor and can therefore be adjusted to the specific situation. Because of that, those supervisory actions will be more effective and remove the inefficiencies and discrepancies which existed in the internal market due to the different supervisory practices.[677]
In contrast to the Authorities, the ECB has been installed as a supervisor for the tasks conferred to it. It replaces the national competent authorities, and its supervisory powers enable the ECB to address the significant supervised entities directly.

But even though the SSM seems to provide a very effective administrative structure for financial supervision in the euro area, there are also some downsides. One of the biggest issues of the SSM (and this is also true for the SRM) is the highly complex system of the distribution of competence between the two levels. To determine if a financial institution is a significant or a less significant institution and with that to determine which one is the competent supervisory authority is, due to intense political struggle, very complex.[678] The legislator did not take the chance to simplify the existing complex system of financial supervisors.[679]
Even though the SSM Framework Regulation provides more details regarding the conditions of significance and with that provides mitigation against an overreaching ECB and the unclear terms of the SSM Regulation, it still does not prevent all uncertainties.[680] A ruling of the General Court of May 2015 showed that, so far, it is not clear how the different requirements of the SSM Regulation and the SSM Framework Regulation will be filled out to distinguish between significant and less significant supervised entities even though the General Court made

[674] See Moloney, 'Banking Union', 1630; Patrick Hilbert, 'Vertikale Aufhebungsentscheidungen. Zu einem neuem Phänomen der Verbundverwaltung im Europäischen Bankenaufsichtsrecht' (2017) 50, Die Verwaltung, 189, 189.
[675] See Ferran, 'European Banking Union: Imperfect, But It Can Work', 27; Moloney, 'Banking Union', 1630.
[676] See Moloney, 'Banking Union', 1644.
[677] Ibid.; Ohler, 'Verwaltungsverbund und Finanzaufsicht'.
[678] See Ferran, 'European Banking Union: Imperfect, But It Can Work', 8; Kaufhold, 'Bankenunion', 36.
[679] See Ladler, *Finanzaufsicht in der EU*, 288.
[680] See Moloney, 'Banking Union', 1646.

some references.[681] And as the financial crisis showed, even rather small institutions can have systemic implications given their particular operating environments.[682] Much of the success of the Banking Union will depend on how this division of competence is carried out and how well the ECB and the national competent authorities and the ECB and the Board work together.[683]

Another interesting innovation in the Banking Union, closely connected to the issue of the classification of financial institutions as significant or less significant, is that due to a change in responsibility (from significant to less significant or the other way around), it is now possible for national authorities to revoke or modify supervisory measures of the ECB. This is a new situation since before then, national authorities had only been capable of temporarily suspending decisions of European Union bodies.[684] Since the ECB can intervene in every supervisory procedure and instruct national competent authorities as well as step in and take over the supervisory processes, this is not as path-breaking as one might think, but it shows a new step regarding the cooperation of the two different administrative levels and illustrates once more that the success of the SSM will very much depend on the cooperation of these two levels.[685] What also shows the need for a close cooperation is the fact that the national competent authorities constitute the majority in the ECB's Supervisory Board.[686] The effectiveness and viability of the new infrastructure for decision-making depends on the removal of national conflicts on economic interests between the different Member States.[687]

This high degree of dependence on good and consistent cooperation in various areas shows the main weakness of the SSM. Smooth cooperation and coordination is needed to guarantee consistent supervision of less significant banks by the national competent authorities, and for the ECB to be an effective supervisor, it must be kept well-informed by local authorities regarding significant banks.[688] Another shortcoming is the SSM's sectoral and institutional

[681] For the General Court's ruling see Case T-122/15 *Landeskreditbank Baden-Württemberg v. ECB* [2017] OJ C 213/26. See also Hanten and Bracht, 'Die Europäisierung des Bankaufsichtsrechts im Praxistest', 237, 239.
[682] Moloney, 'Banking Union', 1645.
[683] This holds also true for the ECB's complex decision-making structure, see European Court of Auditors, 'Single Supervisory Mechanism - Good Start but Further Improvements Needed' Special report No 29/2016, 26 et seq, 79.
[684] See Hilbert, 'Vertikale Aufhebungsentscheidungen', 206.
[685] Ibid.
[686] See Thiele, *Finanzaufsicht,* 523.
[687] See Binder, 'Cross-border Coordination of Bank Resolution in the EU: All Problems Resolved?', 15.
[688] See Moloney, 'Banking Union', 1647; see also Ferran and Babis, 'The European Single Supervisory Mechanism', 255; Guido Ferrarini and Luigi Chiarella, 'Common Banking Supervision in the Eurozone: Strengths

limitation to banking supervision.[689] In case of poor cooperation with national supervisors of the two other supervisory areas, this might lead to coordination difficulties and supervisory failures. In addition, the ECB will have to apply 19 or more different national laws (implementing European Union directives).[690] This is for one difficult and, second, the understanding and considerations regarding national particularities will partly be lost.[691]
Finally, the SSM's and the Board's governance can be regarded as suboptimal.[692] In the case of the SSM, the TFEU requires the final decision-making power of the ECB's Governing Council, and because of that the Supervisory Board can only propose draft decisions which have to be adopted by the Governing Council, cf. Article 129 TFEU. This can make future decision-making difficult. However, so far, the Governing Council did not hamper the SSM's effectiveness, and they have adopted internal procedural rules addressing their relationship. But it could be an obstruction in the future, especially in cases when the ECB has to quickly adopt a decision. In addition, the Supervisory Board's large size (18 euro-area national competent authorities and a Chair, a Vice Chair, and four ECB representatives) have so far not been proving to be generating inefficiencies.[693]

But besides these high demands regarding a good and consistent cooperation, there are also positive developments attached with the establishment of the Banking Union. First of all, with the Banking Union, great centralization has taken place in the euro area banking sector. Banking supervision and resolution are now settled at the European level. Second, even though the ECB does not have the power to fulfil all the tasks associated with prudential supervision, the ECB now has the power, if it has a task but not the power to fulfil the task, to instruct the respective national competent authority to execute the task according to national law.[694]

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and Weaknesses' (2013) European Corporate Governance Institute - Law Working Paper No 223/2013 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309897##> accessed 01.10.2017.

[689] But the ECB is legally constrained from engaging with market- (and consumer-)based conduct risk, given its strict Articles 1 and 4 operational mandate. Ultimately, the treatment of conduct risk, a core risk to banks, is not clearly delineated.

[690] See Hellwig, 'Yes Virginia, There is a European Banking Union! But it may not make your wishes come true', 14.

[691] See Hanten and Bracht, 'Die Europäisierung des Bankaufsichtsrechts im Praxistest', 241.

[692] See Matthias Lehmann, 'Single Supervisory Mechanism Without Regulatory Harmonisation? Introducing a European Banking Act and a 'CRR Light' for Smaller Institutions' (2017) European Banking Institute Working Paper Series 2017 - no 3, 2 <https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2912166> accessed 01.10.2017.

[693] See Moloney, 'Banking Union', 1651.

[694] This can be traced back to the SSM's legal basis, namely Article 127(6) TFEU, whereupon the Council can "confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings".

This vertical element with its binding effect ensures to a great extent a common and more consistent supervisory practice. And even though there are practical difficulties regarding the differentiation of significant and less-significant entities and with that regarding direct and indirect supervision, this system assures the functionality of the supervisory system. It would not have been practical feasible for the ECB to exercise direct supervisory powers over all banks in the euro area.[695]

Secondly, this model still gives the ECB the possibility to influence prudential supervision of national competent authorities over less-significant supervised entities by issuing regulations, guidelines and general instructions and with that contribute a great deal to a common and consistent supervisory practice in the European Union. Furthermore, if the functioning of the system requires it, the ECB can always step in and take over supervision over less significant supervised entities. Through the ECB's superordinate position, it contributes a great deal to a common and consistent supervisory practice since it can always instruct national competent authorities on how to exercises their powers. The ECB's central position and its mixture of direct and indirect supervisory powers ensures a truly European perspective in the euro area's banking supervision.[696]

The situation with regard to the Banking Union's second pillar, the SRM, is similar regarding the operational structure as well as the decision-making process. These two issues show some deficiencies regarding the effectiveness of banking resolution in the euro area. In the SRM, the exact distribution of competences between the Board and the national resolution authorities shows some practical problems.

The SRM's operational structure is especially problematic with regard to the actual resolution process due to the national resolution authorities' task to implement the resolution scheme. There are benefits to having national resolution authorities implement the resolution scheme who consider and know national company, insolvency, contract and property laws. However, there are also some issues regarding the coordination and cooperation of banking resolution at the implementation levels since it is the Board that actually drafts the resolution scheme at the European Union level.

[695] There are around 6,000 euro area banks which the ECB otherwise would have to supervise. It was important to establish an operational system and let the ECB establish itself as supervisor as well as to maintain the national supervisors' knowledge and experience. See also Moloney, 'Banking Union', 1645.
[696] Ibid., 1670; Ohler, 'Verwaltungsverbund und Finanzaufsicht', 331.

This division clearly shows that centralizing banking resolution at the European level, unfortunately, has not eliminated the difficulties of coordinating the two different levels. Besides coordination conflicts between the national resolution authorities and the Board, when implementing resolution schemes, coordination issues may also arise with regard to Council interferences. This is especially problematic since the Board has to take far-reaching, legally and economically complex decisions within a very short period of time.[697]

Furthermore, the Boards decision-making process itself is problematic especially with regard to the preparation of a resolution scheme. In banking resolution, time is always an issue and even though the resolution process is now designed to adopt a resolution scheme over a weekend, there are many different actors, supranational, national as well as intergovernmental, which are involved in this process and which make it even more difficult.[698] This complicated procedure has been established to take into account the Member States' (fiscal) interests. In addition, it was necessary due to Treaty constraints regarding the delegation of powers to agencies and the need for a fast and efficient decision-making process. The Board, even though it is the central resolution actor, does not have full autonomy and has to submit its decision to the Commission, who has to scrutinize it.

Furthermore, the Council (and with that the Member States) can express concerns that the Board's resolution scheme does not meet the "public interest" which the SRM Regulation does not clearly define and therefore leaves room for a great deal of discretion.[699] Through the Council and the Board's plenary sessions, Member States have the possibility to influence the Board's decision-making to a great extent.[700] In banking resolution, much more than in other areas of supervision, fiscal implications on the Member States' budget have to always be kept in mind and make a direct involvement of the Council necessary.[701]

Although the SRM's operational and decision-making structure partially restrains the effectiveness of banking resolution, the fact is that with the establishment of the SRM and the Fund the mutualization of losses has been established, a historic step has been taken.[702] This

[697] See Binder, 'Cross-border Coordination of Bank Resolution in the EU: All Problems Resolved?', 14 et seq.
[698] See Moloney, 'Banking Union', 1639 et seq; Binder, 'Cross-border Coordination of Bank Resolution in the EU: All Problems Resolved?', 14.
[699] See Binder, 'Cross-border Coordination of Bank Resolution in the EU: All Problems Resolved?', 14.
[700] See Hellwig, 'Yes Virginia, There is a European Banking Union! But it may not make your wishes come true', 18.
[701] Even though, the Council never had a direct operational role in EU financial supervision governance so far. Moloney, 'Banking Union', 1644.
[702] National governments generally want to retain their authority over highly political issues as for example issues of redistribution. See Philipp Genschel and Markus Jachtenfuchs, '1. Introduction: Beyond Market Regulation:

step is greatly important for the overall effectiveness of banking supervision in the euro area.[703] Only with a centralized resolution authority at the European level can the "vicious cycle" between financial institutions and states be broken.

The centralization of fundamental resolution actions, like the decision to initiate a resolution and the choice of resolution tools, guarantees that national biases and interests are not given too much room.[704] Furthermore, the Board has a few effective powers to ensure a common and consistent resolution practice like instructing national resolution authorities and, in case a national resolution authority fails to take the necessary actions, to order institutions subject to a resolution plan to take certain actions.[705] These powers lead to the much-needed alignment of banking supervision and banking resolution, and to the much-needed convergence and consistency in banking supervision.[706]

The success and stability of the Banking Union will to a great extent depend on the coordination between central (ECB/the Board) and national (the national authorities) elements.[707] In addition, since the Banking Union is only a sector-specific supervisory system, the coordination as well as the exchange of information between the other two sectoral supervisors has to be effectively ensured.[708] But all in all, the ECB and the Board have discretional, operational, direct and fiscally significant supervisory powers which ensure an effective supervisory and resolution system.

In contrast to the ESFS, the SSM's and the SRM's centralized supervisory powers are farther reaching. However, even though the SSM and SRM display a great deal of supranational characteristics, with the involvement of the Council they also show elements of intergovernmentalism. In the ESFS as well as in the Banking Union, national authorities and the Member States still play a very important role, last but not least due to the strong fiscal implications of financial supervision.[709] But the European actors are, in the ESFS only in certain

Analyzing the European Integration of Core State Powers', in Philipp Genschel and Markus Jachtenfuchs (eds), *Beyond the Regulatory Polity? The European Integration of Core State Powers* (Oxford University Press 2013), 2.

[703] See Moloney, 'Banking Union', 1644.

[704] See Binder, 'Cross-border Coordination of Bank Resolution in the EU: All Problems Resolved?', 13.

[705] See Moloney, 'Banking Union', 1655.

[706] Ibid., 1638.

[707] Ibid., 1645.

[708] See Kaufhold, 'Bankenunion', 35.

[709] See Moloney, 'Banking Union', 1642.

situations, in a clear hierarchical position to the national authorities and have the power to ensure a common and consistent European supervisory practice.

1.4 Differentiated Integration: The Relationship between the ESFS and the Banking Union

Besides the design of the different cooperation mechanisms, the relationship between the Banking Union and the ESFS is important for the effectiveness of the administrative framework as well. With the establishment of the Banking Union, another form of differentiated integration took place, and the interconnection of these two systems is important for the functioning of the internal market and the integration of the European Union.

The decision to establish a Banking Union after the ESFS was put in place, and to transfer the competences of banking supervision in the euro area to the ECB (and not to EBA) is of far-reaching significance for the integration process of the internal market in the European Union. The establishment of two different mechanisms in banking supervision, one for the European Union's internal market and one only for the euro area, leads to a deeper level of differentiated integration between euro area Member States and the rest of the Member States. But during the crisis, it became apparent that with a single currency and a fragmented financial sector, mere coordination would not be enough and that real homogenization and centralization of banking supervision was needed.[710]

With the establishment of the Banking Union, coordination as well as administration has been moved to the European level. The ECB's supervisory actions set a uniform and standardized administrative practice. Integration dynamics have been fastened with this new institutional structure, and another level of harmonization in the field of the financial sector has been reached with the ECB as the central body for an optimal integration of the banking system.[711]

The coexistence of the ESFS and the Banking Union does affect the uniformity of the internal market and the idea of a unified regulatory framework in the financial sector. This differentiation has been understood to be especially unfortunate with regard to the UK and its

[710] EBA is, due to its locality in London, not suitable to supervise and carry out bailouts of euro area banks. Moreover, the Meroni doctrine prevented the transfer of further powers to a European agency. Ohler, *Bankenaufsicht,* § 5, paras 12 et seq; Ohler, 'Verwaltungsverbund und Finanzaufsicht', 334.

[710] Recitals 2, 5 SSM Regulation. Francesco Capriglione and Andrea Sacco Ginevri, 'Politics and Finance in the European Union' (2015) Law and economics yearly review, 60 <http://ssrn.com/abstract=2662084> accessed 01.10.2017.

[711] See Capriglione and Sacco Ginevri, 'Politics and Finance in the European Union', 45.

important banking sector.[712] But with the UK now leaving the European Union, the concerns regarding the important financial centre London being left out of the Banking Union are now superfluous.[713]

The European Union did consider the difficulties of this differentiation for the internal market. All the measures taken refer to the internal market as a whole.[714] To maintain and deepen the internal market, the Banking Union is also open to non-euro area Member States.[715] With that, there has been an opening up towards non-participating Member States. Non-euro area Member States can establish a close cooperation between their national competent authority and the ECB. But so far, the existing option for other Member States to establish a close cooperation and with that join the SSM is of a mere theoretical nature.[716]

With the establishment of the Banking Union, the supervisory practice in the banking sector in the internal market is divided. It leads to a strong centralization of the supervisory practice in the euro area and keeps the traditional decentralized structure in the ESFS.[717] It is unclear if supervisory and resolution mechanisms which apply only in parts of the internal market will be effective and ensure financial stability.[718]

While the interplay of the internal market and the euro area is a difficult issue, the most problematic question is the relationship between the ECB, as the banking supervisor in the euro

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[712] Ibid., 72 et seq.

[713] See Kaufhold, 'Bankenunion', 34. For more information on Brexit and its impact on financial markets see Franklin Allen and others (eds), *The Changing Geography of Finance & Regulation in Europe* (European University Institute (EUI) 2017), 111 et seq; Nicolas Véron, 'Charting the Next steps for the EU Financial Supervisory Architecture' (2017) Bruegel, Policy Contribution, Issue no 16 <http://bruegel.org/2017/06/charting-the-next-steps-for-the-eu-financial-supervisory-architecture/> accessed 01.10.2017.

[714] Different mechanisms can be found throughout the new instruments to ensure such reconnection to the European Union's legal framework and to the idea of a unified European Union. See Article 6(2) SRM Regulation, Recital 30, Article 1(1) SSM Regulation: "With full regard and duty of care for the unity and integrity of the internal market based on equal treatment of credit institutions with a view to preventing regulatory arbitrage." or Article 3 SSM Regulation.

[715] See Recital 11 SSM Regulation. A close cooperation can be established between the national competent authorities of non-participating EU Member States and the ECB, see Article 2(1), 7 SSM Regulation, Article 4(2) SRM Regulation. Other forms of cooperation are also possible, Article 3 SSM Regulation, Articles 10 et seqq. SRM Regulation.

[716] This is true even though changes have been made to make close cooperation work. First of all, a new decision-making process was created to enable non-euro area Member States that want to join the SSM to participate, since by Treaty only euro area Member States have decision-making authority within the ECB, Articles 26(8), 7(7) SSM Regulation, and second there has been a change in the voting system within EBA's Board of Supervisors when non-euro area Member States were worried about a loss of influence in European decision-making fora. However, so far, only Bulgaria and Romania are reported to be in discussions with the ECB on close cooperation. Ohler, 'Verwaltungsverbund und Finanzaufsicht', 334; see also Schammo, 'ESFS', 3 et seqq; Moloney, 'Banking Union', 1662.

[717] See Ohler, 'Verwaltungsverbund und Finanzaufsicht', 335; Binder and Gortsos, *The Banking Union*, 14 et seq.

[718] See Kaufhold, 'Bankenunion', 34.

area, and EBA.[719] The relationship between the ECB and EBA can be described as complementary as well as competitive. Regarding the establishment of the single rule book, it is complementary; regarding microprudential supervision of credit institutions, it is competitive.

The latter becomes especially visible in the case of the ECB's indirect supervision of less significant supervised entities. Regarding indirect supervision, the ECB has the competence to influence national competent authorities' supervisory activities through regulations, guidelines or general instructions so the supervisory practices converge and a common supervisory culture can emerge. This coincides with EBA's task to contribute to the establishment of a common and consistent supervisory practice.[720] Even though the ECB's administrative practice is formally restricted to the euro area, it will also influence the financial sector of the European Union as a whole.[721] However, EBA on the other hand, can perform coordination tasks between the ECB and national competent authorities which can also lead to competition with the ECB's supervisory powers.[722]

However, one of the biggest risks for the effectiveness of the governance regime for the banking sector is the cooperation between the Banking Union's participating Member States (so far, the euro area Member States) and the other Member States in the ESFS's decision-making processes. There, the danger exists that the bloc of participating Member States and a strong ECB limit EBA's effectiveness. However, this danger had been considered from the very beginning, and some mechanisms were put in place which resulted in enhancements of the EBA Regulation in 2013.

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[719] Difficulties also arise in relation to the Board, since EBA also has to contribute to and participate in the development and coordination of effective, consistent, and up-to-date recovery and resolution plans. But these difficulties are of a more limited nature. The institutional interplay has been designed by the UK and finally agreed, despite Commission's concern due to potential fragmentation risks and German opposition, at the final "emergency" ECOFIN meeting in December 2012. See also Eilis Ferran, 'European Banking Union and the EU Single Financial Market: More Differentiated Integration, or Disintegration?' (2014) University of Cambridge Faculty of Law Research Paper No 29/2014 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2426580&rec=1&srcabs=2171785&alg=1&pos=8> accessed 01.10.2017; Moloney, 'Banking Union', 1663 et seq.

[720] See Ohler, 'Verwaltungsverbund und Finanzaufsicht', 336.

[721] Recital 30, Article 3(6) SSM Regulation, Article 5 SRM Regulation. Non-participating Member States will interact with SSM Member States through the EBA and through the ESFS. In addition, the ECB and the competent authorities of non-participating Member States have to conclude a memorandum of understanding describing in general terms how they will cooperate.

[722] But one should not forget that EBA has direct supervisory powers only in three expressly mentioned scenarios. See Ohler, 'Verwaltungsverbund und Finanzaufsicht', 336.

The most important one concerns EBA's decision-making process. The changes in EBA's decision-making process are intended to protect the interests of non-participating Member States from being overruled by the bloc of participating Member States on EBA's Board of Supervisors. Because of that, a double majority voting system has been installed.[723] Such a double majority voting system also applies to other highly sensitive decisions of EBA, as for example decisions in cases of Union law being breached as well as binding mediation actions. Furthermore, the ECB has been included in the ESFS and is now subject to EBA's powers. Even though it is the only practical way to cope with the institutional structure, since the ECB replaces national competent authorities in the scope of the SSM, this leads to a rather unusual arrangement.[724] Now the ECB, a Treaty institution, is subjected to an agency, EBA, set up under secondary law. The two main issues here are the independence guarantee of the ECB and the ECB's lack of voting power in EBA's Board of Supervisors.[725] But the aim of these provisions is to secure the internal market interest. Furthermore, it ensures that the ECB cooperates with the Authorities as well as respects EBA's (and the other Authorities') competences and tasks. The question remains whether the changes in the decision-making process and the institutional adjustments are sufficient for EBA to assert itself and to protect the internal market.[726] So far it seems as if EBA succeeds with the latter but not so much with the former. At least for the internal relations of the euro area, the impression emerges that the ECB suppresses EBA, and it seems realistic that EBA will withdrawal and focus on its regulatory tasks.[727]

1.5 Financial Supervision and Other Forms of Economic Supervision

In the European Union's communications and energy sectors, numerous forms of horizontal and vertical cooperation mechanisms with regard to the decision-making-process exist. In the communications sector, national regulatory authorities have to make certain draft decisions (ex ante) available to the other actors in this field (Commission, BEREC and the other national regulatory authorities) so that these actors can issue non-binding opinions. Even though the comments of these other actors are not legally binding, the respective national regulatory

[723] This means to reach a qualified majority which is required for the Board of Supervisor's quasi-rule-making activities, a simple majority within the participating as well as in the non-participating member states' blocs is required.
[724] See Moloney, 'Banking Union', 1630, 1663 et seq.
[725] Only a non-voting representative of the ECB's Supervisory Board sits in EBA's Board of Supervisors.
[726] See Moloney, 'Banking Union', 1630, 1663 et seq.
[727] See Ohler, 'Verwaltungsverbund und Finanzaufsicht', 336.

authority has to consider the comments with the utmost account and in certain delimited cases, the Commission has actual veto rights. This (mainly) horizontal cooperation in the decision-making process ensures, without legally binding mechanisms, that the different national regulatory authorities cooperate and coordinate their supervisory decisions. The idea is that through the cooperation, the different supervisory practices converge and a common and consistent supervisory practice is established.

In the energy sector, similar mechanisms exist with the exception that in cases where either the national regulatory authorities concerned cannot reach an agreement or if the national regulatory authorities jointly request it, ACER is authorized to take the decision itself. In addition, national regulatory authorities have numerous (ex post) notification duties towards the Commission regarding decisions taken where the Commission is in the position to ask the national regulatory authority to amend or withdraw a decision or can even take the decision itself.

Cooperation in the ESFS is very different. In the ESFS, the Authorities and the national competent authorities are not very involved in the actual decision-making process. Convergence in the decision-making process and a common and consistent supervisory practice should be achieved through executive rulemaking (draft regulatory and implementing technical standards, guidelines and recommendations) and only in situations where the functioning of the financial system is at stake or the national competent authorities infringe Union law can the Authorities use their intervention powers and take binding decisions towards the national competent authorities.

This also holds true for the ECB's indirect supervisory powers. Here the ECB influences national competent authorities' supervisory decisions directly through regulations, guidelines and general instructions. The advantages of this system are that the Authorities and the ECB develop a common and consistent regulatory framework on which the national competent authorities can fall back and which can be adapted in case of changing circumstances. In addition, such a common framework is time-saving and also saves capacities. Of course, general instructions or guidelines are not able to take into account individual cases and their special features as it is possible in the communications and energy sectors, but they ensure a higher degree of harmonization and convergence.

Furthermore, the Authorities, the Board and the ECB have the power to step in and exercise direct supervisory powers in individual cases when it is important for the functioning of the

financial system.[728] These intervention powers allow, through their vertical and binding element, convergence and consistency of supervisory practice in crucial situations. These intervention powers show similarities to the changes of responsibilities in antitrust law.

The right of the Authorities, the Board and the ECB to step in and take over supervisory proceedings is inspired by the Commission's power to take over antitrust proceedings, Article 11(6) Council Regulation EC No 1/2003.[729] But the starting point in the two different areas of supervision is very different.[730] Due to a complex system of parallel competences in European Union antitrust law, the Commission and the national competition authorities share the day-to-day supervisory business.[731]

In financial supervision, such a system of parallel competence does not exist. Neither in the Banking Union, even though the European Union has here an exclusive competence like in antitrust law, nor in the ESFS. In financial supervision, the Authorities and the Board can only take over proceedings in cases in which national competent authorities or national resolution authorities infringe Union law.[732]

In the case of the SSM, the ECB can take over supervision with regard to less significant supervised entities and decide to exercise directly all the relevant powers itself only in situations where it is necessary for the ECB to ensure the consistent application of high supervisory standards. In these cases, a transfer of powers takes place.

In financial supervision, the tasks and powers regarding the supervisory activities are clearly divided among the different actors. With the exception of direct supervision of significant supervised entities, the day-to-day supervision is carried out by the national competent authorities. Even though the system is not as closely interconnected as supervision in antitrust

[728] In the case of the ECB, this only holds true when exercising indirect supervision. Otherwise the ECB is the central supervisory authority for significant supervised entities.
[729] See Kämmerer, 'ESFS', 1284; Kämmerer, 'Bankenunion', 832.
[730] See Hänle, *ESMA*, 175.
[731] The system of parallel competence in antitrust law extends the competence to the Member States' competition authorities. The Commission and the national competition authorities share the day-to-day supervisory business. For this system of parallel competences to work, a complex system of vertical and horizontal forms of cooperation exists. The Commission has to transmit copies of the most important documents it has collected to the national competition authorities, and the national competition authorities in turn have to inform the Commission when acting under Articles 101, 102 TFEU. In addition, national competition authorities and national courts cannot take decisions which would run counter to Commission decisions. Even if the Commission takes on a case, it is ensured, through the Advisory Committee, that cooperation and exchange between the national competition authorities and the European level takes place.
[732] See Kämmerer, 'ESFS', 1284.

law, the Authorities still have the power to build a common and consistent supervisory practice through their executive rulemaking.

In the field of consumer protection, cooperation takes place in the execution phase of European consumer protection law. Here, the different national competent authorities are obliged to cooperate and mutually assist each other through the exchange of information (CPC Network), assist each other with enforcement measures, and coordinate market surveillance and enforcement measures. In certain cases where different national competent authorities cannot reach an agreement, a vertical element exists and the matter is brought to the Commission who has to issue an opinion.
This system is very similar to the cooperation in the ESFS, with the exception that in the ESFS European agencies can set up a harmonized framework through their executive rulemaking. However, also in the ESFS the different national competent authorities have to cooperate closely, exchange the necessary information to carry out their tasks and assist each other whenever necessary. But in contrast to consumer protection in the ESFS, cooperation, assistance and the exchange of information is coordinated and monitored carefully by the Authorities. This leads to a much more effective way of ensuring that exchange and assistance actually takes place.

As this shows, there are many different ways for the different levels to cooperate in horizontal and vertical dimensions. It can be observed that in competition law, the cooperation and coordination between the national competition authorities is very close, but at the same time the Commission is the central and leading supervisory authority that focuses on the important cases and can provide the general framework for the consistent application of European Union competition rules.[733] This shows similarities to supervision in the ESFS and to the ECB's indirect supervision of less significant supervised entities even though the Authorities and the ECB only have intervention powers in certain and crucial circumstances.
In addition, in most of the ex-ante cooperation mechanisms in the decision-making process, the instruments of the European bodies or other national authorities are primarily of an advisory nature. However, those advisory opinions have to be taken into the utmost account by the authorities before taking the decision, and the actual impact of these advisory opinions (through

[733] See Mager, 'Die Europäische Verwaltung', 379; Ottow, 'Supervision of Competitive Markets', 207 et seq.

peer pressure) should not be underestimated.[734] But in comparison with the Authorities' and the ECB's binding supervisory powers and their executive rule making powers, these non-binding opinions fall short.

A unique feature of the ESFS supervisory structure is the Authorities' intervention-based model. Besides the Authorities' task to promote a common and consistent supervisory practice, their actual direct supervisory powers are intervention-based in cases in which there has been a violation of Union law. However, regarding the daily supervisory practice, Authorities' intervention powers are rather limited. This intervention-based model clearly differentiates the supervisory model in the ESFS from the ECN in antitrust law. In antitrust law, coordination and cooperation takes place through the ECN, while in financial supervision such an institutionalized exchange does not exist. This is not necessary due to the executive rulemaking powers and the intervention-based model. In the case of the ESFS, the heads of the national competent authorities are, at the same time, voting members of the Authority's Board of Supervisors. Because of that, there would not be any benefit if there would be something similar to the ECN because in both cases the same people would decide.[735]

This comparison shows that so far, there is no uniform or standardized "European supervisory model", but rather a potpourri of different approaches. Whether the Authorities' supervisory concept will prevail remains to be seen. In contrast to the other models, the advantages of this model are that with the Authorities some kind of European superintendent has been established which can uphold the European interest in crucial situations through its intervention powers.[736] In addition, no "super" European regulatory authority has been established and the principle of the Member States autonomy when applying Union law still holds true in many instances.

2. Independence and Accountability

Several new actors as well as a great deal of new cooperation mechanisms have been put in place to facilitate the establishment of a common and consistent supervisory practice in European financial supervision and with that to improve the shortcomings of the system of

[734] See Ottow, 'Supervision of Competitive Markets', 214.
[735] See Hänle, *ESMA*, 183 et seq.
[736] See Kämmerer, 'ESFS', 1286.

indirect administration. However, the new supervisory system raises concerns regarding the independence and the accountability of the different supervisory actors.[737]

Especially in multilevel governance systems with forms of indirect administration, accountability is a highly problematic issue. As Chapter 3 has shown, in the administrative framework of financial supervision, numerous actors from the two levels work closely together, and a large variety of cooperation mechanisms have been put in place. These cooperation mechanisms, which contribute a great deal to the effectiveness of an administrative structure, are highly problematic when it comes to accountability. Because of that it is important that in this administrative framework, effective accountability mechanisms are put in place as well.

Operational independence of supervisors from any (political) influence is one of the core principles of an effective supervisory system.[738] In case of European financial supervision this means independence from political influence of the Member States' national authorities and governments as well as of any European institutions. But at the same time the need exists to hold supervisors accountable for their supervisory actions. Accountability is an essential prerequisite for the legitimacy of administrative actions. Sufficient accountability mechanisms have to be established in every administrative system to control the activities of the different actors.[739]

Especially cooperation mechanisms, an essential component of composite administration, are highly problematic regarding the question of accountability.[740] Cooperation mechanism make it very difficult to attribute individual actions to individual actors.[741] In European financial supervision the legal nature of four of the supervisory authorities add to the problem of

[737] For more information on the issue of the accountability of agencies see Deirdre Curtin, 'Holding (Quasi-)Autonomous EU Administrative Actors to Public Account' (2007) 13, European Law Journal, 523.

[738] Basel Committee on Banking Supervision, 'Core Principles for Effective Banking Supervision' (September 2012), principle 2; see also Robert A. Eisenbeis, '12. Agency Problems in Banking Supervision', in Donato Masciandaro and Marc Quintyn (eds), *Designing Financial Supervision Institutions: Independence, Accountability and Governance* (Edward Elgar 2007), 438; Ferran and Babis, 'The European Single Supervisory Mechanism', 16.

[739] See Schmidt-Aßmann, *Verwaltungsrecht,* 399.

[740] See Eckhard Pache, 'Verantwortung und Effizienz in der Mehrebenenverwaltung' (2006) Staatsrechtslehrertagung, 116, 136 et seq <https://www.degruyter.com/downloadpdf/books/9783110914665/9783110914665.106/9783110914665.106.xml> accessed 01.10.2017; Christoph Möllers and Jörg Philipp Terhechte, '§ 40 Europäisches Verwaltungsrecht und Internationales Verwaltungsrecht', in Jörg Philipp Terhechte (ed), *Verwaltungsrecht der Europäischen Union* (Nomos 2011), para 15.

[741] See Deirdre Curtin, 'Holding (Quasi-)Autonomous EU Administrative Actors to Public Account' (2007) 13, European Law Journal, 523, 523; von Danwitz, *Europäisches Verwaltungsrecht,* 639; Schmidt-Aßmann, '§ 5 Verfassungsprinzipien für den Europäischen Verwaltungsverbund', paras 53-54.

accountability. Since there is hardly any mentioning of their design in the Treaties, agencies (here the three Authorities and the Board), complicate the issue of accountability.[742]

2.1 Independence

Operational independence of supervisors from any influence is one of the core principles of an effective supervisory system.[743] Therefore it is not surprising that the Authorities' founding regulations as well as the SSM and SRM Regulation all deal with the question of supervisory independence.

According to Article 42 EBA Regulation, the Board of Supervisor's Chairperson as well as the voting members are independent. They are not allowed to take instructions from either Union institutions or bodies, Member State's governments or any other public or private body. Neither the Member States nor Union institutions or bodies are allowed to influence the members of the Board of Supervisors when performing their tasks. Moreover, the Board of Supervisors has to act objectively and in the sole interest of the European Union as a whole.

The Authorities are strictly independent from Union institutions as well as Member States' governments and national authorities which clearly distinguishes the Authorities from any other European agency (with the exception of the Board).[744] Especially this independence from national governments is highly important for a common and consistent "European" supervisory practice. Even though the issue of the personal union of the members of the Board of Supervisors, who are at the same time the heads of national competent authorities, still exist, but with Art. 42 EBA Regulation it is at least ensured that as long as these heads of national competent authorities are carrying out their tasks under the EBA Regulation, they are independent from any national influence.[745] What should be stressed here is the Authorities'

[742] With the Treaty of Lisbon Art 263(1) TFEU as well as Article 298(1) TFEU, which are of high importance regarding European agencies, have been adopted. See also Johannes Saurer, 'The Accountability of Supranational Administration: The Case of European Union Agencies' (2009) 29, American University International Law Review, 430, 431. Agencies' accountability is not a new debate see inter alia Martin Shapiro, 'The Problems of Independent Agencies in the United States and the European Union' 4, Journal of European Public Policy, 276, 283 et seq; Saskia Lavrijssen, 'An Analysis of the Constitutional Position of the US Independent Agencies' (2004) TILEC Discussion Paper Series No 2004-001 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=870251> accessed 01.10.2017.

[743] Basel Committee on Banking Supervision, 'Core Principles for Effective Banking Supervision' (September 2012), principle 2; see also Eisenbeis, '12. Banking Supervision', 438; Ferran and Babis, 'The European Single Supervisory Mechanism', 16.

[744] See Ohler, 'Verwaltungsverbund und Finanzaufsicht', 326.

[745] See Silvio Andrae and others, 'III. Europäische Aufsichtsbehörden', in Simon G. Grieser and Manfred Heemann (eds), *Europäisches Bankaufsichtsrecht* (Frankfurt School Verlag 2016), 75.

independence from the Commission,[746] according to Art. 42 EBA Regulation, even though their independence is limited by a proper institutional balance and the principle of democracy.[747]
In addition, Articles 49, 52 EBA Regulation ensure the independence of the Management Board, the Chairperson as well as the independence of the Executive Director.[748]

In contrast to the Authorities' independence, the ECB's and the Board's independence are rather extensive.[749] Besides the already stated Articles 130 and 282(3) TFEU which are applicable to the ECB's supervisory tasks since those tasks are also set up in the Treaties, cf. Article 127(6) TFEU, there is now also an SSM-specific independence requirement.
Article 19 SSM Regulation extends the ECB's independence guarantee to the ECB's Supervisory Board and the Steering Committee.[750] According to Article 19 SSM Regulation, the ECB and the national competent authorities are independent when acting within the SSM. The members of the Supervisory Board and the Steering Committee have to act independently and objectively in the interest of the European Union as a whole and can neither seek nor take instructions from the institutions or bodies of the European Union, from any Member States' government or from any other public or private body. This independence has to be respected by the institutions, bodies, offices and agencies of the European Union as well as the governments of the Member States and any other body.
In addition to this functional independence, the personal independence of the Chair and the Vice Chair of the Supervisory Board is also ensured.[751] With these different provisions, it should be guaranteed that the actors of the ECB can act free from any instruction or political pressure. But of course, the ECB's supervisory measures are subject to the complete judicial control of the Court of Justice of the European Union.[752]

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[746] Ibid.
[747] For more insights on the difficult issue of the Authorities' independence and the Meroni doctrine, see Ulrich Häde, 'Jenseits der Effizienz: Wer kontrolliert die Kontrolleure? Demokratische Verwantwortlichkeit und rechtsstaatliche Kontrolle der europäischen Finanzaufsichtsbehörden' [2011], Europäische Zeitschrift für Wirtschaftsrecht, 662, 663 et seq; Kohtamäki, *Die Reform der Bankenaufsicht,* 209 et seq; Johannes Saurer, 'Die Errichtung von Europäischen Agenturen auf der Grundlage der Binnenmarktharmonisierungskompetenz des Art. 114 AEUV' (2014) 67, Die Öffentliche Verwaltung, 549; Katja Michel, *Institutionelles Gleichgewicht und EU-Agenturen: Eine Analyse unter besonderer Berücksichtigung der European Banking Authority* (Duncker & Humblot 2015), 219 et seq, 227 et seq; Andrae and others, 'III. Europäische Aufsichtsbehörden', 75.
[748] See Articles 46, 49, 52 EBA Regulation.
[749] See Andrae and others, 'III. Europäische Aufsichtsbehörden', 75.
[750] See Moloney, 'Banking Union', 1635; Ohler, *Bankenaufsicht,* § 5, para 82.
[751] See Article 26(3), (4) SSM Regulation.
[752] See Ohler, *Bankenaufsicht,* § 5, para 83.

This new independence regime is a positive change from the previous system, where some supervisory authorities were still subordinate to their Member States' governments. It provides some hope that with these provisions, supervision will be less influenced by national political interests.[753] The SRM's independence regime is identical to the SSM's. According to Article 47 SRM Regulation, the Board and the national resolution authorities act independently and in the general interest when performing their tasks under the SRM Regulation and can neither seek nor take instructions from the Union's institutions or bodies, from any government of a Member State or from any other public or private body.

A legal novelty is the independence of the national competent authorities as well as the national resolution authorities when acting within the SSM and SRM. This provision goes much further than the provision regarding the freedom from instructions of the heads of the national competent authorities when acting within the Authorities' Boards of Supervisor. Article 19 SSM Regulation and Article 47 SRM Regulation comprise the entire national authority to protect all supervisory and resolution actions within the Banking Union from any political influence, and with that guarantee a consistent and common supervisory practice within the SSM and SRM. This independence exists as long as national competent authorities and national resolution authorities act within the scope of the SSM and SRM Regulation.[754] It also differentiates the Banking Union from the ESFS where only the Authorities and the members of their bodies enjoy an independence guarantee.[755]

But as it will be specified in the next section, this independence in the field of supervision is problematic with regard to the principle of democracy (in contrast to the ECB's independence in the area of monetary policy), since in case of banking supervision the ECB fulfils a sovereign public task. Furthermore, the ECB has the power to enforce supervisory requirements with sovereign powers.[756] It remains to be seen if the right balance between accountability and operational independence has been found within the SSM.[757]

[753] See Hellwig, 'Yes Virginia, There is a European Banking Union! But it may not make your wishes come true', 14.
[754] But this independence only includes a functional independence of the national authorities not a personal independence of members of staff. Ohler, *Bankenaufsicht,* § 5, paras 90-91.
[755] See Ohler, 'Verwaltungsverbund und Finanzaufsicht', 334.
[756] See Alexander, 'The ECB and Banking Supervision', 486 et seq.
[757] See See Moloney, 'Banking Union', 1635.

2.2 Accountability

To have effective accountability mechanisms put in place is especially important in areas of law where different actors of different levels work together. The accountability of the Authorities, the ECB and the Board is often questioned with regard to the possibility of political and financial control as well as of judicial review.[758]

Accountability is one of the central categories of public law and numerous meanings of the term exist.[759] The term "accountability" as used in global administrative law mixes the two elements of democratic accountability (*demokratischer Verantwortlichkeit*) and legal or judicial accountability (*rechtsstaatlicher Verantwortlichkeit*).[760] However, four key elements of the accountability concept can be identified. These elements are: first, transparency;[761] second, information rights; third, mechanisms to participate; and fourth, control of the actors by independent bodies (this includes judicial control as well as parliamentary control).[762]

In the following democratic elements as well as judicial elements of accountability will be examined. With regard to democratic elements political and financial control as well as information obligations of the agencies and the ECB will be analysed. With regard to judicial control the possibility of legal protection and remedies is assessed. Since, the issue of transparency is especially important with regard to legal protection, legal protection and transparency will be dealt with together.

2.2.1 Political and Financial Control, Information Obligations

With regard to European agencies, various systems of accountability mechanisms exist. The structure of the agencies' political accountability is very different to national systems of accountability. In national systems, a hierarchical political accountability exists in most cases towards a national parliament elected according to democratic principles. In the European

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[758] See Saurer, 'Accountability of Supranational Administration', 431. There are already some suggestions on how to enhance the ESAs accountability regimes, see Véron, 'Charting the Next steps for the EU Financial Supervisory Architecture', 1.

[759] See Eberhardt Schmidt-Aßmann, 'Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft' (1996) 31, Europarecht, 270, 296; Pache, 'Verantwortung und Effizienz in der Mehrebenenverwaltung', 137 et seq.

[760] See Möllers and Terhechte, '§ 40 Europäisches Verwaltungsrecht', para 15; see also Häde, 'Kontrolle der europäischen Finanzaufsichtsbehörden', 665; for more information on the term "accountability" see Robert O. Keohane, 'Accountability in World Politics' (2006) 29, Nordic Political Science Association, 75, 75 et seq.

[761] The question of transparency is here particularly problematic due to the large number of different cooperation mechanisms which make it difficult to attribute individual actions to individual actors.

[762] See Möllers and Terhechte, '§ 40 Europäisches Verwaltungsrecht', para 16.

Union, a "multiple-principal system" exists. European Union agencies are (politically) held accountable to the European Parliament, the Commission, the Council as well as the Member States.[763]

With the establishment of the Authorities, a new feature has entered the accountability structure in the European Union. The new agencies are much more independent than their predecessors. In contrast to other agencies, the Authorities are only accountable to the European Parliament and the Council.[764] This leads to a greater degree of independence towards the Commission.
However, besides the control mechanisms of the European Parliament and the Council, the Authorities have additional information obligations. According to Articles 43(4), 43(6) EBA Regulation, the Authorities' Boards of Supervisors have to transmit their work program as well as their multiannual work program to the European Parliament, the Council and the Commission (ex ante information for the different European Union institutions). In addition, they have to transmit their annual report on the activities of the respective Authority to the European Parliament, the Council, the Commission, the Court of Auditors and the European Economic and Social Committee (ex post information), which they also have to make public, cf. Article 43(5) EBA Regulation.
This shows that even though the Authorities are only controlled by the European Parliament and the Council, they have extensive ex ante and ex post information duties towards different European Union institutions. In addition, these duties also integrate the Authorities in the wider institutional structure of the European Union.
In contrast to the Authorities, the Board is still accountable to the European Parliament, the Council and the Commission for the implementation of the SRM Regulation, cf. Article 45(1) SRM Regulation. This puts the Board's accountability structure closer to the regular European Union agency accountability structure. Its accountability structure furthermore reflects the requirement as established by the Meroni doctrine.[765]
The Board has to submit an annual report to the European Parliament, the Council, the Commission and the European Court of Auditors on the performance of the tasks conferred on

[763] The accountability mechanisms of European agencies are very different to the accountability system of agencies in the US. For more information see Saurer, 'Accountability of Supranational Administration', 455, 467 et seq, 487; see also Johannes Masing, 'Die US-amerikanische Tradition der Regulated Industries und die Herausbildung eines europäischen Regulierungsverwaltungsrechts: Constructed Markets on Networks vor verschiedenen Rechtstraditionen' (2003) 128, Archiv des Öffentlichen Rechts, 558, 585 et seq.
[764] See Article 3 EBA Regulation.
[765] See Moloney, 'Banking Union', 1643; Binder and Gortsos, *The Banking Union,* 51 et seq.

it by the SRM Regulation. In addition, it is the Chair's duty to present this report in public to the European Parliament and the Council. If the European Parliament requests it, the Board's Chair also has to participate in an annual meeting by the competent committee of the European Parliament. On request of the Council, it can also be heard by the Council.

While previously accountability was also established through budgetary powers, the Authorities and the Board are now independent and fully responsible for their own budget.[766] In order to guarantee the Authorities full autonomy and independence, the Authorities were set up with an autonomous budget with revenues mainly from obligatory contributions from national supervisory authorities and from the General Budget of the European Union.[767] The Boards of Supervisors adopt the budget in accordance with Article 63 EBA Regulation.[768] In addition, and according to Article 58 SRM Regulation, the Board has an autonomous budget, which is not part of the European Union budget. It comprises two parts: Part I of the budget is for the administration of the Board and Part II is for the Fund.

In the case of the ECB with its two separate tasks regarding monetary policy and financial supervision, the issue of accountability is even more problematic. According to Articles 130 and 282(3) TFEU, the ECB's independence regarding monetary policy is already stated in the Treaties. In general, these provisions also apply to the ECB's new supervisory tasks which are also mentioned in Article 127(6) TFEU. But with regard to financial supervision, this independence stands in potential conflict with the democratic need for accountability control.[769] Since in financial supervision a great amount of tax-payer's money is involved and the ECB is not democratically legitimated in the sense that its members are not elected by the people, accountability mechanisms are highly important for the work of the SSM.[770]

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[766] Up to now the European Parliament and the Council shared the budgetary power regarding European agencies, which was an "effective ex ante accountability tool". Saurer, 'Accountability of Supranational Administration', 470.

[767] See Recital 59, Articles 62 et seq. EBA Regulation. The Union's financing of the Authorities is subject to an agreement by the budgetary authority in accordance with Point 47 of the Interinstitutional Agreement between the European Parliament, the Council and the Commission of 17 May 2006 on budgetary discipline and sound financial management. The Union budgetary procedure is applicable and the auditing of accounts is undertaken by the Court of Auditors, while the overall budget is subject to the discharge procedure.

[768] See Article 43(7) EBA Regulation.

[769] See Moloney, 'Banking Union', 1635; Alexander, 'The ECB and Banking Supervision', 285 et seq.

[770] See Recital 55 of the SSM Regulation: "The conferral of supervisory tasks implies a significant responsibility for the ECB to safeguard financial stability in the Union, and to use its supervisory powers in the most effective and proportionate way. Any shift of supervisory powers from the Member State to the Union level should be balanced by appropriate transparency and accountability requirements." See also Andrae and others, 'III. Europäische Aufsichtsbehörden', 150 et seq; Ferran and Babis, 'The European Single Supervisory Mechanism', 17.

In the case of financial supervision, it is especially important that accountability and independence are kept in balance. The requirements regarding accountability are not the same in supervision and monetary policy.[771] Considering the enormous impact and power supervisors have over financial institutions as well as the financial system in general, the ECB's accountability regime needed some adjustments to ensure that its supervisory actions are subject to an effective accountability mechanism that supports legitimacy so that its framework is suitable for the extent and nature of its powers.[772]

The ECB is accountable to the European Parliament and the Council, both of which are democratically legitimated.[773] The legal basis of the accountability regime is the SSM Regulation and an Inter-Institutional-Agreement between the ECB and the European Parliament.[774] This Inter-Institutional-Agreement deals with details regarding the accountability to the European Parliament as well as the procedure for the involvement of the European Parliament when selecting the Chair of the Supervisory Board.[775]

Moreover, the ECB has reporting and review obligations towards the European Parliament, the Council, the Commission and the Eurogroup. Also, here broad information obligations of the supervisor exist. The European Court of Auditors has the power to review the ECB's supervisory tasks when examining the operational efficiency of the ECB.[776] In addition, the ECB has certain reporting obligations towards national parliaments of participating Member States since the ECB's supervisory measures can have a vast impact on their national public finances. Last but not least, the ECB is accountable to a parliamentary inquiry committee. The European Parliament can temporarily set up a parliamentary inquiry committee to "investigate alleged contraventions or maladministration in the implementation of Union law".[777] In addition and according to Article 29 SSM Regulation, the ECB needs to have a separately identifiable budget within its budget for carrying out the tasks conferred on it by the SSM Regulation.

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[771] See Ferran and Babis, 'The European Single Supervisory Mechanism', 17.
[772] Ibid.; Moloney, 'Banking Union', 1635.
[773] See Ohler, *Bankenaufsicht*, § 5, paras 87-89; Andrae and others, 'III. Europäische Aufsichtsbehörden', 151.
[774] Interinstitutional-Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred to the ECB within the framework of the Single Supervisory Mechanism, 2013/694/EU, https://www.ecb.europa.eu/ecb/legal/pdf/celex_32013q113001_en_txt.pdf.
[775] See Andrae and others, 'III. Europäische Aufsichtsbehörden', 151 et seq.
[776] See Moloney, 'Banking Union', 1635.
[777] See Andrae and others, 'III. Europäische Aufsichtsbehörden', 153.

Traditionally European agencies are also accountable to the Member States. There are several mechanisms in the agencies' structure which allow the Member States to control the agencies' work. First of all, Member States are represented in the agencies' Management Boards (which is in general a very powerful accountability tool); second, Member States can carry out control through the national authorities' day-to-day implementation as well as through political actions on the national level.[778]

In case of the Authorities' and the Board's work, this traditional way of controlling agencies has now been limited to a great extent. The Authorities' Founding Regulations grant the Authorities' Boards of Supervisors as well as their Management Boards independence from any national influence.[779] The same holds true for the Board and the ECB's Supervisory Board. Also, the Board and the Supervisory Board have to act independently and in the general interest, and neither the Member States nor any other public or private body is allowed to influence the members of the Board or the Supervisory Board.[780]

However, the Board and the ECB have certain information obligations towards national parliaments. They each have to submit an annual report to the national parliaments of participating Member States. The national parliaments can request the Board or the ECB to reply and the Board or the ECB is obliged to reply in writing to any observations or questions submitted by the national parliaments. Furthermore, national parliaments can invite the Chair or a member of the Supervisory Board to participate in an exchange of views in relation to the resolution of entities in that Member State together with a representative of the respective national authority. The Chair or a member of the Supervisory Board is obliged to follow such an invitation.[781]

2.2.2 Participation mechanisms

A few participation mechanisms have also been put in place with regard to the Authorities and the ECB. Before submitting draft regulatory or draft implementing regulatory technical standards to the Commission the Authorities have to conduct open public consultations, cf. Articles 10(1) subpara. 3, 15(1) subpara. 2 EBA Regulation.[782]

[778] See Saurer, 'Accountability of Supranational Administration', 475, 488.
[779] See Articles 42, 46 EBA Regulation.
[780] See Article 47 SRM Regulation, Article 19 SSM Regulation.
[781] See Article 46 SRM Regulation, Article 21 SSM Regulation.
[782] See Kämmerer, 'ESFS', 1286.

In addition, the ECB as well has to conduct open public consultations according to Articles 4(3) subpara. 3 and 30(2) subpara. 2 SSM Regulation before adopting regulations or establishing an arrangement regarding supervisory fees.

2.2.3 Judicial Control

Besides political accountability, judicial control is the other powerful accountability tool. With the Treaty of Lisbon and the adoption of Article 263 TFEU, much has changed regarding judicial control of agencies' action.[783] But besides the possibility to bring a case before the Court of Justice of the European Union, for the Authorities a Board of Appeal, for the Board an Appeal Panel and in the case of the ECB an Administrative Board of Review have been established.[784]

Judicial control in the ESFS and the SRM consists of a two-step system to better ensure legal protection. In the SSM, the situation is different and it is not mandatory for persons affected by an ECB supervisory decision to first bring it before the Administrative Board of Review. It is an optional intermediate step to have a decision internally reviewed and changed by the ECB in a less time consuming and less expensive procedure.[785] Decisions by the Authorities and the Board, however, have to be first brought before the Board of Appeal or the Appeal Panel; in a second step, the decision of the Board of Appeal or the Appeal Panel have to be brought before the Court of Justice of the European Union. With this two-step system, it should be ensured that anyone who is affected by a supervisory decision of the Authorities or the Board has recourse to the necessary remedies so that their rights can be effectively protected.[786]

In the case of the Authorities, any natural or legal person, including national competent authorities, can appeal against a decision of the respective Authority. The decision has to be addressed to that person, or the decision has to be of direct and individual concern to that person even if it is in the form of a decision addressed to another person. The Board of Appeal is a joint body of the Authorities. It was established so that persons affected by an Authority's decision, referred to in Articles 17-19 EBA Regulation and any other decision taken by an

[783] See Saurer, 'Accountability of Supranational Administration', 481.
[784] For more information see Cornelia Manger-Nestler, 'IV Rechtsschutz in der Europäischen Bankenaufsicht', in Simon G. Grieser and Manfred Heemann (eds), *Europäische Bankaufsicht* (1 edn, Frankfurt School Verlag 2016), 174 et seq. See also Article 263(5) TFEU.
[785] See Lackhoff, *Single Supervisory Mechanism,* paras 1009-1012.
[786] See Recital 58 EBA Regulation.

Authority in accordance with the European Union acts referred to in Articles 1(2), 60(1) EBA Regulation, can appeal against this decision.[787]

The Board of Appeal is composed of six members and six alternates who have to have a great deal of relevant knowledge and professional experience in the respective field.[788] Each Authority appoints two members of the Board of Appeal. Decisions are adopted on the basis of a majority of at least four of the six members. Where the appealed decision falls within the scope of one of the Authorities, at least one of the two members of the Board of Appeal appointed by the respective Authority should be part of the deciding majority.[789] The members of the Board of Appeal are independent in making their decisions. Furthermore, they are not allowed to perform any other duties in relation to the Authority, the Management Board or the Board of Supervisors.[790]

In the Banking Union, the situation is similar. In the SRM, the Appeal Panel is composed of five members from Member States.[791] Any natural or legal person, including national resolution authorities, can appeal against a decision of the Board referred to in Articles 10(10), 11, 12(1), 38 - 41, 65(3), 71 and 90(3) SRM Regulation and which is addressed to that person, or which is of direct and individual concern to that person.

In the case of the SSM, an Administrative Board of Review has been established.[792] It consists of five members from Member States and, upon the request of natural or legal persons, has to carry out an internal administrative review of the ECB's supervisory decisions which are addressed to those natural or legal persons or are of a direct and individual concern to that person. A request for a review of a final decision from the Governing Council regarding this review process is not admissible. After ruling on the admissibility of the review, the Administrative Board of Review expresses an opinion and remits the case to the Supervisory Board which then has to prepare a new draft decision and has to take into account the opinion of the Administrative Board of Review. The new draft version, which is to abrogate the initial decision, replaces it with a decision of identical content or with an amended decision. It is then submitted to the Governing Council. The new draft decision is deemed to be adopted unless the Governing Council objects within a maximum period of ten working days.

[787] See Kämmerer, 'ESFS', 1282.
[788] See Article 58(2) EBA Regulation.
[789] See Article 58(6) ESMA Regulation.
[790] See Article 59 EBA Regulation.
[791] See Article 85 SRM Regulation.
[792] See Article 24 SSM Regulation.

In a second step, the decisions of the Board of Appeal and the Appeal Panel, or, in cases where there is no right of appeal before the Board of Appeal or the Appeal Panel, by the Authorities or the Board, can be brought before the Court of Justice of the European Union.[793] Member States and the European Union institutions, as well as any natural or legal person, can institute proceedings before the Court of Justice of the European Union against decisions of the Authorities or the Board, in accordance with Article 263 TFEU.
In situations where the Authorities or the Board have an obligation to act and fail to take a decision, this can be brought before the Court of Justice of the European Union in accordance with Article 265 TFEU. In the case of the SSM, any decision of the ECB, other than recommendations and opinions, intended to produce legal effects vis-à-vis third parties can be brought before the Court of Justice of the European Union for the review of the legality of the acts.[794]

This overview shows that with the Board of Appeal, the Appeal Panel and the Administrative Board of Review a comprehensive system of legal protection for parties concerned by certain supervisory decisions has been established. With this new system, these parties have now more effective legal protection also at the European level. Even though this does not resolve the issue of the large number of cooperation mechanisms which make it difficult to always tell the individual contributions of the different levels apart completely, it improves the issue of transparency since it clearly gives those parties concerned by certain (clearly stated) supervisory decisions, cf. Article 60(1) EBA Regulation, Article 85(3) SRM Regulation, Article 24(1) SSM Regulation, the possibility to take legal actions.
With these provisions a great number of supervisory actions can now be attributed to one specific supervisor and it can be held accountable for it. With the Board of Appeal, the Appeal Panel and the Administrative Board of Review and as a last resort the Court of the European Union legal protection against supervisory actions of European supervisory actors at the European level is now better ensured.

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[793] See Article 61 EBA Regulation, Article 86 SRM Regulation. For more information on the importance of independence of supervisory authorities see Marco Arnone, Salim M. Darbar and Alessandro Gambini, '5. Governance in Banking Supervision: Theory and Practices', in Donato Masciandaro and Marc Quintyn (eds), *Designing Financial Supervision Institutions: Independence, Accountability and Governance* (Edward Elgar 2007), 155 et seq; for more information on financial market supervision see Fabian Arne Dechent, 'Bundesanstalt für Finanzdienstleistungsaufsicht und Bundesanstalt für Finanzmarktstabilisierung - Unabhängige Behörden in der Bankenaufsicht?' [2015], Neue Zeitschrift für Verwaltungsrecht, 767, 767 et seq.
[794] See Recital 60 SSM Regulation.

3. Conclusion

With the establishment of the ESFS and its new administrative framework, the organization of supervisory governance has not been radically reshaped. Day-to-day supervision is still carried out by the national competent authorities and agencies already existed in other areas of Union law.[795] But with the establishment of the new supervisory structure a great number of sophisticated coordination requirements were set up.[796]
Moreover, greater centralization and with that "greater homogeneity in and centralization of law in action" took place and, in addition, the Authorities' extensive information duties can be regarded as a positive development.[797] Last but not least, centralizing licensing and ESMA's direct supervisory powers over credit rating agencies are of historical importance.[798]

The ESFS is established as an intervention-based model. This means that the Authorities, besides their extensive cooperation and coordination powers, only have direct supervisory powers (intervention powers) in certain limited cases while the day-to-day business is carried out by the national competent authorities.[799]
Besides these intervention powers, the Authorities dispose over executive rulemaking powers. The Authorities hold a strong position regarding the adoption of regulatory and implementing technical standards and, moreover, the comply or explain mechanism regarding the Authorities guidelines and recommendations promises a binding element of these actions. If the tendency to more basic legal instruments continues, which leaves the detailed regulation to the "third level", these powers will make the Authorities very powerful and influential actors and, even though influencing and harmonizing the national administrative level through horizontal

[795] This is a very typical development in the European Union. The European Union's administrative centre does not replace the national authorities, but instead connects, guides, and controls them see Philipp Genschel and Markus Jachtenfuchs, '13. Conclusion: The European Integration of Core State Powers. Patterns and Causes', in Philipp Genschel and Markus Jachtenfuchs (eds), *Beyond the Regulatory Polity?: The European Integration of Core State Powers* (Oxford University Press 2013), 252.
[796] See Matthias Lehmann, 'Grundstrukturen der Regulierung der Finanzmärkte nach der Krise', in Ludwig Gramlich and Cornelia Manger-Nestler (eds), *Europäisierte Regulierungsstrukturen und -netzwerke* (Nomos 2011), 143; Moloney, 'Banking Union', 1621.
[797] See Moloney, 'EU Financial Market Regulation', 1321.
[798] Especially ESMA's direct supervisory powers have received a great deal of positive reviews. Howell, 'The Evolution of ESMA and Direct Supervision', 1051. This fits into a general trend to centralize licensing and authorization at the European level. See Huber, '§ 45 Überwachung', para 101. See also the ECB's exclusive competence to authorize credit institutions.
[799] ESAs' limited intervention powers reflect the constitutional limitations of an EU agency. See Moloney, 'Banking Union', 1621.

rulemaking has been widely used in the past, the Authorities position especially with regard to regulatory and implementing technical standards puts it on a new level.[800] The Authorities' executive rulemaking powers together with the intervention-based model combine the benefits of decentralized and centralization administration.[801]

Furthermore, special attention has been payed to improve and ensure the exchange as well as the acquisition of information. Several provisions deal with the obligation to collect and exchange information. Even though this does not sound like a very powerful tool, the financial crisis showed that there were major shortcomings regarding the exchange of information. In a multilevel administrative structure like the European Union a clear and well-structured information exchange system cannot be underestimated for the success of the administrative system.

Even if the information exchange in the ESFS is not as formally structured as in other areas of supervision, this is not problematic in case of the ESFS, since the Authorities can dispose over all the information which is necessary for them to fulfil their tasks and to ensure the functioning of the financial system, but at the same time, since they are not responsible for the day-to-day supervision, they do not need to have all the information regarding the day-to-day practice.

In addition, especially the Authorities' direct supervisory powers which clearly separate them from other European agencies have to be stressed regarding the effectiveness of the supervisory structure. With the establishment of the Authorities the weaknesses of the Lamfalussy process, and there especially the shortcomings of the level three committees, have been removed. Because of their intervention powers, Authorities are situated in a superordinate position relative to national competent authorities. This superordination, inter alia, arises out of the Authorities' executive rulemaking powers which allow them to discipline national competent authorities in emergency situations or when Union law has been breached.

One important direct supervisory power that has to be mentioned in particular is ESMA's power of registration. Since registration and authorization of financial institutions are of very high relevance to the functioning of a financial system, it is very important that this is now carried out in a trustful and consistent manner. To transfer that competence to the European level was a highly effective step to improve trust and to ensure the functioning of the European Union's

[800] See Kämmerer, 'ESFS', 1286.

[801] See De Larosière Group, 'De Larosière Report' (2009), paras 184-185; Moloney, 'Banking Union', 1621; Ohler, 'Verwaltungsverbund und Finanzaufsicht', 325.

financial market. It would be recommendable, if this competence would be transferred also to the other Authorities (it has been transferred to the ECB for the euro area but not for the rest of the internal market) and with that follow the trend to shift the taking up of an activity and the authorization of financial institutions to the European level.
Nevertheless, for the European Union's multilevel system, a supervisory model based on intervention powers is, considering all the factual and legal circumstances (lack of capacity, of experience as well as of local knowledge of the European Union; furthermore, competence issues, legal constraints and the highly problematic question on how fiscal responsibility with cross-border allocation has to be allocated), a much more practical and reasonable system than a European day-to-day supervisory model.[802]

However, there are also some shortcomings regarding this intervention-based model. First of all, one has to name the highly problematic institutional structure of the Authorities' Boards of Supervisors, especially with regard to the Boards' decision-making structure, since the Boards' voting members are the heads of the national competent authorities. This personal union can be highly conflictual in cases where different Member States or national competent authorities are involved[803] and it makes it rather doubtful if the European Union interest will prevail in crucial situations.[804] While it might lead to more convergence at the national level due to more coordination of the heads of the national competent authorities in the Boards of Supervisors, it might hinder a European approach in difficult situations. Because of that, the disadvantages of this structure prevail.
Furthermore, the different acts regarding the Authorities' executive rulemaking powers have a great variety of legal natures ("soft law"). The legal nature of all the guidelines, recommendations and opinions and their relation to each other has so far not been clarified.[805]
In addition, the practical operation of this intervention-based model can become difficult. This model does not ensure to the same extent like other forms of economic supervision that poor execution through the national competent authorities can always be prevented.

[802] See Schammo, 'ESFS', 773; Moloney, *EU Securities and Financial Markets Regulation,* 950.
[803] See Hänle, *ESMA,* 183.
[804] Regarding proposed amendments by the Commission see Commission, 'Capital Markets Union' Press release, Brussels, 20 September 2017; see also Raschauer, 'Behördenkooperation in der Finanzmarktregulierung', 206; Ladler, *Finanzaufsicht in der EU,* 289; Moloney, 'Banking Union', 1668 et seq.
[805] See Ladler, *Finanzaufsicht in der EU,* 280; Groß, *Die polyzentrale EU-Verwaltung,* 14.

Due to political and Treaty constraints, these national competent authorities are still independent bodies with a separate accountability structure and the Authorities' direct supervisory powers are limited and they cannot intervene in the same way as national authorities could even when national authorities are acting within the ESFS.[806]

With the exception of ESMA, the Authorities are mostly a "supervisor of supervisors".[807] First of all, the Authorities can use their direct supervisory powers in very few situations, and second, the Authorities are in some of these situations dependent from other European institutions. For the Authorities, to use their direct supervisory powers in case of emergency situations, the emergency situation first has to be declared by the Council. In case of breach of Union law, neither the Authorities nor the Commission dispose over any direct supervisory powers towards the national competent authorities and the Authorities can only (as a last step) use their direct supervisory powers towards financial institutions. Furthermore, the Authorities' direct supervisory powers towards private market participants, can only be used in case of breach of Union law and not in case of different views regarding the application of Union law or discretionary elements in Union legislation.

In case of ESMA which with regard to credit rating agencies and short selling also has some direct supervisory powers outside of the already stated "situative scenarios" the situation is different. This was possible due to credit rating agencies' strong cross-border effects and their rather limited potential to pose fiscal risks to Member States.[808] This concern on "fiscal responsibility" is the main limitation on moving day-to-day supervision to the European level today.[809]

However, for the administrative framework to effectively establish a common and consistent supervisory practice in the European Union, intervention and instruction powers of the Authorities also in situations where there are only different views regarding discretionary elements of the application of EU law (content-related and not legality issues), would have been necessary. A template for this could be the ECB's powers regarding the indirect supervision of less significant supervised entities in the SSM (but of course here the European Union disposes

[806] Politically, the fiscal costs which the initial series of crisis-era bank rescues by Member States imposed on domestic tax payers, shaped the resistance by some Member States to transfer executive powers with fiscal implications to the European level. This also explains why Member States can still disapply certain decisions of ESA when pleading fiscal implications of these decisions. See Moloney, 'EU Financial Market Regulation', 1326; Moloney, 'Banking Union', 1613; Schammo, 'ESFS', 786.

[807] See Moloney, *EU Securities and Financial Markets Regulation*, 776 et seq.

[808] Ibid.

[809] See Schammo, 'ESFS', 780.

over exclusive competences) and also ESMA's direct supervisory powers regarding credit rating agencies and short selling could be used for future reforms of the Authorities direct supervisory powers. Here especially ESMA's power of registration should be stressed.

Even though some call the ESFS an "unfinished business"[810] or already want to reform parts of the ESFS,[811] the ESFS can be regarded as a new era of financial market supervision with the Authorities resolving the tension between centralized rulemaking and local supervision.[812]
The Authorities' intervention powers are of great significance to financial market supervision, although it remains to be seen how dynamically they will be able to ensure a European perspective due to institutional and stakeholder constraints.[813] In contrast to the SSM, the ESFS only leads to a very close form of cooperation and coordination of the different national competent authorities and does not constitute a "real European supervisor".[814] But the shortcomings of the original financial supervisory system with its lack of coordination and cooperation between the different national competent authorities and the national and the European level have to a great extent been met and overcome.[815]
With its mixture of decentralized and centralized elements, the ESFS combines the strength of nationally based supervision (experience and expertise of national competent authorities) with the strength of a European based supervision (convergence and a uniform and consistent supervisory practice in the internal market). This is additionally supported by the Authorities' intervention powers and introduces a hierarchical element in crucial situations.
The administrative framework's strength lies in the fact that in situations in which the interest of the European Union as a whole is at stake and with that the stability and the functioning of the financial system, it ensures a common and consistent supervisory practice through the Authorities' intervention powers without the necessity to lift up the day-to-day supervisory business to the European level.[816] Since the heads of the national competent authorities are the voting members of the Board of Supervisors, even in these situations national competent

[810] See Howard Davies, '2. Unfinished Business: An Assessment of the Reforms', in Eddy Wymeersch, Klaus J. Hopt and Guido Ferrarini (eds), *Financial Regulation and Supervision: A post-crisis analysis* (Oxford University Press 2012), para 2.29.
[811] See Véron, 'Charting the Next steps for the EU Financial Supervisory Architecture', 1 et seq.
[812] See Moloney, 'EU Financial Market Regulation', 1331, 1334; Wymeersch, '9. ESAs', paras 9.01 et seq; Haar, '6. Organizing Regional Systems', 175.
[813] See Schammo, 'ESFS', 786 et seq.
[814] See Thiele, *Finanzaufsicht,* 529.
[815] Although some still regard the Authorities' coordination powers as limited. See Moloney, *EU Securities and Financial Markets Regulation,* 777; Haar, '6. Organizing Regional Systems', 176 et seq.
[816] See Schammo, 'ESFS', 791 et seq.

authorities are not really directed by others. Besides the procedural "top-down" approach, an organizational "bottom-up" approach joins in.[817]

For future reforms, especially the Authorities' governance model with regard to the Board of Supervisors should be reconsidered and adapted to the needs of the European Union.[818] In addition, the Authorities' accountability structures are problematic. With respect to the Authorities' legitimacy as well as democratic principles, some stronger accountability mechanisms with regard to the members of the Authorities' Boards of Supervisors would be favourable.

With regard to the SSM and the SRM, the situation is different. Here the European Union's exclusive competence regarding monetary policy and the ECB's status as a European Union institution made it possible to transfer to the ECB direct day-to-day supervisory powers.

With the SSM, banking supervision is now primarily located at the European level. Also in cases where national competent authorities are executing supervisory powers regarding less significant supervised entities, their competence derives from the ECB's supervisory competence since they are assisting the ECB with its task.[819] Moreover, with the ECB as the central supervisor and its wide range of supervisory powers and the Board as the central European resolution authority, the Banking Union now covers the whole area of banking supervision in the euro area and substantial progress has been made regarding cross-border bank resolution.

With this centralization of supervision and resolution of euro area banks at the European level, the vicious cycle between Member States and their credit institutions has now been disrupted. This is a very important characteristic of the Banking Union and it was crucial for the effectiveness of the Banking Union.[820]

The ECB and the Board are now responsible for all supervisory measures regarding the life span of the financial institutions, falling within the scope of the Banking Union. Furthermore, what is of relevance for the effectiveness of the system is the fact that in the Banking Union, there is a clear hierarchy between the European and the national level with a lot of instruction and intervention powers of the European level, also with regard to indirect supervision of less

[817] See Kämmerer, 'ESFS', 1286.
[818] See Commission, 'Capital Markets Union' Press release, Brussels, 20 September 2017.
[819] See Hanten and Bracht, 'Die Europäisierung des Bankaufsichtsrechts im Praxistest', 240. See also Recitals 18, 28, 37 et seq. SSM Regulation.
[820] See Ohler, *Bankenaufsicht,* § 5, paras 8 et seq.

significant supervised entities. Most intense is this hierarchy with regard to banking resolution, where the Board has explicit instruction powers towards the national resolution authorities.[821]

However, there are also shortcomings in the Banking Union. One shortcoming is the Banking Union's limitation to the banking sector and that it is missing a similar coordination mechanism with the other areas of financial supervision as it exists with the Joint Committee in the ESFS.[822]
In addition, regarding European Union integration, the ESFS and the Banking Union, unfortunately, contribute a great deal to differentiated integration. Even though the two systems set up a great deal of cooperation mechanisms between the European and the national level, due to their different scopes and the limitation of the Banking Union only to the euro area, two different supervisory practices in the area of banking supervision are established.
But the European legislator was aware of the risks associated with it and different mechanisms were put in place to secure the interests of the European Union as a whole as far as possible. Nonetheless, for the effectiveness of the system of financial supervision the limitation of the Banking Union only to banking supervision and to the euro area is not beneficial.
But the legal as well as the institutional arrangements promise effective banking supervision as well as bank resolution without unnecessary influence from national authorities, since it "reflects a very strong commitment to cooperative rather than “isolationist” approaches".
However, the new framework will still have to prove itself in future practice, since different economic interests of the different Member States exist and residual conflicts might still be able to take place.[823] It remains to be seen how the new SSM and SRM structure will be able to balance out these residual conflicts.[824]

[821] See Groß, *Die polyzentrale EU-Verwaltung,* 18 et seq.
[822] Which proves to be an effective mechanism to ensure cross sectoral cooperation. See 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, 9.
[823] See Lehmann, ‘Regulierung der Finanzmärkte’, 143.
[824] See Binder, ‘Cross-border Coordination of Bank Resolution in the EU: All Problems Resolved?’, 20.

Conclusion

As it has been shown in the first Chapter, with direct and indirect administration, a basic concept of European administration exists. This concept clearly differentiates between the European and national level when applying Union law. However, today in all areas where Union law is applied, a great variety of different horizontal and vertical cooperation mechanisms has been put in place. These cooperation mechanisms are reflected by the concept of composite administration. The standard model, due to the division of competences between the European and the national level, is still a form of indirect administration but with multiple linkages, connections and cooperation mechanisms between the European and the national level.

Also, in the ESFS, with its integrated network structure, elements of indirect administration still exist. But since differences in the application process, which are an inherent element of indirect administration, are only tolerable and manageable to a certain extent and degree, the European legislator added some new elements to the administrative framework in financial supervision: the intervention-based model and the Authorities' involvement in executive rulemaking.

The newly implemented intervention-based model allows it, to keep the benefits of indirect administration and at the same time tries to overcome the shortcomings of the old supervisory system by putting in place three central European Authorities which have the power to step in and to issue instructions in certain crucial situations where the functioning of the financial system in the European Union is highly at risk. In addition, through the involvement of the (European) Authorities in executive rulemaking, a common and consistent supervisory practice in the EU is facilitated. These two powers clearly separate the Authorities from most of the other European Union agencies and put the three Authorities in a hierarchical position towards the national competent authorities. This structure adds, to the usual horizontal-cooperative elements, a vertical-hierarchical element.

With its mixture of decentralized and centralized elements, the ESFS combines the strength of nationally based supervision (experience and expertise of national competent authorities) with the strength of a European based supervision (convergence and a uniform and consistent supervisory practice in the internal market).

The establishment of the Banking Union altered the administrative structure of banking supervision and bank resolution in the euro area to an even greater extent. The administrative supervisory structure in the Banking Union has been changed to a more direct form of

administration and direct supervisory powers have been transferred to the ECB and the Board. With the ECB as the central supervisor and its wide range of supervisory powers and the Board as the central European resolution authority, the Banking Union covers the whole area of banking supervision and bank resolution in the euro area. Because of that supervision and resolution of banks within the euro area now take place in a uniform way and by one deciding body with the advantage of greater consistency and a better information flow.

With the establishment of the Banking Union the European level is now responsible for all supervisory measures regarding the life span of the financial institutions, falling within the scope of the Banking Union. However, these changes in the euro area were only possible since here the European Union disposes over exclusive competences and with the ECB a Union institution, to which it was possible to transfer the wide range of tasks and powers, already existed, cf. Art. 13(1) TEU.

In the Banking Union there is a clear hierarchy between the European and the national level with a lot of instruction and intervention powers of the European level, also with regard to indirect supervision of less significant supervised entities. However, most intense is this hierarchy with regard to banking resolution, where the Board has explicit instruction powers towards the national resolution authorities.

The ESFS is a good example, how in areas of shared competence, indirect administration in the European Union can be improved and a common and consistent supervisory practice can be established. This has been attained by keeping the benefits of indirect administration, the closeness as well as the experience and the knowledge of the national competent authorities, and to improve the weaknesses of poor coordination through a centralized authority with a strong involvement in executive rulemaking as well as intervention powers in crucial situations. With the Authorities, there is now a "European" supervisor put in place, that focuses on the common interest of the Member States and the European Union as a whole. Due to their intervention powers, the Authorities are responsible in all situations which are of particular interest to the European Union, while the national competent authorities are still responsible for standard situations and day-to-day supervision.

With regard to the Banking Union, especially the model of indirect administration of less significant supervised financial institutions and the cooperation mechanisms with the national competent authorities are of practical relevance for future administrative reforms. Here it is

well-shown, how the different levels can work together and in which situations, the competence and the powers should lay with the European level.
Moreover, with the establishment of the Board of Appeal, the Appeal Panel and the Administrative Board of Review, there are now also internal administrative complaints mechanism put in place. However, there is still some room for improvement. But, transferring more competences to the European level would be problematic regarding the competences of the European Union as well as the principle of conferral and subsidiarity, cf. Article 5(1) TEU. Furthermore, this would also add to the deficiencies regarding the legitimacy and the accountability of the European supervisory actors as shown above.

Even though the implementation and execution of Union law is carried out very differently in the different competence areas of the European Union and, as shown at the end of Chapter 1, there are various kinds of supervisory frameworks in European economic supervision, to be able to develop a common administrative practice and to adjust it to new situations and challenges, it is necessary to work in reference areas and to review the findings obtained in one reference area regarding their capability to use them as general principles which can be transferred to other areas of administration. Only this allows it to develop a common administrative structure in the European Union and to ensure legal certainty and stability.
Although up to now, financial supervision did not serve as such a reference area for general administrative practices, due to its technical nature and its complexity, there are different reasons why its administrative framework and its different cooperation mechanisms can now be used as a template for other areas of supervision.
First of all, financial supervision is one of the most advanced areas of administrative practice regarding cooperation as well as the degree of intensity. Second, financial supervision is an area with a large number of actors, an even larger number of financial activities and a need for rapid intervention. Last but not least, it is an area with very strong Member States' interests, due to its great implications on national finances. Cooperation mechanisms which have been put in place in financial supervision will very likely be able to be set up in other areas of strong Member States' interests.
The design of the ESFS's and the Banking Union's supervisory system is therefore highly relevant for future changes in the European Union's administrative system, but the two different supervisory systems should only be used as templates in their respective areas of competence:

The ESFS can be used in areas of shared competence, and the Banking Union, with its great deal of centralization, only in areas of exclusive competence of the European Union.

The analysis of the administrative framework of financial supervision in the European Union and its cooperation mechanisms shows, that the ESFS as well as the Banking Union are still work-in-progress and both mechanisms have to prove their functionality in difficult situations in the future. It remains to be seen whether or not the Authorities, the ECB and the Board will be able to take difficult and neutral decisions in case of a major financial crisis.
However, the ESFS and the Banking Union have taken up their work. The mechanisms and instruments that have been put in place take into account the particularities and characteristics of the European Union's multilevel governance as well as the shortcomings of the previous system of financial supervision. The administrative structure of the ESFS and the Banking Union maintain elements of the initial system of indirect administration but also new forms of centralization, intervention powers and enhanced forms of cooperation and coordination were put in place. The Authorities' direct supervisory powers and their involvement in executive rulemaking clearly separate them from other European agencies and the centralization and concentration of banking supervision and bank resolution in the euro area at the European level for the whole life span of financial institutions mark a milestone in European integration.
Even though this system might not be perfect, and there are already some voices who call for new reforms to enhance supervisory convergence, major changes have been taken place in this supervisory area. The administrative framework will have far reaching effects on the European Union's financial supervisory governance and on future institutional designs of the European Union's administrative framework generally.

Theses

I. A common and consistent administrative practice and with that the uniform application of Union law is one of the central concerns of European integration. However, the European Union's multilevel structure with different public authorities make European administration and the application of Union law a complicated matter. The lack of such a common and consistent administrative practice also turned out to be one of the major weaknesses of the European Union's system of financial supervision before the financial and European debt crisis.

II. The classical concept of European administration can be described as a system of direct and indirect administration, while the dominant system in the Treaties is an indirect one, cf. inter alia Article 291 TFEU. In general, it is the Member States that have to adopt all measures of national law necessary to implement legally binding Union acts. However, the categories of direct and indirect administration are not sufficient to explain the complex structures which link the European and national administration when applying Union law today. Between the different national administrations and the European Union, a great number of horizontal and vertical forms of cooperation exist and a form of composite administration with regard to information sharing, decision-making and supervision has evolved. This also holds true for the administrative framework in European economic supervision.

III. An effective institutional supervisory framework to ensure a common and consistent practice in European Union financial supervision is not easily designed and there is no "best practice template" for operational supervision. In the European Union, different public authorities, an internal market and the euro area as well as cross-border financial institutions and cross-border activities have to be considered. Even though there is still no general opinion on which factors contribute best to the effectiveness and uniform application of Union law, horizontal and vertical forms of cooperation (and with that elements of composite administration) make a substantive contribution to a common and consistent administrative practice.

IV. The institutional structures of the ESFS and the Banking Union provide an example on how to rebalance the respective competences of the European Union and its Member States and on how to interlink the two different levels more closely. Two different solutions to ensure a common and consistent supervisory practice where chosen. With regard to the ESFS three

European agencies as central Authorities that facilitate cooperation and coordination tasks as well as take on supervisory tasks were established (with certain decisive modifications regarding the Authorities structure and powers in contrast to previous European agencies). In the Banking Union a great deal of centralisation took place. National authorities are linked under the supervision of the ECB and the Board which are provided with extensive direct supervisory powers. A comparison of the ESFS's institutional structure with the institutional structure of the SSM and the SRM shows that the supervisory organization of the ESFS follows a much more decentralized approach than the one of the Banking Union.

V. The ESFS is constituted as an integrated network, where the day-to-day supervision is still carried out by the national competent authorities. In addition, it is established as an intervention-based model. This means that the Authorities, besides their extensive cooperation and coordination powers, only have direct supervisory powers (intervention powers) in certain limited cases. Besides these intervention powers, the Authorities dispose over executive rulemaking powers. The intervention-based model together with the Authorities' executive rulemaking powers clearly separate them from other European agencies and combine the strength of nationally based supervision (experience and expertise of national competent authorities) with the strength of a European based supervision (convergence and a uniform and consistent supervisory practice in the internal market).

VI. Extensive direct supervisory powers have been transferred to ESMA with regard to credit rating agencies and short selling, making ESMA the most powerful one of the three Authorities: First of all, ESMA is responsible for the registration and the withdrawal of registration of credit rating agencies that want to take up business in the European Union; second, ESMA has the power to decide if there is an emergency situation and if it has to take any actions and use its intervention powers; and third, in certain situations, ESMA can take a decision and require national competent authorities to temporarily restrict short selling of financial instruments in the case of a significant fall in price or to refrain from such an action.

VII. The European Union's exclusive competence regarding monetary policy for the Member States whose currency is the euro and the ECB's status as a European Union institution made it possible to transfer direct day-to-day supervisory powers to the ECB as well as to establish at the European level the Board and the Fund regarding banking resolution. The supervision and resolution of banks within the euro area now take place in a uniform way and by one deciding

body with the advantage of greater consistency and a better information flow. For the effectiveness of banking supervision and resolution it was crucial to break the link between Member States and their credit institutions.

VIII. A large number of different cooperation mechanisms in the different areas of the supervisory process show a very close interconnection between the European and the national level in the ESFS as well as in the Banking Union when applying Union law. At the same time Member States' national competent authorities and national resolution authorities are still very much involved in the decision-making processes of the European level. The Authorities' Boards of Supervisors, the Board as well as the ECB's Supervisory Board and the JSTs of the SSM consist of national representatives. This strong involvement of national authorities in the European level's decision-making process, may weaken the effectiveness of the supervisory system and can be highly conflictual in cases where different Member States' or national competent authorities' interests are involved.

IX. Fiscal neutrality remains one of the defining characteristic of European Union-level supervision. The three Authorities as well as the Board have to ensure that none of their actions or decisions require Member States to provide extraordinary public financial support or impinge on the budgetary sovereignty and fiscal responsibilities of the Member States. These provisions protect national treasuries from any fiscal costs generated by the Authorities' or the Board's supervisory or resolution decisions.

X. The large number of supervisory actors and cooperation mechanisms, which contribute a great deal to the effectiveness of the administrative structure with regard to a common and consistent supervisory practice, are problematic when it comes to accountability. Even though accountability mechanisms and information obligations were put in place, the close interconnection of the two levels in the decision-making process is nonetheless problematic with regard to the issue of transparency and legal protection. However, with the Authorities' Board of Appeal, the Board's Appeal Panel and the ECB's Administrative Board of Review a comprehensive system of legal protection for parties concerned by certain supervisory decisions has been established at the European level. Even though this does not resolve the issue of transparency regarding the large number of cooperation mechanisms completely, it does improve it since it gives those parties concerned by certain supervisory decisions the possibility to take legal actions.

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