The Evolution of ESMA and Direct Supervision: Are there Implications for EU Supervisory Governance?

Abstract

The European Securities and Markets Authority ('ESMA') was established six years ago. It, and its sibling bodies for banking, and the insurance and occupational pensions, emerged from the ashes of the crises, and the agencies have been the topic of much discussion in academic scholarship from a variety of perspectives. This article provides a new situating of ESMA within the broader policy context. Employing empirical observations, and rooting it within the related literature on supervisory governance (defined, broadly, as the supervisory practices and enforcement measures that contribute to governing the EU's financial set-up), it explores ESMA's pro-active use of its direct supervisory and enforcement powers, and uses this as a launching pad for reflecting on how EU supervisory governance is evolving.

Specifically, the article speculates that although ESMA is still at a relatively youthful stage with respect to its direct role, it is strengthening its reputation as a credible and pro-active supervisor, and is becoming an important driver with respect to the evolution of EU supervisory governance. This article suggests that, over time, and in line with arguments observable in the related institutional governance scholarship, ESMA's influence and approach could gradually result in the greater centralisation of supervisory governance at the EU level. Linked to this, the article also speculates that any such shifts in this regard will continue to develop slowly, and over time, rather than via any seismic shift. There is one caveat to this analysis, however; as the current EU set-up adjusts following the 'Brexit' decision, this could lead to a more interventionist agenda materialising from some quarters.

Keywords: European financial regulation; European Securities and Markets Authority; Supervisory governance.

The Evolution of ESMA and Direct Supervision: Are there Implications for EU Supervisory Governance?

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1 Introduction

The European Securities and Markets Authority ('ESMA') was established six years ago. It, and its sibling bodies for banking, and the insurance and occupational pensions, emerged from the ashes of the crises, and the agencies have been the topic of much discussion in academic scholarship from a variety of perspectives.[1] This article provides a new situating of ESMA within the broader policy context. Employing empirical observations, and rooting it within the related literature on supervisory governance (defined, broadly, as the supervisory practices and enforcement measures that contribute to governing the EU's financial set-up), it explores ESMA's pro-active use of its direct supervisory and enforcement powers, and uses this as a launching pad for reflecting on how EU supervisory governance is evolving.

Specifically, the article speculates that although ESMA is still at a relatively youthful stage with respect to its direct role, it is strengthening its reputation as a credible and pro-active supervisor, and is becoming an important driver with respect to the evolution of EU supervisory governance. This article suggests that, over time, and in line with arguments observable in the related institutional governance scholarship, ESMA's influence and approach could gradually result in the greater centralisation of supervisory governance at the EU level.[2] Indeed such incremental developments can be evidenced for instance, via the EU's current Capital Markets Union project ('CMU'),[3] which has led to proposals focused on

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[1] There is an emerging, burgeoning literature with respect to the ESAs. In particular both legal scholarship, and the related political economy literature examine key questions with respect to the development of the EU agencies; the constraints placed on them; how they operate with respect to the tools they have been granted. The scholarship stemming from a political economy standpoint also particularly examines and speculates as to which particular influences assist in shaping the EU's institutional architecture. See in particular, Niamh Moloney, 'Institutional Governance and Capital Markets Union: Incrementalism or a "Big Bang"?' (2016) 13 ECFR 376; Madalina Busuioc, 'Rule-Making by the European Financial Supervisory Authorities: Walking a Tight Rope' 19 European Law Journal 111 Pierre Schammo, 'The European Securities and Markets Authority: Lifting the Veil on the Allocation of Powers' (2011) 48 CML Rev 1879. From a banking sector perspective, see Eilís Ferran, 'The Existential Search of the European Banking Authority' (2016) 17 European Business Organization Law Review 285. From a political economy angle, see e.g. Daniel Mügge, 'The Political Economy of Europeanized Financial Regulation' (2013) 20 Journal of European Public Policy 458. For related analysis, especially with respect to EU regulatory governance, the current Capital Markets Union project, and the possible deployment of a more 'experimentalist approach', see Niamh Moloney, 'Capital Markets Union: "Ever Closer Union" for the EU Financial System?' (2016) 41 European Law Review 307; Jonathan Zeitlin (ed) *Extending Experimentalist Governance?: The European Union and Transnational Regulation* (OUP 2015).

[2] Specifically, for a discussion of such overlapping incremental developments that are observable with respect to the shape of the overall institutional design of the EU, see in particular Moloney, 'Institutional Governance and Capital Markets Union: Incrementalism or a "Big Bang"?' (n 1); Moloney, 'Capital Markets Union: "Ever Closer Union" for the EU Financial System?' (n 1).

[3] This project, amongst other aims, seeks to ensure more diversified sources of finance to enable all types of company can tap the capital markets, see e.g. European Commission, 'Action Plan on Building a Capital Markets Union' (COM(2015) 468 final).

strengthening the EU's supervisory framework (although it has also led to more emotive suggestions concerning the establishment of a single European capital markets supervisor).[4] Linked to this issue, the article also speculates that any such shifts in this regard will continue to develop slowly, over time 'the way it has always happened', rather than via any seismic shift.[5] There is one caveat to this analysis, however; as the current EU set-up adjusts following the 'Brexit' decision, this could lead to a more interventionist agenda materialising from some quarters.[6]

This article acknowledges that there is a functional logic to centralising certain supervisory powers: ESMA is a technocrat, and oversight and enforcement of market actors with a pan-EU reach is, in certain areas, efficient and, in principle, effective. Empirically, ESMA has also demonstrated its appetite and ability for engaging with its direct role; in particular it has been especially assertive in utilising its more constitutionally sensitive enforcement powers. Further, in recent reviews, ESMA has also received considerable international and political endorsement with respect to its new role, helping to further cement itself into its new position.[7]

Nonetheless, there is a range of well-documented risks associated with centralising supervision, and to confining such powers sectorally. In particular the crises demonstrated the clear dangers in relying on a 'silo-based' approach to regulation.[8] Specifically, such a strategy is unhelpful for authorities apprehending functionally equivalent risks, and creates the risk of regulatory arbitrage. Hence, there should be some hesitance before embarking too far down this avenue. Second, prudential regulators have started to express an interest in securities market risks to financial stability, and this could also impede ESMA cementing any direct claims over the capital markets.[9]

Further, there are also familiar constitutional, practical, and political hurdles to additional shifts of power to the centre, especially with respect to systemically significant sectors. In particular, there are long established constitutional constraints on the delegation of powers to

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[4] Jean-Claude Juncker and others, *Completing Europe's Economic and Monetary Union: The 'Five Presidents Report'* (June 2015) 12. Note that the UK in particular voiced concerns about such controversial suggestions, see e.g. House of Lords European Union Select Committee, *'Whatever It Takes': The Five Presidents' Report on Completing Economic and Monetary Union* (13th Report of Session 2015–16, 12 May 2016) 42-43.

[5] Former French President Sarkozy, as quoted by Lord Pearson, *UK Parliamentary Debate* (Hansard, HL, 2 July 2009, col 328); Moloney, 'Institutional Governance and Capital Markets Union: Incrementalism or a "Big Bang"?' (n 1).

[6] Niamh Moloney, 'Financial Services, the EU, and Brexit: An Uncertain Future for the City?' (2016) 17 German LJ 75, 80.

[7] IMF, *EU Technical Note on ESMA* (IMF Country Report No. 13/69, March 2013); European Commission, *Report on the Operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)* (COM(2014) 509 final); European Parliament, *Review of the New European System of Financial Supervision (ESFS)* (Report by Committee on Economic and Monetary Affairs (ECON): October 2013).

[8] FSA, 'The Turner Review: A Regulatory Response to the Global Banking Crisis' (March 2009); Niamh Moloney, 'EU Financial Market Regulation after the Global Financial Crisis: "More Europe" or More Risks?' (2010) 47 CML Rev 1317.

[9] Niamh Moloney, 'International Financial Governance, the EU, and Brexit: The 'Agencification' of EU Financial Governance and the Implications' (2016) 17 EBOR 451, 464; Financial Stability Board, 'FSB Publishes Proposed Policy Recommendations to Address Structural Vulnerabilities from Asset Management Activities' (2016) <http://www.fsb.org/wp-content/uploads/FSB-Asset-Management-Consultative-Document-press-release.pdf> accessed 6 January 2017.

EU agencies under the *Meroni* doctrine.[10] Specifically, although clearly defined executive powers (which can be subject to strict review) can be delegated to EU agencies; discretionary powers that imply a wide measure of flexibility cannot. On the basis of *Meroni* (as well as on other grounds), the UK challenged ESMA's direct powers of intervention with respect to short sales at the Court of Justice of the European Union (the 'CJEU'), alleging that the powers implied that ESMA was vested with a large measure of discretion, breaching the limits set by *Meroni*.[11] The CJEU affirmed ESMA's direct short selling powers,[12] and although it did not reject *Meroni*, on a liberal reading, it did 'clip its wings'.[13] The CJEU held that provided the powers were circumscribed by various conditions and criteria that limited ESMA's discretion, and provided that as the powers were amenable to judicial review, then *Meroni* was complied with.[14] Although the judgment's reasoning was relatively case-specific, a liberal reading of the case perhaps help ensure ESMA is on a firmer constitutional footing.[15]

Practical barriers also exist; an increase in ESMA's workload has not been mirrored by an equivalent increase in its human resources and budget.[16] A further major impediment relates to a lack of political will. The main reservations stem from fiscal matters; in particular, where it is the Member State and national taxpayer that will 'foot the bill' when a market actor fails, this reinforces arguments for retaining supervision at the national level.[17] Nevertheless, this is not a static situation, and this article speculates that, when one observes the empirical facts on the ground, substance rather than form suggests that none of these barriers are necessarily insurmountable.

One way or another, however, in the field of direct enforcement, ESMA's hands are tied in a much more practical regard. Constitutional constraints result in ESMA only being able to impose relatively small sanctions within a procedural straightjacket. Without it being granted the ability (that a national regulator, or ESMA's comparative relative, the US's Securities and Exchange Commission ('SEC') has) to impose sufficiently tough sanctions on rogue market

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[10] Case 9/56 *Meroni v High Authority* [1957 and 1958] ECR 133.

[11] Case C-270/12 *United Kingdom v Council of the European Union and European Parliament* ECLI:EU:C:2014:18.

[12] Ibid.

[13] Eilis Ferran, 'European Banking Union: Imperfect, but It Can Work' University of Cambridge Faculty of Law Research Paper No 30/2014 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2426247> accessed 6 January 2017.

[14] *United Kingdom v Council of the European Union and European Parliament* (n 11).

[15] On the other hand, a more restrictive view suggests that nothing has essentially changed, see Niamh Moloney, *EU Securities and Financial Markets Regulation* (3rd edn, Oxford University Press, 2014), 1002-3. See also Moloney, 'International Financial Governance, the EU, and Brexit: The 'Agencification' of EU Financial Governance and the Implications' (n 9) 461. Moloney suggests that there are incentives for ESMA to use its direct powers sparingly to manage litigation risk.

[16] European Commission, *Report on the Operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)* (n 22) 5, 11; House of Lords European Union Select Committee, *The Post-Crisis EU Financial Regulatory Framework: Do the Pieces Fit?* (5th Report of Session 2014-2015, 2 February 2015) 42.

[17] 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, 780; Eilis Ferran, '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* (OUP 2012) (n 23) 154. As Schammo and Ferran observe, in the literature this is often referred to as 'he who pays the piper calls the tune', see e.g. Dirk Schoenmaker and Sander Oosterloo, 'Cross-Border Issues in European Financial Supervision' in David Mayes and Geoffrey Wood (eds), *The Structure of Financial Regulation* (Routledge 2007).

offenders to act as an adequate deterrent, market participants may simply perceive ESMA, as, at best, a toothless enforcer.

The article is structured as follows. After this introduction, section 2 contextualises the analysis. Section 3 then uses empirical observations with respect to three case studies: credit rating agencies; trade repositories; and short selling. For clarity, the first two topics concern the conferral of direct day-to-day supervisory responsibilities on ESMA. The third relates to the related, but distinct, grant of direct emergency powers of intervention on ESMA. Section 4 considers the implications for EU financial law and supervisory governance. Section 5 concludes.

2 The Context

All three European Supervisory Authorities ('ESAs') were created in January 2011, along with the European Systemic Risk Board ('ESRB') that was mandated to oversee risk in the financial system as a whole. In conjunction with the Member State national supervisors, the ESAs, and the ESRB form the European System of Financial Supervision ('ESFS'), replacing the former 'level 3' committees. Respecting the Treaty principles of subsidiarity and proportionality, the ESFS is conceived largely as a decentralised structure and day-to-day supervision is intended, in the main, to be carried out at the Member State level by the national competent authorities ('NCAs') closest to the markets and institutions that they supervise.[18] One exception however, concerns the oversight of credit rating agencies ('CRAs').[19] Here, responsibility for direct day-to-day supervision has been transferred to ESMA.[20] ESMA has a wide range of supervisory powers over CRAs, and can also take enforcement action, including the imposition of financial penalties.[21]

The transfer of supervisory competence over CRAs has not been the sole exception to the rule, and the development of ESMA's role as a 'credible direct supervisor',[22] and as a fundamental component of the ESFS, is now evident in other areas of financial market activity. In particular, in 2012, ESMA was granted direct responsibility for the registration

[18] Regulation (EU) No 1095/2010 Establishing a European Supervisory Authority (European Securities and Markets Authority) [2010] OJ L331/84, recital 9; Jacques de Larosière, *The High-Level Group on Financial Supervision in the EU: Report* (2009) 47. The ESFS's architecture is commonly referred to as the 'hub and spoke' model; rulemaking is centralised but the focus of supervision largely remains at the national level, European Commission, *Commission Communication: European Financial Supervision COM(2009) 252 Final* (2009) 9; Eddy Wymeersch, 'The European Financial Supervisory Authorities or ESAs' in Eddy Wymeersch, Klaus J. Hopt and Guido Ferrarini (eds), *Financial Regulation and Supervision: A Post-Crisis Analysis* (OUP 2012) 234; Carmine Di Noia and Matteo Gargantini, 'Unleashing the European Securities and Markets Authority: Governance and Accountability after the ECJ Decision on the Short Selling Regulation (Case C-270/12)' (2014) 15 EBOR 1, 40.

[19] Jacques de Larosière (n 18) 19. CESR (ESMA's predecessor) first highlighted this issue in 2004, CESR, *Preliminary Progress Report: Which Supervisory Tools for the EU Securities Market* (2004 Ref (04-333f)).

[20] Regulation (EU) No 513/2011 Amending Regulation (EC) No 1060/2009 on Credit Rating Agencies L145/30. See e.g. ESMA, 'ESMA's Role in European and International Regulatory Cooperation' (Chief Executive Speech, 12 June 2012) who observes that bringing CRAs under the 'umbrella of EU supervision is a milestone achievement'.

[21] CRA Regulation II recitals 14, 17-18.

[22] ESMA, Strategic Orientation 2016-2020 (ESMA/2015/935) 3; European Commission, *Report on the Operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)*. See also European Court of Auditors, *EU Supervision of Credit Rating Agencies – Well Established but Not yet Fully Effective* (Special Report No 22, 2015).

and supervision of trade repositories within the EU (broadly, bodies who collect and maintain records of derivatives), again with such functions extending to include enforcement powers.[23] The gradual expansion in ESMA's competence can also be observed in relation to short selling regulation. ESMA is granted direct powers of intervention in exceptional circumstances: it can, subject to a detailed set of procedural conditions and constraints, prohibit or impose conditions on the entry into a short sale (subject to a number of conditions) and such measures will prevail over prior actions taken by NCAs.[24] Each of these three case studies clearly evidence the gradual extension to ESMA's operational role over time, and each will be further elucidated upon through reflecting on the empirical facts on the ground.

3 Three Case Studies

3.1 CRAs

Why is ESMA's approach to supervising CRAs worthy of consideration?[25] First, regardless of who supervises them, the regulation and oversight of CRAs is an important issue.[26] Specifically, CRAs were close to the origin of the problems that arose with the sub-prime market,[27] and as the crisis evolved, CRAs were criticised, especially for failing to reflect the worsening market conditions in their ratings early enough, and then for not adjusting their credit ratings in time following the deepening crisis.[28] Further, despite considerable post-crisis efforts to stimulate competition in the industry, the market remains oligopolistic, meaning it is vital CRAs are subject to a tough regulatory framework that is also backed up by a robust sanctioning regime.[29] Finally, as CRAs based in one country can issue ratings that have a pan-EU reach, it makes logical sense to transfer the monitoring role to ESMA: it is more effective and efficient for an authority with EU-wide reach to exercise oversight.[30]

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[23] Regulation (EU) No 648/2012 on OTC Derivatives, Central Counterparties and Trade Repositories [2012] OJ L201/1, arts 55-81; Eilis Ferran, 'Understanding the New Institutional Architecture of EU Financial Market Supervision' (n 17)152.

[24] Council Regulation (EU) No 236/2012 on Short Selling and Certain Aspects of Credit Default Swaps [2012] OJ L86/1, art 28. Although beyond the scope of this paper, ESMA will also be granted further direct powers with respect to the sale of particular financial instruments under the MiFID II/MiFIR reforms (although implementation of these rules has been postponed and is now currently anticipated for 2018).

[25] Note that the CRA regime and the post-crisis reforms are also connected to the broader EU banking reforms, however the relation between CRAs and banking regulation is beyond the scope of this paper.

[26] Much has been written on CRAs. In particular, see e.g. Chris Brummer and Rachel Loko, 'The New Politics of Transatlantic Credit Rating Agency Regulation' in Tony Porter (ed), *Transnational Financial Regulation after the Crisis* (Routledge 2014); John Coffee, 'What Went Wrong? An Initial Inquiry into the Causes of the 2008 Financial Crisis' (2009) 9 Journal of Corporate Law Studies 1; Jakob de Haan and Fabian Amtenbrink, 'Credit Rating Agencies' DNB Working Paper No 278/ January 2011 accessed 13 May 2016.

[27] European Commission, Impact Assessment Accompanying the Proposal for a Regulation on Credit Rating Agencies SEC(2008) 2746 7. CRAs gave favourable opinions on instruments financially engineered to give high confidence to investors, and investors took insufficient interest in the instruments' risk characteristics, choosing to rely on a CRA's expertise.

[28] Regulation (EC) No 1060/2009 on Credit Rating Agencies L302/1, recital 10.

[29] See e.g. European Commission, 'Report on the Credit Rating Agency Market' (COM(2016)664) 21.

[30] European Commission, Impact Assessment for a Regulation Amending Regulation (EC) No 1060/2009 on Credit Rating Agencies SEC(2010) 678 (n 46), 4; European Commission, Impact

Next, what are CRAs? Put simply, they are companies that assess the credit-worthiness of issuers and financial instruments, and CRAs can have a major impact on the markets (as ratings actions are carefully tracked by, amongst others, issuers, investors, borrowers, and governments).[31] CRAs traditionally issued opinions on the probability of default or expected losses of companies and governments; however in the years leading up to the global financial crisis, CRAs also provided ratings for more exotic financial instruments, and CRAs were linked to the issues that arose surrounding the 2007 sub-prime crisis. Some of these issues arose in particular from the conflicts of interest inherent within the ratings business due to what can be termed the 'issuer-pays' model. As a CRA was, generally, paid by the same issuer whose creditworthiness it was rating, this model created potential conflicts of interest for the CRA.[32]

Although there is a counter-argument, in that CRAs must protect their reputation with investors, and balance any short-term gain from satisfying an issuer with its long-term reputation in the market, it is questionable whether the risk of reputational loss can actually act as a form of effective sanction.[33] Indeed, this is especially the case with the ratings of structured finance products during the crisis, where the fees that CRAs could obtain strongly impacted their assessments.[34] In particular, the major investment banks that brought in this work acquired much power over the agencies: if they were dissatisfied with a rating, business could be moved elsewhere.[35] Consequently, to retain a client, the rating had to 'satisfy' them, creating the possibility of influencing the overall process.[36]

In the light of this, an early round of EU reforms on CRAs was adopted in 2009: one of the first key EU regulatory responses. These reforms attempted to tackle the main issues that had become apparent during the crisis,[37] and CRAs established in the EU became subject a registration requirement. Agencies also became subject to rules concerning independence and the avoidance of conflicts of interest; as well as provisions on rating methodology; and rules to increase transparency.[38] During the eurozone sovereign debt crisis however, CRAs were again the subject of criticism, especially politically, with respect to the transparency and quality of sovereign debt ratings. In a similar vein to the political allegations levied at short sellers at the time, CRAs were accused of exacerbating the crisis, both through the decisions to downgrade various eurozone economies, and due to the more subjective nature of

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Assessment for a Regulation Establishing a European Securities and Markets Authority SEC(2009) 1235, 26.

[31] European Commission, Impact Assessment for a Regulation Amending Regulation (EC) No 1060/2009 on Credit Rating Agencies SEC(2011) 1354, 6.

[32] Impact Assessment CRA I (n 27) 14-20; John Coffee (n 26) 8.

[33] Jakob de Haan and Fabian Amtenbrink (n 26) 8.

[34] Ibid 8.

[35] John Coffee (n 26) 9.

[36] Brummer and Loko (n 26) 162.

[37] It also illustrated the EU's desire to respond to, and frame the post-crisis international G-20 led agenda, see Moloney, *EU Securities and Financial Markets Regulation* (n 15) 648; Brummer and Loko (n 26).

[38] Impact Assessment CRA I (n 27). The International Organisation of Securities Commissions' ('IOSCO') Code of Conduct for CRAs formed a basis for the first round of CRA reforms, although the EU rules were stricter and more specific, IOSCO, *Code of Conduct Fundamentals for Credit Rating Agencies* (note that the Code was the subject of substantial revisions in 2008 in the light of the crisis, and most recently revised in 2015), IOSCO, *Code of Conduct Fundamentals for Credit Rating Agencies (Final Report)* (2015).

sovereign debt ratings that led to allegations of political bias.[39] Other weaknesses were also re-emphasised, including the risk of an over-reliance on ratings by market participants; and the domination of the three main US agencies operating globally: Standard & Poors; Fitch; and Moody's.[40]

CRAs are now subject to a set of three EU regulations (collectively the 'CRA Regulation').[41] In brief, the rules require CRAs to comply with rigorous rules of conduct to mitigate possible conflicts of interest, and to ensure the high quality and sufficient transparency of the credit ratings and the ratings process.[42] There are also specific requirements in relation to CRA rating methodologies. Further, reflecting the influence of politicisation on the regulatory process, there are also detailed provisions on the approach to be taken to sovereign debt ratings.[43] The reforms also introduce measures to reduce an over-reliance on credit ratings;[44] as well as a new civil liability regime.[45.] From the supervisory perspective, oversight of CRAs is also the first exception to the rule that, by in large, day-to-day supervision should be carried out at the national level.

Before ESMA took up the supervisory reins in July 2011, the rules provided for a type of 'college-type' supervision over CRAs. This enabled all relevant NCAs to participate in registering and supervising a CRA, in conjunction with a coordinating function via CESR, ESMA's predecessor.[46] This rather complex supervisory framework was never considered to be a long-term solution for CRA oversight, however.[47] Although it helped streamline supervisory cooperation and coordination, it was recognised there would be considerable advantages (especially factoring in the specificities and the global nature of the ratings industry) in having centralised EU oversight of CRAs.[48] It is also pertinent that this transfer of supervisory competence to ESMA occurred relatively smoothly. Two main factors made this a less risky prospect for Member States: there were no major national interests at risk given the domination of three US agencies in the ratings business; and second, CRAs were a small (albeit influential) part of the financial markets, meaning the agencies were unlikely to require a bail-out that could risk implicating national taxpayers.[49]

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[39] Brummer and Loko (n 26) 168. Specifically, CRAs form their opinion on sovereign States based on a combination of both qualitative and quantitative considerations, including economic and fiscal history; default history; assessment of the political situation; and policy developments in a particular country. Such ratings are important from a credit market perspective as well as for financial stability: if a sovereign rating is changed, it can have a 'cascade' effect on other rated entities (such as banks) as sovereign ratings are usually a factor in the determination of other ratings. Further, during the recent crises, sovereign ratings also experienced high levels of volatility (both in relation to the number of downgrades and upgrades, as well as the frequency of ratings).

[40] Impact Assessment CRA III (n 31) 4-5; 7.

[41] CRA Regulation; CRA Regulation II; Regulation (EU) No 462/2013 Amending Regulation (EC) No 1060/2009 on Credit Rating Agencies L146/1. The set of CRA reforms will be referred to as the 'CRA Regulation', although reference to an individual regulation will be made where relevant.

[42] CRA Regulation III, recital 1.

[43] CRA Regulation, art 8; art 8a.

[44] Ibid arts 5a-5c.

[45] Ibid art 35a.

[46] Ibid, recital 46, art 29; Impact Assessment CRA II, 14.

[47] CRA Regulation, recital 51; CRA Regulation II, recital 8.

[48] CRA Regulation, recital 51; Impact Assessment CRA II (n 46).

[49] Eilis Ferran, 'Financial Supervision' in Daniel Mügge (ed), *Europe and the Governance of Global Finance* (OUP 2014) 34; Niamh Moloney, 'The European Securities and Markets Authority and

3.1.1 ESMA and CRAs: Approach to Direct Supervision

The thinking on supervision varies with the times. In particular, stances are especially shaped and driven by the wider economic and political climate. In the pre-crisis days, for instance, a more 'principles based', and light-touch type of model was especially in vogue in the UK; although, unsurprisingly this fell out of favour with the crisis, and post-crisis thinking has now heralded a wider, global shift towards more 'risk-based' supervisory models.[50] What is a risk-based approach? It has been defined as the use of systematised frameworks of inspection or supervision to manage regulatory or institutional risk, the focus being *not* on the potential risks that individuals or the economy face by a firm, but the risks the regulator faces in failing to achieve its objectives.[51]

In essence, such a model requires supervisors to make choices, and to decide what types and levels of risk they are prepared to tolerate, and such decisions will be especially driven by the broader political backdrop, and the related risk to the regulator's reputation.[52] Consequently, the higher the political salience of a risk, the less the supervisor's risk tolerance will be in that area.[53] Applying this to CRA supervision, ESMA's risk model focuses particularly on financial stability and probable regulatory failure, and this is firmly on a par with the broader post-crisis political attitudes that emphasise the prevention of financial market instability and systemic risk.[54] Further, the endorsement of such a risk-based approach by ESMA may also be geared towards bolstering its credibility as a direct supervisor, especially if it ensures the continued political confidence in its ability to perform its operational roles.[55]

3.1.2 An Illustration of ESMA's Supervisory Powers in Practice: Sovereign Ratings

In terms of the specifics, ESMA has a wide range of direct supervisory powers including the power to request relevant information; examine records; and conducting on-site inspections and investigations (individual and thematic).[56] In practice, ESMA has conducted a number of such investigations, including with respect to the more politically sensitive area on the

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Institutional Design for the EU Financial Market – a Tale of Two Competences: Part (2) Rules in Action' (2011) 12 European Business Organization Law Review 177, 204.

[50] See e.g. Financial Stability Board, *Increasing the Intensity and Effectiveness of SIFI Supervision: Progress Report to the G20* (2012); Julia Black, 'Regulatory Styles and Supervisory Strategies' in Niamh Moloney, Eilis Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (OUP 2015) 13.

[51] Julia Black, 'Risk-Based Regulation: Choices, Practices, and Lessons Being Learnt' in *Risk and Regulatory Policy: Improvign the Governance of Risk* (OECD Publishing 2010) 187-8; Black, 'Regulatory Styles and Supervisory Strategies' (n 50).

[52] Black, 'Risk-Based Regulation: Choices, Practices, and Lessons Being Learnt' (n 51) 193. Broadly, it involves the regulator developing decision-making procedures in order to prioritise regulatory activities and utilise resources (especially relating to inspection and enforcement) based on an assessment of the risks a firm poses to the regulator's objectives.

[53] Note that aside from the influence of political considerations, risk-based frameworks face other risks including model risk (the risk the model fails to encapsulate all relevant risks) and implementation risk (the risk the model is implemented inadequately), see ibid 186.

[54] ESMA, *2013 Annual Report: Credit Rating Agencies* (ESMA/2014/151) 27-8.

[55] Black, 'Risk-Based Regulation: Choices, Practices, and Lessons Being Learnt' (n 51) 193-4.

[56] CRA Regulation II, art 23b-art 23d. ESMA's powers are articulated in detail in line with *Meroni.*

issuance of sovereign ratings.[57] This was carried out before the final wave of CRA amendments were introduced, but it nonetheless helps demonstrate ESMA's willingness to tackle more politically sensitive areas on its watch,[58] whilst also illustrating that ESMA's risk tolerance will be lower in this especially politically salient sector.

ESMA's sovereign ratings report was highly critical, and identified a wide number of concerns and deficiencies that could compromise the independence of the process, and the quality of the ratings.[59] This included, for instance, senior management involvement in rating activities; disclosure of upcoming actions to unauthorised third parties; significant delays in publishing ratings; and allocation of lead responsibilities to junior staff. Individual remedial action plans were set for each of the CRAs, and ESMA continued to monitor and assess their implementation as part of its on-going supervisory work, which subsequently also led to enforcement action being instigated against Fitch (further discussed in section 3.1.7 below).[60] Aside from the political aspects, the investigation demonstrates ESMA's clear appetite for its new role; its willingness to set itself challenging targets; and its enthusiasm for engaging in ambitious and sensitive work. Pragmatically, such investigations also enable it to learn quickly about the CRA industry, and its 'hands on' approach to its operational responsibilities contributes to it strengthening its reputation as a proactive and preventive supervisor who intends to drive change in the industry.[61]

3.1.3 ESMA and CRAs: Ex Post Enforcement

Credible supervision of CRAs needs to be accompanied by an effective sanctioning regime. This is particularly true given the oligopolistic nature of the CRA industry. A sanctioning regime needs to, first, provide a deterrent effect to keep at bay the risk CRAs breach the rules, and second, once an offence has been committed, impose a strong enough sanction to compel a CRA to restore the situation.[62]

Nonetheless, conferring ex post enforcement powers on ESMA was, understandably, a controversial proposition,[63] and the Commission initially sought to retain the ability to apply penalties itself.[64] Ultimately however, ESMA has been allocated a set of enforcement tools,

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[57] Other thematic investigations focused on bank rating methodologies; and the monitoring of structured finance ratings at four large CRAs, see e.g. ESMA, *Investigation into Structured Finance Ratings* (ESMA/2014/1524).

[58] Moloney, *EU Securities and Financial Markets Regulation* (n 15) 674.

[59] ESMA, *Sovereign Ratings Investigation* (ESMA/2013/1775).

[60] ESMA, *2014 Annual Report on the Supervision of Credit Rating Agencies and Trade Repositories* (ESMA/2015/280) 20. ESMA also subsequently conducted supervisory work on the compliance of the CRAs with the sovereign ratings disclosure requirements introduced by the CRA III Regulation. Such additional measures included requesting CRAs publish sovereign ratings and related ratings outlooks on a Friday after the close of business of the last EU regulated market (rather than in the morning); clearly stating whether ratings were solicited or unsolicited; and requesting that CRAs notify a rated entity in advance of any public disclosure at least 24 hours before notifying the market.

[61] ESMA, *2013 Annual Report: Credit Rating Agencies* (n 54).

[62] See e.g. Impact Assessment CRA II (n 46) 27.

[63] Ibid 30; House of Lords European Union Select Committee, (7th Report of Session 2010-2011, 10 November 2010), 70-72.

[64] E.g. Impact Assessment CRA II (n 46) 30-32. As Moloney observes, the Commission Impact Assessment Board highlighted *Meroni* concerns in relation to the justification of ESMA's supervisory and enforcement powers. It queried why *Meroni* concerns were only raised in the context of sanctioning powers, and not with respect to ESMA's registration and supervision powers. The second

although linked to the constitutional *Meroni* constraints, ESMA's discretion is especially restricted in this regard.[65] In particular, there is a highly detailed procedural framework articulated in the CRA rules with which ESMA must comply.[66] Although rather technical, the main 'bones' of the regime are set out relatively briefly below in order to support the subsequent analysis.

Procedurally, where ESMA concludes there are serious indications of the possible existence of facts liable to constitute an infringement of the rules,[67] a rigorous process must be followed. First, an independent investment officer ('IIO') will be appointed to investigate.[68] On the basis of an IIO's findings, and having heard the person subject to the investigation,[69] ESMA's Board of Supervisors will then decide if one or more infringements have been committed. If so, it shall take a supervisory measure, and potentially (where the infringement is committed intentionally or negligently), impose a monetary penalty. Supervisory measures are non-financial and can include, for instance, withdrawing a CRA's registration; requiring the CRA to bring the infringement to the end; and issuing a public notice.[70] ESMA must notify any such decision to the CRA (as well as the NCA, the Commission, and the other ESAs) and has to make public the decision on its website within 10 working days from the date it was adopted.[71] This includes making public that the decision can be appealed to the Board of Appeal of the ESAs.[72]

Where the infringement has been committed intentionally or negligently,[73] ESMA can impose a fine.[74] Bearing in mind the *Meroni* concerns, ESMA's powers are especially restricted and are subject to a detailed and rather rigid procedural framework.[75] The rules lay down minimum and maximum basic amounts depending on the infringement: for instance for the lowest category of infringement, sanctions range from 10,000 to 50,000 euro; and the highest category ranges from 500,000 to 750,000 euro (with 750,000 euro being the

report highlighted the same concerns (although it acknowledged that the justification was somewhat improved), European Commission, *Opinion on Impact Assessment on CRA II Proposal* (Ref. Ares(2010)108790, February 2010); European Commission, *Resubmitted Opinion on Impact Assessment on CRA II Proposal* (Ref. Ares(2010)205437, April 2010); Moloney, 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market – a Tale of Two Competences: Part (2) Rules in Action' (n 49).

[65] Moloney, *EU Securities and Financial Markets Regulation* (n 15) 674.

[66] CRA Regulation II, art 23e.

[67] Annex III lists infringements and these include: conflicts of interest, organisational or operational requirements, as well as obstacles to the supervisory activities, and infringements to the disclosure provisions.

[68] CRA Regulation II, art 23e.

[69] Ibid art 36c. Note in this regard, the Commission has published additional rules of procedure to be followed by ESMA, Commission Delegated Regulation 946/2012 on Rules of Procedure on Fines Imposed to Credit Rating Agencies by ESMA L282/23.

[70] CRA Regulation II art 23e(5); art 24(1).

[71] Ibid art 24(5).

[72] Ibid art 24(5); Regulation 1095/2010, art 60.

[73] According to art 36a(1), an infringement is intentional if ESMA finds objective factors demonstrating the CRA or its senior management acted deliberately to commit the infringement.

[74] CRA Regulation II art 23e(5); art 36a.

[75] Moloney, *EU Securities and Financial Markets Regulation* (n 15) 675.

maximum basic amount that can be imposed for a first infringement).[76] The basic amount can also be adjusted, if need be, taking into account aggravating or mitigating factors.[77] There is also a ceiling whereby a fine is not to exceed 20 per cent of the annual turnover of the CRA in the preceding business year.[78] The fines must again be publicly disclosed unless exceptional reasons exist.[79] Enforcement is governed by the civil procedure rules in the Member State in the territory of which it is carried out, and an order can be enforced once the authenticity of ESMA's decision has been verified.[80] Enforcement can be suspended only by the CJEU, which can also review ESMA's decision, and annul, reduce, or increase a fine imposed.[81]

ESMA's Board of Supervisors also has the power to impose a periodic penalty payment, including in order to compel a CRA to put an end to an infringement.[82] Such payments are to be 'effective and proportionate' and are to be imposed on a daily basis until the CRA or relevant person complies.[83] Notwithstanding this, the provisions also specify that the amount of the payment shall be three per cent of the average daily turnover (or in the case of natural persons, two per cent) and that a payment may not be imposed for more than six months.[84] Again, before a periodic penalty is imposed, the same procedural framework applies as for fines.[85] The rules do not provide for criminal sanctions but ESMA can refer matters for criminal prosecution to the relevant national authority.[86]

Although the inflexible nature of ESMA's enforcement powers cannot be avoided due to the surrounding constitutional issues, the current level of sanctions that ESMA is permitted to impose is not proportionate to the turnover of the larger CRAs in the industry.[87] This issue will be returned to when reflecting on the fines ESMA has imposed so far in practice, but it is pertinent here to reflect on the approach of ESMA's overseas counterpart, the SEC. In particular, the SEC has never been backwards at coming forwards when imposing tough sanctions, including on offending CRAs. As an illustration, in October 2015, the SEC charged the US arm of DBRS[88] with misrepresenting that it would monitor the ratings of residential mortgage-backed securities (and other complex instruments) on a monthly basis as detailed in its surveillance methodology.[89] DBRS agreed to pay nearly 6 million dollars, plus a censure

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[76] CRA Regulation II, art 36a. To determine whether the basic amount of the fine should be in the lower, middle, or higher end of the limits, ESMA shall have regard to the CRA annual turnover in the previous business year.

[77] Annex IV provides that, based on mitigating or aggravating factors, adjustment coefficients will be applied.

[78] CRA Regulation II, art 36a(4). Further, where the CRA has benefitted from the infringement, the fine shall be at least equal to that financial benefit.

[79] Ibid, art 36d(1). Such exceptional reasons include where public disclosure would damage financial markets or cause 'disproportionate damage' to the parties involved.

[80] Ibid art 36d(3).

[81] Ibid art 36d(3); art 36e.

[82] Ibid art 36b.

[83] Delegated Regulation 946/2012, art 36b(2).

[84] Ibid arts 36b(3)-(4).

[85] CRA Regulation II arts 36c-e; Delegated Regulation 946/2012.

[86] CRA Regulation II art 23e(8).

[87] European Commission, 'Report on the Credit Rating Agency Market' (n 29) 18; IMF 18.

[88] DBRS is a CRA headquartered in Toronto, but also has offices in New York, Chicago, and London.

[89] SEC, *DBRS Administrative Proceedings* (Release No. 76261, October 26, 2015).

to settle the charges, and also agreed to retain the services of an independent consultant to improve its internal controls.[90]

One needs to be very cautious about any 'slap dash' direct comparisons between the two supervisors (that are by no means equivalent), nonetheless this illustration does reiterate that ESMA's maximum fine of 750,000 euro for a first infringement is simply too low to have any dissuasive effect on a large CRA. It is true that sanctions are only one instrument in ESMA's enforcement toolkit,[91] and so in theory the requirement for ESMA to publicly disclose the outcome could also assist in influencing CRA behaviour for the better. Nevertheless given that the threat of reputational loss failed to act as a deterrent on CRAs in the past, it is debateable if this can offer any useful impact in this area.

3.1.4 Enforcement Powers in Practice

The table included below sets out a brief summary of the three CRA enforcement actions that have been concluded by ESMA at the time of writing. Broadly, these cases all related to a number of CRA internal control failures and shortcomings, including with respect to the retention of adequate records; inadequate compliance functions; and infringements of the rules concerning non-disclosure of information to unauthorised third parties.

ESMA Enforcement Action

Enforcement Measures	**Number**	**Parties**
Public Notices	3	S&P (June 2014) DBRS (June 2015) Fitch Ratings (July 2016)
Other Non-Monetary measure	-	-
Fines	2	DBRS: €30,000 (June 2015) Fitch: €1,380,000 (July 2016)
Periodic Payments	-	-

3.1.5 First Public Notice: S&P

The first concluded case resulted in the issue of a public notice for the first time and censured Standard & Poor's Credit Market Services France SAS and Standard & Poor's Credit Market Services Europe Limited ('S&P') for failing to meet some of the organisational requirements set out in the CRA rules.[92] In brief, the case concerned S&P's production of Banking Industry Country Risk Assessments ('BICRAs'), which, according to S&P, were not credit ratings but an assessment of the banking systems in particular countries.[93] Nevertheless S&P decided to maintain BICRAs in the same internal database as credit ratings and to display them on its web-based Global Credit Portal ('GCP') (one of the methods S&P used to

[90] Ibid (n 89) 8-12; SEC, 'SEC Charges Credit Rating Agency with Misrepresenting Surveillance Methodology' (October 2015) <https://www.sec.gov/news/pressrelease/2015-246.html> accessed 21 July 2016.

[91] E.g. Baldwin and Black refer to there being a pyramid of sanctions ranging from ex ante supervision and monitoring to more intrusive enforcement mechanisms in the event of non-compliance, see e.g. Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71 Modern Law Review 59.

[92] ESMA, *2014 Annual Report on the Supervision of Credit Rating Agencies and Trade Repositories* (n 60) 23.

[93] ESMA, *Decision of the Board of Supervisors: S&P Public Notice* (ESMA/2014/544) 4.

disseminate its financial information products). The predictable result of this was that BICRAs were treated as credit ratings, and no effective action was taken by S&P to address the implications this could have.[94]

This led to the incident in the midst of the sovereign debt crisis, when an attempt to change an incorrect display of the BICRA for France triggered an email alert to S&P subscribers, erroneously informing them that S&P had downgraded its ratings of France (specifically, the email stated in its header, 'France (Republic of) (Unsolicited Ratings): DOWNGRADE').[95] Understandably, such an error, coming in the midst of the crisis, led to uproar in France, amid considerable speculation that the worsening state of France's public finances could result in it losing its prized triple A status.[96]

ESMA's Board of Supervisors concluded that the incident resulted from control failures within S&P's organisation; for instance there was a clear lack of responsibility for the project, the relevant staff appeared inadequately informed, and they did not demonstrate sufficient or necessary understanding as to what was taking place.[97] There was also a lack of effective oversight and responsibility: in particular the person who had approved the upload of BICRA for France had 'completely forgotten' the information had been uploaded and was not aware BICRA was shown together with France's sovereign rating.[98]

The imposition of a non-monetary measure amounted to a cautious start by ESMA, and the press suggested it fell short of the tough action European politicians wished to see with respect to the credit rating industry.[99] Nevertheless, from a purely legal angle, as ESMA was not satisfied the violation had occurred intentionally or negligently, a financial penalty was never going to be an option. Nevertheless, in line with ESMA's attitude to its direct supervisory responsibilities, the case can still be interpreted as a signal to other CRAs that ESMA is also seeking to be a pro-active enforcer, as well as offering a useful case study to CRAs as to the types of internal control mechanisms that they should have in place.[100]

On a pragmatic note, the case also serves to illustrate that enforcement action takes time. ESMA's investigation commenced in November 2011, and was only concluded over two years later. Indeed, when one reflects on ESMA's operational role, not only will the rigid procedural conditions make swift enforcement action tricky, so will the fact it has only relatively limited resources. To provide an illustration: in 2013 while the S&P investigation was progressing, out of a total of 32 CRA staff,[101] only approximately 20 per cent of staff

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[94] Ibid 4.

[95] Ibid 3-4. According to Reuters, S&P was also criticised at the time for taking nearly two hours to correct the mistake, by which point the market had closed, 'EU Watchdog Censures S&P for French Rating Cut Error' *Reuters* (3 June 2014) <http://uk.reuters.com/article/uk-esma-s-p-idUKKBN0EE0KJ20140603> accessed 18 July 2016.

[96] Sam Fleming and Hugh Carnegy, 'S&P Censured for Erroneous France Downgrade Alert' *Financial Times* (3 June 2014) <http://www.ft.com/cms/s/0/326b279c-eafb-11e3-bab6-00144feabdc0.html#axzz4EluV9HBk> accessed 19 July 2016. S&P did in fact subsequently downgrade France a few weeks later although the move had little effect on France's borrowing costs.

[97] ESMA, *Decision of the Board of Supervisors: S&P Public Notice* (n 93) 5.

[98] Ibid 5, 7. It also observed that there was also no clear procedure for taking rapid and effective corrective action once the error was discovered.

[99] Sam Fleming and Hugh Carnegy, (n 96).

[100] Cheryl Jones, 'Standard Not Poorer after ESMA Enforcement' (June 2014) <http://blogs.lexisnexis.co.uk/fs/standard-not-poorer-after-esma-enforcement/> accessed 19 July 2016.

[101] This was from a headcount of 139 ESMA staff, see ESMA, *Annual General Supervision Report* (2013) 73.

time was engaged in day-to-day supervision and enforcement activity.[102] Likewise out of ESMA's total budget of 28.1 million euro in 2013, only 5.7 million euro (approximately 20 per cent) was allocated to CRAs.[103] In contrast (and, bearing in mind its different range of activities) in the UK, the Financial Conduct Authority's ('FCA's) total budget for the same period was £432.1 million.[104] With this in mind, ESMA clearly requires a bigger 'budget envelope' to function more effectively in practice.[105]

3.1.6 Monetary Penalties: DBRS

In June 2015, ESMA concluded its action against the European arm of DBRS Ratings Limited ('DBRS') that resulted in a public notice, as well as a fine, with respect to one infringement. The case again concerned a number of internal corporate governance and control failings within DBRS. There were three main infringements: first, DBRS had a governance structure in place whereby the board of directors, and an 'Executive Group' worked alongside each other without any delegation from the board, and without the two bodies having procedures in place to report to one another.[106]

Next, the evidence demonstrated that DBRS's compliance department had no formal work plan during the period under investigation, its records were incomplete, and no risk assessment activities had been carried out.[107] Finally, DBRS had also failed to meet the requirements with respect to adequate records and audit trails. For example, in certain instances DBRS could not confirm whether, or to what extent, documents provided to ESMA constituted all the existing records of procedures implemented by DBRS in order to comply with the CRA rules.[108] ESMA concluded that DBRS had committed this third infringement negligently, and imposed a fine of 30,000 euro.[109]

DBRS earned the 'dubious honour' of being the first CRA to be the subject of a monetary penalty,[110] yet the fine itself was minute; and at most, was simply a cost of DBRS doing

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[102] Aside from this, approximately 35 per cent of staff time was engaged in thematic and individual investigations; 25 per cent in single rulebook and international cooperation; and 10 per cent in registration/perimeter and risk-analysis related activities (totalling 90 per cent of staff time), ESMA, *Report on Staffing and Resources* (ESMA/2014/939) 14.

[103] ESMA, *Annual General Supervision Report* (n 101) 68. Note however that ESMA did observe that other authorities with CRA regulatory responsibilities such as the SEC's Office of Credit Ratings had similar sized teams to those at ESMA, ESMA, *Report on Staffing and Resources* (n 102) 14.

[104] FCA, *Business Plan 2013/14* (2013) 55; Moloney, 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market – a Tale of Two Competences: Part (2) Rules in Action' (n 49) 214.

[105] IMF (n 87) 14-15 that observed ESMA's budget envelope for 2013 was insufficient.

[106] ESMA, *2015 Annual Report on the Supervision of Credit Rating Agencies and Trade Repositories* (ESMA/2016/234) 17; ESMA, *Decision of the Board of Supervisors: DBRS Public Notice and Fine* (ESMA/2015/1048) 5.

[107] ESMA, *Decision of the Board of Supervisors: DBRS Public Notice and Fine* (n 106) 7.

[108] Ibid 8-9.

[109] Ibid 9-10.

[110] 'EU Ratings Watchdog Imposes First Fine on DBRS' *Financial Times* (29 June 2015) <http://www.ft.com/fastft/2015/06/29/eu-ratings-watchdog-imposes-first-fine-on-dbrs/> accessed 20 July 2016.

business.[111] The small size of the sanction is especially notable when one again contrasts it with the recent enforcement action taken against the US arm of DBRS. Although the US proceedings concerned different, and more serious offences, the fine of almost 6 million dollars certainly had more likelihood of acting as an effective deterrent.[112]

3.1.7 Fitch

ESMA's most recent action against Fitch Ratings Limited ('Fitch) in July 2016, related to a set of negligent infringements, and resulted in a 1.38 million euro fine, plus the issuance of a public notice. The case arose from ESMA's sovereign ratings investigation and involved three main issues. First, from December 2010 until June 2012, certain senior analysts at Fitch passed on information about forthcoming rating actions on sovereign ratings to senior persons in Fimalac S.A. (one of Fitch's parent companies). In particular, there were nine separate sets of email exchanges with respect to actual or potential rating actions in six countries[113] that infringed the requirements not to share or disclose information on new ratings with those not involved in their production.[114] Next, Fitch failed to allow Slovenia the minimum period of time (12 hours) to consider and respond before publishing a sovereign rating, and also failed to provide it with the principal grounds on which the rating was based.[115] Finally, Fitch's internal controls were again affected by substantial shortcomings. For instance, the policy framework provided unclear guidance to staff on how to comply with the 12-hour requirement; those responsible for supervising compliance did not exercise their control function; and follow up action did not detect and adequately address such shortcomings.[116]

A number of observations can be made in relation to this case. First, it demonstrates that ESMA's on-going supervisory work is useful not only to improve practices and behaviour within CRAs, but also as a vital aid for teams in evaluating whether a CRA may be breaching the rules. Next, the Fitch penalty is the largest fine imposed so far by ESMA. It also reiterates that, despite the constitutional sensitivities, ESMA has embraced its direct responsibilities, and is gradually making 'ESMA-shaped changes'[117] within the parameters it has to operate.

Nevertheless it is also again true that when one juxtaposes the size of ESMA's penalties with those recently imposed by the SEC, the difference is stark. For instance the SEC announced charges against S&P in 2015 involving fraudulent misconduct with respect to S&P's ratings

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[111] Note that DBRS responded to the outcome by stating that ESMA's review related to the time it was starting up in Europe and adapting to the demands of a new supervisor, that it had immediately addressed all these issues, and was now fully compliant with the rules, 'EU Watchdog Imposes Its First Fine on Rating Agency DBRS' *Reuters* (29 June 2015) <http://www.reuters.com/article/eu-dbrs-fine-idUSL5N0ZF2C320150629> accessed 20 July 2016

[112] SEC, *DBRS Administrative Proceedings* (n 89).

[113] Greece, France, Spain, Ireland, Italy, Portugal, see ESMA, *ESMA Fines Fitch Ratings Limited €1.38 Million: Press Release* (ESMA/2016/1157).

[114] Note that although the infringements stemmed from December 2010, ESMA found breaches only between 1 June 2011 and June 2012 when the infringement provisions of the CRA rules entered into force.

[115] ESMA, ESMA Fines Fitch Ratings Limited €1.38 Million: Press Release (n 113).

[116] ESMA, *Public Notice: Fitch* (ESMA/2016/1159) 3-4. The overall penalty of 1.38 million was made up of 60,000 euro for breaching the 12 hour requirement; 825,000 euro for the internal control failings; and 495,000 euro for the unauthorised disclosures (aggravating factors applied to the internal control failings and the unauthorised disclosures). The overall penalty also reflected the fact that Fitch had voluntarily taken measures to ensure the infringements could not be committed again in the future.

[117] Moloney, 'Institutional Governance and Capital Markets Union: Incrementalism or a "Big Bang"?' (n 1) 389.

of certain commercial mortgage-backed securities ('CMBS'). In particular, in 2011 S&P had misrepresented that it was using one approach to rate such deals, when in fact it was using a different methodology in order to make its ratings less conservative.[118] Further, after being frozen out of the market for rating particular CMBS, and in a bid to re-enter it, S&P published a false and misleading study that omitted crucial data and also claimed that its ratings could withstand a 'Great Depression-style economic collapse'.[119] To settle the SEC charges, S&P agreed to pay more than 58 million dollars, plus a further 19 million to settle parallel cases brought by the New York and Massachusetts Attorney General's offices.[120] S&P was also banned for a year from rating certain CMBS.[121] Notably as well, the resolution of the SEC's case helped pave the way for the subsequent resolution of a much larger settlement with the US Department of Justice, where S&P agreed to pay almost 1.4 billion dollars.[122]

Undoubtedly these are serious sums of money, and some commentators have seized on this to argue that ESMA has been 'timid' in comparison, and that this represents a lack of willingness by ESMA to punish the agencies.[123] This argument should be further reflected on. At a basic level, there is clearly an enormous chasm separating the SEC's approach to enforcement action, and that of ESMA's. Yet, despite this, one should remain mindful about making any straightforward comparisons. In particular, the US and the EU are two very different systems, and ESMA is also required to engage in any enforcement activity within a technical and procedural straightjacket.

Next, no consensus has yet emerged in the literature as to the best way to measure enforcement's intensity or effect; for instance looking at the size of a penalty imposed fails to account for the deterrent effect of reputational penalties.[124] Nevertheless, as observed at the outset of this discussion, in the context of CRAs, given that the risk of reputational loss failed to act as an effective deterrent in the past, it may be questionable whether reputational penalties can ever offer a meaningful impact here. Moreover, even if publishing sanctions *could* assist in influencing behaviour for the better, [125] the three ESMA cases (especially the

[118] 'S&P in $77m Mortgage Securities Settlement with the SEC' *Financial Times* (21 January 2015) <http://www.ft.com/cms/s/0/2a5201cc-a188-11e4-bd03-00144feab7de.html#axzz4F86jBtIC> accessed 22 July 2016.

[119] Ibid; SEC, 'SEC Announces Charges against Standard & Poor's for Fraudulent Ratings Misconduct' (January 2015) <https://www.sec.gov/news/pressrelease/2015-10.html> accessed 22 July 2016.

[120] SEC, 'SEC Announces Charges against Standard & Poor's for Fraudulent Ratings Misconduct' (n 120).

[121] Note that the SEC has also since brought related fraud charges against Barbara Duka, a former S&P manager, who oversaw its CMBS ratings, and at the time of writing, this case is continuing, despite Duka's attempts at halting the use of SEC in-house administrative proceedings, 'SEC Can Resume Case against Ex-S&P Executive -U.S. Appeals Court' *Reuters* (13 June 2016) <http://www.reuters.com/article/sec-duka-idUSL1N1951ZT> accessed 22 July 2016.

[122] Ed Beeson, 'SEC's Stiff S&P Sanction Raises Curtain for DOJ Action' (2015) <http://www.law360.com/articles/613620/sec-s-stiff-s-p-sanction-raises-curtain-for-doj-action> accessed 22 July 2016.

[123] See e.g. Daniel Cash, 'Credit Rating Agency Regulation after the UK's European Union Membership Referendum' (2016) 37 The Company Lawyer 195.

[124] John Armour, Colin Mayer and Andrea Polo, 'Regulatory Sanctions and Reputational Damage in Financial Markets' Research Paper Number 62/2010, 1 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1678028> accessed 24 September 2015; John Coffee, 'Law and the Market: The Impact of Enforcement' (2007) 156 University of Pennsylvania Law Review 229.

[125] See further, John Armour, Colin Mayer and Andrea Polo (n 124); Jakob de Haan and Fabian Amtenbrink (n 26) 8.

Fitch action) generated only relatively limited mainstream press coverage.[126] What is clear though, is that although it is still 'early days' with respect to ESMA's enforcement actions, the current fines available to ESMA are inadequate to be effective in the highly concentrated CRA industry. On the upside, this is now becoming something of a work in progress, as the Commission recently proposed revisions to the CRA sanctioning regime to ensure the regime is credible and proportionate as a deterrent.[127] It remains to be seen, however, whether these changes will be sufficient to tackle the current (largely unfair) perception of ESMA as being a toothless enforcer.

3.2 Case Study 2: Trade Repositories

CRAs were not the sole exception to the rule that supervisory responsibilities should generally be orchestrated by the NCAs. Due particularly to the lack of transparency surrounding derivatives trading during the financial crisis, a post-crisis framework was introduced that required derivative trades be reported to trade repositories ('TRs').[128] Such entities act as a type of 'middleman' for ESMA; rather than individual firms submitting reports to ESMA, the information is submitted to the TR that maintains records that can then be made available to regulators.[129] Consequently, TRs are intended to play an important role in improving transparency, and in ensuring accurate reporting in the derivatives market.[130] Akin to the CRAs, transferring supervisory responsibility to ESMA was relatively straightforward: there were no major national TRs for countries to seek control over; and TRs were not perceived as a serious source of systemic risk that could trigger fiscal responsibility at the national level.[131]

The same could not be said concerning the regulation and supervision of central counterparties ('CCPs'), however.[132] The post-crisis rules also require standardised derivatives transactions be cleared through such CCPs,[133] so that rather than two parties concluding a derivatives transaction privately, they now have two separate contracts with a CCP. The rules aim at promoting financial stability through reducing counterparty risk (as well as the enhancement of transparency). The introduction of a CCP does not eliminate systemic concerns, however, it only shifts this risk to the CCP, thereby potentially increasing

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[126] For instance, on a simple Internet news search, the S&P censure generated the most broadsheet coverage, including reports by the FT; the Telegraph; and the Financial News, as well as legal coverage from Pinsent Masons (via 'Out-Law.com'). The DBRS fine was reported by Reuters, the FT, and again by Pinsent Masons. The recent Fitch case generated no major coverage aside from via Reuters, and the 'West Australian' (a devoted FT search produced no results). All three cases also received some industry specific reports (e.g. via 'the Investment Executive'; and 'Waters Technology').

[127] European Commission, 'Report on the Credit Rating Agency Market' (n 29) 20.

[128] This framework is introduced via EMIR 2012.

[129] Finance Magnates, 'Is ESMA's €64,000 Fine of the DTCC the First of More to Come?' (2016) <http://www.financemagnates.com/institutional-forex/bloggers/esmas-e64000-fining-dtcc-first-come-part-1/> accessed 2 August 2016; EMIR 2012, art 81(3) sets out the range of entities to whom TRs must make the data available including ESMA, NCAs supervising central counterparties, and the NCAs supervising the trading venues of the reported contracts.

[130] ESMA, *2014 Annual Report on the Supervision of Credit Rating Agencies and Trade Repositories* (n 60) 31.

[131] Eilis Ferran, 'Financial Supervision' (n 49) 34.

[132] CCPs provide clearing and settlement services and ensure financial instruments and/or money are available to settle the trade, EMIR 2012, art 2(3).

[133] Ibid art 4. This was in line with G20 commitments to improve oversight and transparency in OTC derivatives trading following the crisis, *G20 Leaders Statement: The Pittsburgh Summit* (September 2009).

systemic risk in the CCPs themselves.[134] Although the rules seeks to tackle this via a set of risk management and prudential provisions,[135] in the event a CCP fails, fiscal responsibility will lie primarily with the Member State.[136] Consequently, it follows that it is largely the NCAs (albeit via a complex college cooperation set-up), rather than ESMA, that remain responsible for authorising and supervising CCPs established in the EU.[137]

Indeed, on a related point, although ESMA was allocated a type of 'gatekeeper' role in relation to granting access to the EU for third country CCPs,[138] EMIR's early drafts had in fact proposed that third country CCPs obtain authorisation from each individual country where it wished to provide clearing services.[139] It was only the result of much lobbying by industry groups (who argued that such an approach could result in discrepancies between countries and could create barriers to trade) that responsibility for third country CCPs was eventually transferred to ESMA.[140]

3.2.1 Enforcement Action: DTCC

ESMA's general supervisory and enforcement powers mirror the CRA template and ESMA has, to date, completed one enforcement action against a TR, DTCC Derivatives Repository Limited ('DTCC') that resulted in a public notice and a 64,000 euro fine. DTCC provides post-trading services to the global financial services industry,[141] and is the largest EU registered TR. In May 2014, ESMA's supervisory team became aware of delays in DTCC providing regulators with access to data. ESMA found that for approximately nine months during 2014, access delays were experienced that increased from two days to as much as 62 days after reporting, affecting 26 billion reports.[142] These delays were due to DTCC's negligence in failing to put in place data processing systems capable of providing regulators with direct and immediate access to the data. Further, once DTCC became aware of the issue, it failed to inform ESMA in a timely manner; and then took three months to establish an

[134] This means a CCP default could detrimentally affect its participants, other CCPs and also potentially destabilise the market, see ESMA, *Recovery and Resolution of CCPs: Let's Bring the Lifeboats in Place* (ESMA/2016/1002) 2.

[135] EMIR 2012 arts 14-54; Linklaters, *Guide to the European Market Infrastructure Regulation (EMIR)* (2014).

[136] EMIR 2012, recital 52; art 22; Eilis Ferran, 'Financial Supervision' (n 49) 34. See further also ESMA, *Recovery and Resolution of CCPs: Let's Bring the Lifeboats in Place* (n 134) with respect to the Commission's 2012 proposal to in relation to establishing a framework for CCP resolution.

[137] Niamh Moloney, 'Resetting the Location of Regulatory and Supervisory Control over EU Financial Markets: Lessons from Five Years On' (2013) 62 ICLQ 955, 965; Moloney, *EU Securities and Financial Markets Regulation* (n 15) 618; EMIR 2012, art 18.

[138] EMIR 2012, art 25; Eilis Ferran, 'Understanding the New Institutional Architecture of EU Financial Market Supervision' (n 23) 152. Such third country CCPs can apply to ESMA for authorisation to provide clearing services within the EU.

[139] Moloney, *EU Securities and Financial Markets Regulation* 618; Herbert Smith, *EMIR: EU Regulation of OTC Derivatives, Central Counterparties and Trade Repositories* (March 2012) 3.

[140] Herbert Smith (n 139) 3. See EMIR 2012, art 25 for the range of conditions that must be met. Note that for an overview of ESMA's advice to the Commission on the equivalence of third countries in relation to CCPs and TRs, see Clifford Chance, *ESMA Advises European Commission on Equivalence of Non-EU Clearing and Derivatives Rules* (October 2013).

[141] ESMA, *Decision Notice – DTCC Derivatives Repository Limited* (ESMA/2016/408) 3.

[142] ESMA, *ESMA Fines DTCC Derivatives Repository Limited €64,000 for Data Access Failures: Press Release* (ESMA/2016/468).

effective remedial action plan, even when the delays worsened.[143] ESMA concluded that DTCC was negligent in each respect, and the fine also represented aggravating factors (the infringement had continued for more than six months, it revealed systemic weaknesses in the organisation of the TR, and had a negative impact on the quality of TR data maintained by DTCC).[144]

This action is notable, first, for being ESMA's first enforcement case against a TR. The fine imposed was a relatively modest one, especially when one factors in the nature of the aggravating factors, although in this instance, the press coverage (despite being, again, relatively limited) suggested that the outcome would have been 'embarrassing for one of the world's most important market infrastructure organisations'.[145] This in itself may hint at the possibility that reputational sanctions could play more of a role in this, and other, market sectors, although it is still early days, and this could also depend on the sufficiency of the coverage. More generally though, and firmly in line with ESMA's approach to CRA enforcement work, the case articulates that ESMA has fully engaged with this extension to its direct powers.

3.3 Case Study Three: Short Selling

Although the third case study does not reflect the conferral of further *day-to-day* direct powers on ESMA, it remains a pertinent on to reflect on. Why? It is interwoven with the bigger picture concerning the incremental shifts observable in transferring direct operational powers on ESMA over time. What is short selling? In brief, the practice concerns the sale of an asset (often shares) not owned by a seller with the aim of buying back an identical asset later for a lower price, and the practice is now the subject of a range of restrictions and requirements under the EU Short Selling Regulation ('SSR').[146]

Focusing only on ESMA's direct powers, the authority is granted direct powers to intervene in the markets to prohibit or impose conditions on short sales in exceptional circumstances, and any such measure prevails over previous measures taken by NCAs.[147] There is one caveat, however: sovereign debt is excluded from its ambit due to political concerns as to the possible effects on countries' borrowing costs.[148] In line with its CRA, and TR direct powers, ESMA can only utilise these direct powers in exceptional, tightly specified circumstances,[149] and must follow a number of procedural steps, including prior consultation with the ESRB,

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[143] Ibid; ESMA, *Decision Notice – DTCC Derivatives Repository Limited* (n 141) 6.

[144] ESMA, *Decision Notice – DTCC Derivatives Repository Limited* (n 141) 7.

[145] 'EU Watchdog Fines DTCC for Derivatives Repository Failings' *Reuters* (31 March 2016) <http://www.reuters.com/article/eu-derivatives-regulator-idUSL5N173206> accessed 3 August 2016. Again, using a simple Internet news search, Reuters, and the Financial News provided the main coverage. There was no FT coverage of this fine.

[146] For further discussion see e.g. Elizabeth Howell, 'Short Selling Restrictions in the EU and the US: A Comparative Analysis' (2016) 16 Journal of Corporate Law Studies 333; Moloney, *EU Securities and Financial Markets Regulation* (n 15) 538; Jennifer Payne, 'The Regulation of Short Selling and Its Reform in Europe' (2012) 13 EBOR 413.

[147] Regulation 236/2012 art 28(11).

[148] Ibid, art 28.

[149] Broadly, where there is a threat to the orderly functioning of markets or the stability of the financial system, there are cross-border implications, and NCAs have either not taken action, or the measures taken do not adequately address the threat. Ibid art 28.

prior notifications to NCAs affected by any such measure, and publication of the measure on its website.[150]

The ability for ESMA to directly intervene in the markets in emergencies places the agency at the heart of important and delicate decisions with respect to short selling. It also constitutes another significant step forward in relation to the ability for ESMA to intervene directly in the markets. In this regard it is worth reiterating that although the UK sought to legally challenge the conferral of these powers on ESMA, the CJEU affirmed the powers, as well as the legal basis on which they were adopted.[151]

3.3.1 ESMA's Powers in Practice

ESMA has not yet utilised its direct powers of intervention, and so it remains to be seen what use it makes of this new competence. In related developments, however, following the Brexit vote of June 2016, ESMA's chairman confirmed that ESMA and the NCAs had coordinated in advance and had decided there was no need to use their powers on the day of the result, including in relation to imposing short selling bans.[152]

Linked to this, ESMA has also issued a number of opinions over the years concerning the imposition of NCA emergency bans, and an important shift is discernable here. In the main, ESMA has generally been supportive of such measures, yet its early opinions were notably brief, and tended to closely map the SSR's wording.[153] Over time, however, ESMA has started to provide far more detailed and comprehensive opinions,[154] and notably ESMA also recently issued one negative opinion on a NCA's emergency measure. Specifically, in January 2016, it published a relatively detailed negative opinion opposing the proposed extension of an emergency short selling ban by Greece, relating to the shares of Attica Bank S.A. ('Attica'). ESMA considered that the threat to financial stability of Attica, and the Greek financial market, had considerably decreased, and took the view that renewing the measure was neither appropriate nor proportionate.[155]

This was the first time ESMA had opposed a NCA's proposed emergency measure, and its opinion was comprehensive, providing quantitative analysis of Attica's share price to illustrate that its pricing history did not suggest a highly fragile situation, and, also observing

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[150] Ibid art 28(4)-(5); art 28(7).

[151] For a comprehensive discussion of this case see e.g. Carl Fredrik Bergström, 'Shaping the New System for Delegation of Powers to EU Agencies: United Kingdom v. European Parliament and Council (Short Selling)' (2015) 52 CML Rev 219; Elizabeth Howell, 'The European Court of Justice: Selling Us Short?' (2014) 11 ECFR 454.

[152] Indeed, although in the immediate aftermath of the referendum, financial institutions such as Lloyds and Societe Generale had approximately one fifth wiped off their share value, ESMA (as well as the head of equities at the London Stock Exchange) took the view that the market infrastructure had coped well with the impact and there was no need to introduce any extraordinary measures, see Huw Jones, 'Market Infrastructure Coped Well with Brexit Fallout: EU Watchdog' *Reuters* (29 June 2016).

[153] For instance, one of the first opinions issued in relation to emergency measures imposed by the Spanish regulator in 2012 contained a brief factual background before simply stating that there were adverse developments; that the measure was appropriate and proportionate, and that the measure's duration was justified. See e.g. ESMA, *Opinion on Spanish Emergency Measures* (ESMA/2012/715); see also ESMA, *Opinion on Greek Emergency Measures* (ESMA/2013/542).

[154] This included for instance its nuanced review on a three-month emergency ban imposed by the Italian regulator, CONSOB, in July 2016 on Banca Monte dei Paschi di Siena's ('BMPS') shares ESMA, *Opinion on Italian Emergency Measures* (ESMA/2016/1078).

[155] ESMA, *Opinion on Greek Emergency Measures* (ESMA/2016/28).

that Attica stood for only a very small part of the Greek banking sector with respect to financial stability concerns.[156] ESMA also identified a number of other tools under the SSR that could be more appropriate if a significant downward spiral in the share price was to occur.[157]

The Greek regulator proceeded to implement its ban regardless, although it is probable that the reigniting of the Greek crisis in 2015, the broader political landscape, and the fragility of Greek relations within the EU all played a part in this decision. Nonetheless the instance remains significant for ESMA's opposition. In particular it reflects a strengthening of ESMA's capacity as a supervisor, especially in its willingness to adopt an opposing position that directly criticises the stance of a national authority.[158] With an eye to the future, it is also likely that this will not be the only occasion when a NCA and ESMA disagree on whether an emergency measure should be introduced. Consequently, in the event there are differences of opinion (and although the Brexit ESMA/NCA interaction arguably augurs well for the future), the Greek negative opinion reflects ESMA gaining further confidence in its ability to assert itself as an authority. The question therefore remains open as to whether this could result in ESMA fully embracing its direct powers of intervention in a future crisis, especially in the absence of any NCA cooperation.

4 ESMA: Implications for EU Financial Law and Supervisory Governance

4.1 ESMA's Credibility: Recent Reviews

The arguments geared towards transferring direct responsibility to ESMA over market actors, practices and activities are evident in each of the cases explored in section 3: direct oversight should ensure that there is greater consistency in applying the rules; as well as enabling more effective and efficient supervision.[159] Indeed, particularly where actors or practices have pan-EU reach, there is considerable sense to centralising certain supervisory powers to a EU agency such as ESMA. Such (mainly) positive verdicts also come through in a number of recent reviews on ESMA and these assist in bolstering ESMA's credibility both politically and internationally.

Although perhaps not an impartial review, in 2013, the founding father of the ESAs, Jacques de Larosière commented that ESMA had performed well and become a recognised international authority.[160] Likewise, the Commission's first 'stocktake' of the ESAs in 2014, observed that there was broad consensus as to the efficiency and effectiveness of ESMA's direct supervision of the CRAs, as well as its mandate for supervising TRs.[161] It also indicated that further tasks could be potentially assigned to ESMA in the future including (but not limited to) international financial reporting standards enforcement, the direct supervision of

[156] Ibid 6.

[157] Ibid 7.

[158] Moloney, 'Institutional Governance and Capital Markets Union: Incrementalism or a "Big Bang"?' (n 1) 418.

[159] Eilis Ferran, 'Financial Supervision' (n 49) 35.

[160] Jacques de Larosière, 'The European System of Financial Supervision' (Speech: Public hearing on Financial Supervision in the EU (May 2013)) 12.

[161] European Commission, *Report on the Operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)* (n 22) 11.

critical and highly integrated market infrastructures such as CCPs, and the strengthening of ESMA's direct settlement powers.[162]

With respect to ESMA's supervision over CRAs, a slightly more equivocal report by the European Court of Auditors ('ECA') concluded that ESMA had laid down good foundations for effective supervision and that the regime was well established.[163] It also set out a number of areas where there was room for improvement, however. For instance, the report suggested that ESMA's lack of a documentation trail made it hard to understand why certain risks were reprioritised. Perhaps rather ironically given ESMA's own CRA enforcement work, the report's recommendations mainly relate to ESMA improving its record keeping and decision-making processes, but ESMA, in the main, accepted the suggestions.[164] Finally, the Commission's recent 2016 report on the CRA industry also concluded that the CRA rules granted the authorities the necessary tools to supervise CRAs, but emphasised that the sanctioning regime required revision to ensure it was credible and proportionate as a deterrent.[165]

More generally, ESMA is maintaining a relatively ambivalent stance about the evolving nature of its direct role. On the one hand it announced that it had merged its supervision of CRAs and TRs into a single 'Supervision Department' at the end of 2015 to strengthen its role as a direct supervisor.[166] On the other, in its 2016-20 Strategic Orientation, it stated that although it anticipated that its focus would shift more towards supervision and supervisory convergence, it was not asking for new areas of direct supervision, but stood ready to assume new tasks, should these be assigned, along with the appropriate resources.[167]

4.2 ESMA's Direct Role: Risks and Obstacles

At this stage it is evident that ESMA has succeeded in quickly establishing itself a relatively well-functioning and efficient direct supervisor that has performed well against a broad range of operational tasks.[168] It is also apparent, however, that there is a set of stumbling blocks to ESMA fully achieving its current mandate, or to taking on further direct responsibilities. The first relates to the current institutional approach that continues to tackle the conferral of powers sectorally. This approach can be questioned, especially given the recent evidence

[162] Ibid 13-14. Other areas identified for ESMA included the supervision of critical benchmarks in financial instruments and contracts; and with respect to central securities depositaries ('CSDs'), see European Commission, *Staff Working Document Accompanying the Commission ESA Report* (SWD(2014) 261 final) 26.

[163] NB the report covers the period till September 2015 but was not published until 1 February 2016.

[164] European Court of Auditors (n 22). ESMA only partially accepted some recommendations however; for instance ESMA did not consider that a dedicated IT system was necessary given the limited number of registered CRAs. It also suggested that the direct comparison with NCAs was not proportionate in light of the numbers of registered CRAs and the size of ESMA's supervisory team compared with the NCAs' respective figures. See also, Council of the European Union, *Economic and Financial Affairs: Outcome of the Council Meeting* (9342/16 25 May 2016) 15.

[165] European Commission, 'Report on the Credit Rating Agency Market' (n 29) 20.

[166] ESMA, *2015 Annual Report on the Supervision of Credit Rating Agencies and Trade Repositories* (n 106) 40. With this one unit, ESMA intends to build on its expertise in each area, and to employ a wide range of supervisory mechanisms to achieve its objectives, and to change industry practices, where required.

[167] ESMA, Strategic Orientation 2016-2020 (n 22) 16.

[168] European Commission, *Report on the Operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)* (n 22) 12.

from the crises. Such a strategy does not tackle functionally similar risk, and creates risks of regulatory arbitrage.[169] Indeed, on a related point, it is notable that prudential regulators are now starting to express an interest in risks to financial stability that could be posed by the capital markets. For instance, there is currently a fairly heated discussion as to the risks that could be posed by asset management activities.[170] Regardless of the rights and wrongs of these precise proposals, there is certainly much sense in prudential regulators surveying *all* potential threats to financial stability, yet from ESMA's perspective, this could ultimately also create a threat to its claim as the EU's securities and markets supervisor.[171]

Next, ESMA's ability to perform its current activities is hampered by its limited human resources and budget.[172] Indeed although ESMA's budget has increased since its creation, its funding arrangements are not proportionate to its increasing workload and duties.[173] With this in mind, unless the resources available to ESMA are increased considerably, it will remain limited in its ability to effectively achieve its current objectives, and will slow down the likelihood of any further transfers of supervisory power.[174]

ESMA's precise funding set-up is also relevant. All three ESAs are funded via a subsidy from the EU, as well as contributions from the NCAs, however ESMA is also partially funded via annual fees that are levied on the CRAs and TRs.[175] The funding received from the EU and NCAs is far from ideal, however: for instance, concerns have been raised that ESMA's independence could be undermined by the role of both the NCAs and the Commission in

[169] Moloney, 'EU Financial Market Regulation after the Global Financial Crisis: "More Europe" or More Risks?' (n 8) 1360.

[170] See e.g. Caroline Binham et al, 'FSB Proposes Stress Testing for Asset Managers' *Financial Times* (22 June 2016) <https://www.ft.com/content/5b60ba04-387e-11e6-a780-b48ed7b6126f> accessed 6 January 2017; Moloney, 'International Financial Governance, the EU, and Brexit: The 'Agencification' of EU Financial Governance and the Implications' (n 9).

[171] Moloney, 'International Financial Governance, the EU, and Brexit: The 'Agencification' of EU Financial Governance and the Implications' (n 9) 464; Moloney, 'Institutional Governance and Capital Markets Union: Incrementalism or a "Big Bang"?' (n 1) 394; Financial Stability Board, 'FSB Publishes Proposed Policy Recommendations to Address Structural Vulnerabilities from Asset Management Activities' (n 9).

[172] For instance (and, again, although the comparison with the FCA is not perfect given that their functions are not identical), in 2015, the UK's FCA had a budget of nearly £500 million and over 3000 staff. In contrast, ESMA had a budget of €34 million and a staff of 186. Figures drawn from ESMA and the FCA's 2015 annual reports, see ESMA, *Annual General Supervision Report for 2015* (2015) 64; FCA, *Annual Report and Accounts 2015/16* (2016) 9.

[173] European Commission, *Report on the Operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)* (n 22) 11. See also e.g. Jacques de Larosière, 'The European System of Financial Supervision' (n 160); IMF (n 87) that expressed the view that ESMA's work plan should be implemented with additional resources.

[174] Eilis Ferran, 'Understanding the New Institutional Architecture of EU Financial Market Supervision' (n 23) 137. It is also acknowledged that simple increases in staff and budget may fail to achieve significant change if staff are under-motivated and under-paid, Niamh Moloney, 'Supervision in the Wake of the Financial Crisis' in Eddy Wymeersch, Klaus J. Hopt and Guido Ferrarini (eds), *Financial Regulation and Supervision: A Post-Crisis Analysis* (OUP 2012) 87. See also Howard Jackson and Mark Roe, 'Public and Private Enforcement of Securities Laws: Resource-Based Evidence' (2009) 93 Journal of Financial Economics 207.

[175] Note that its funding sources now also include an additional NCA contribution towards delegated tasks. In 2015, ESMA was financed 40 per cent by NCAs; 26 per cent by the EU; 21 per cent by the CRAs; 6 per cent by TRs; and 7 per cent by an NCA contribution for delegated tasks, see ESMA, *Annual General Supervision Report for 2015* (n 172) 64.

financing them.[176] Second, as ESMA grows, the contribution from NCAs could become a heavy burden for smaller Member States, creating a risk of non-payment.[177] Again, this issue may be now a work in progress as the Commission is mindful of such concerns, and has recommended that further analysis be carried out in relation to improving the funding structures for all the ESAs, including with respect to increasing the level of industry fees funding.[178] However, it is also clear that there are risks with expanding such a model, including risks as to 'double charges', where market actors could be funding both its own NCA and ESMA. Further, even if the domestic fee could be offset, this could then risk negatively impacting the operation of the relevant NCA.[179] Nevertheless, as the NCA and ESMA functions are not technically identical, perhaps it could be feasible to implement a type of dual system going forward.[180]

A further significant hurdle stems from fiscal concerns. In particular, as already observed, when a market actor fails, and domestic taxpayers' money is at risk, the adage 'he who pays the piper, calls the tune' applies, and supervisory competence remains at the domestic level.[181] Whereas the CRAs, and TRs were never likely to be a source of fiscal risk for Member States, this constraint is likely to present one of the main stumbling blocks to the Commission's proposal that direct competence could be transferred to ESMA over CCPs. Indeed, such fiscal concerns were also behind the exclusion of sovereign debt from ESMA's direct intervention powers with respect to short selling.

Closely interwoven with this issue, however, is the prevailing political climate. With respect to the EU's current CMU project, the recent 'Five Presidents Report'[182] commented on the need to strengthen the EU's supervisory framework to ensure financial stability. Notably, however, this report also contained much more contentious hints, including that such moves should ultimately lead to the creation of a single European capital markets supervisor.[183] This

[176] European Commission, *Staff Working Document Accompanying the Commission ESA Report* (n 162) 20.

[177] See IMF (n 87) 11.

[178] Ibid 11; European Commission, *Report on the Operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)* (n 22) 11; European Commission, *Staff Working Document Accompanying the Commission ESA Report* (n 162) 20. See also ESMA, *Strategic Orientation 2016-2020* (n 22) 17 where the President of the Commission has requested there be a focus on eliminating EU and NCA budgetary contributions and that the ESAs be solely funded by the sectors they supervise.

[179] IMF (n 87) 12.

[180] See further e.g. Moloney, *EU Securities and Financial Markets Regulation* (n 15) 917 who notes that budgetary constraints on ESMA has been repeatedly identified as a risk, including from the industry, and also noting that ESMA's ability to levy fees on market actors is very limited.

[181] Eilis Ferran, 'Understanding the New Institutional Architecture of EU Financial Market Supervision' (n 23); Charles Goodhart and Dirk Schoenmaker, 'Should the Functions of Monetary Policy and Banking Supervision Be Separated?' (1995) 47 Oxford Economic Papers 539, 544. See also Schammo, 'EU Day-to-Day Supervision or Intervention-Based Supervision: Which Way Forward for the European System of Financial Supervision?' (n 17) 781 who observes that the fiscal argument is not without its problems if e.g. a smaller Member State is incapable of meeting the financial burden where a market actor fails.

[182] This report was prepared by the Commission President, the Euro Summit President, the President of the Euro Group, the ECB President, and the European Parliament President.

[183] Jean-Claude Juncker and others (n 4) 12. See also e.g. ECB, *Building a Capital Markets Union – Eurosystem Contribution to the European Commission's Green Paper* (2015) 15. A response from the UK House of Lords was less effusive however. It noted that the creation of such a single supervisor was not mentioned in the Commission's CMU action plan; and that the House had previously opposed such a development, House of Lords European Union Select Committee, *'Whatever It Takes': The Five*

article speculates, however, that no such dramatic developments are likely in the near future (absent another global crisis). The EU is not at the stage of creating a 'EU-SEC'. Rather, it is more probable that ESMA's direct powers and influence will continue to increase over time and that ESMA will continue to be an important driver in shaping how EU supervisory governance evolves. Indeed, in line with arguments put forward in the related institutional governance literature,[184] all such shifts may gradually then lead to a greater enhancement of ESMA's direct powers, despite the various hurdles that have been identified. How such developments could be affected by the current shake-up of the EU caused by Brexit is impossible to predict, however. At this stage, the most that can be said with any certainty is that it may reinforce some Member State leanings towards an increased centralisation of powers, including with respect to greater supervisory integration.[185] Finally, the one factor that may still truly hinder ESMA in practice is the tools it has in its enforcement kit. Without the ability to impose severe penalties on dominant CRA players, it will struggle to have any dissuasive impact in practice.

5. Conclusion

ESMA has seized the day with its new role as a direct supervisor. It has set to work immediately in carrying out its supervisory and enforcement responsibilities, and has shown itself to be a pro-active patroller of the markets that is also able to engage with more politically delicate aspects on its watch. ESMA has acknowledged that it is still at a relatively early development stage with respect to its direct responsibilities, but it is building up a reputation as a credible watchdog that has also been endorsed both politically and internationally.[186]

This article speculates that ESMA is strengthening its influence over time (with a notable recent instance being its negative short selling opinion). The article suggests that ESMA is likely to continue to be a significant driver in shaping EU supervisory governance going forward and that this could likely result in the greater centralisation of supervisory powers, over time. Despite the change in the air following the Brexit decision, this article suggests that any such supervisory governance shifts will continue to progress in a somewhat unspectacular fashion, but when one bears in mind the facts on the ground, the article speculates that ESMA remains in a prime position to play a major influence going forward. Although the article has also sought to document that there are still a wide range of formal obstacles and risks, it speculates that there may be in fact few real constraints given the empirical evidence observable in practice.

Presidents' Report on Completing Economic and Monetary Union; see also Bank of England, *Bank of England's Response to the European Commission Green Paper: Building a Capital Markets Union* (May 2015) that observes that the ESAs' current supervisory powers are sufficient and that 'no new measures are required'.

[184] In particular see Moloney, 'Institutional Governance and Capital Markets Union: Incrementalism or a "Big Bang"?' (n 2).

[185] Moloney, 'Financial Services, the EU, and Brexit: An Uncertain Future for the City?', 80; Jean-Claude Juncker and others (n 4) 4-5.

[186] ESMA, *Strategic Orientation 2016-2020* (n 22) 15.