



KU LEUVEN

FACULTY OF LAW

Academic year 2018 - 2019

The future of the institutional architecture of the European Supervisory Authorities

Supervisor: prof. dr. V. COLAERT

Corrector: prof. dr. M. PANZAVOLTA

Master thesis, submitted by

Sara DE MOOR

As part of the final examination for the degree of

MASTER OF LAWS (LL.M.)



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PLAGIARISM DECLARATION

"I confirm that this thesis is my own work, that all ideas contained in the thesis are expressed in my own words and that I have not literally or quasi-literally taken anything over from other texts, except for fragments cited between quotes for which I provided full and accurate bibliographical data." – Sara De Moor

ABSTRACT

The institutional architecture of the trinity of European Supervisory Authorities (ESAs) is called into question. Their sectoral structure mirrors the deeply-rooted segmentation which has traditionally characterized the financial system, as a result of which the EBA, the ESMA and the EIOPA coordinate the micro-supervision of respectively the banking, the securities and the insurance sector. Due to the many cross-sectoral developments that have emerged during the last couple of decades, the sectoral pillars have started to wobble. Many Member States have reacted to this by substituting their sectoral supervisory structure for either an integrated structure or an objectives-based twin peaks structure. At European level, no similar (re)action has been taken.

In the plea for structural action, two lines of reasoning can be followed. One line consists of arguments that lead to a cross-sectoral structure for European micro-supervision by putting forward the overall assertion that the present, complex sectoral model is not able to absorb the many challenging innovations that lie ahead of Europe and its Member States. The other line of arguments upholds the sectoral structure: it draws attention to the fact that another structure might neither be feasible nor imperative.

After outlining how the European single market for financial services developed alongside sectoral lines (Chapter I), and discussing the arguments against and in favour of Europe's sectoral approach (Chapter II), the research paper maps out two paths for the future of European micro-supervision (Chapter III): the path it could follow, and the path it should follow.

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Laarne, 19 August 2019

ABBREVIATIONS

BU	Banking Union
CEBS	Committee of European Banking Supervisors
CEIOPS	Committee of European Insurance and Occupational Pensions Supervisors
CESR	Committee of European Securities Regulators
CDS	Credit default swap
CFPB	Bureau of Consumer Financial Protection
CJEU	Court of Justice of the European Union
CMU	Capital Markets Union
COB	Conduct of business
EU	European Union
EBA	European Banking Authority
ECB	European Central Bank
EIOPA	European Insurance and Occupational Pensions Authority
ESA	European Supervisory Authority, meaning the European Banking Authority, the European Securities and Markets Authority or the European Insurance and Occupational Pensions Authority
ECFS	European Coordinator of Financial Supervision
ESFS	European System of Financial Supervision
ESMA	European Securities & Markets Authority
ESRB	European Systemic Risk Board
FICOD	Financial Conglomerates Directive
FSAP	Financial Services Action Plan
FSOC	Financial Stability Oversight Council
IAIS	International Association of Insurance Supervisors
IOSCO	International Organization of Securities Commissions
JC	Joint Committee
MiFID II	Markets in Financial Instruments Directive II
NCA	National Competent Authority
PEPP	Pan-European Personal Pension Product
PPP	(Single market for) Personal Pension Products
PRIIPs	Packaged Retail Investment and Insurance Products (Regulation)
SSM	Single Supervisory Mechanism

TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union

APPENDICES

Appendix I: Illustration of the use of bancassurance as a distribution level for life insurance.

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INTRODUCTION

A. Introductory overview

1. State of play

Setting the scenery. With the focus on establishing a single market for financial services, the European legislator has realized throughout the years that harmonized rules need to be surrounded by strong financial supervision.¹ This growing awareness is reflected in the numerous initiatives that have succeeded each other over the last two decades during which – as an unwritten rule – times of crisis have largely dictated the crucial reforms.²

State of play. The financial crisis (2007-2008) planted the seeds for a subsequently burgeoning European System of Financial Supervision (ESFS), a solid network of cooperating supervisory authorities.³ Divided into different levels, these authorities take care of the traditional objectives of financial supervision being macro- and micro-supervision.⁴ Macro-supervision, that concerns the surveillance of systemic risk in the financial system⁵ and in connection to that, the prevention of financial instability, lies in the hands of a supranational body, the European Systemic Risk Board (ESRB)⁶. Micro-supervision has two complementary dimensions: micro-prudential supervision that concerns the individual financial stability of financial institutions, and conduct

¹ A ‘single financial market’ is a market where capital flows freely between its participants, *i.e.* the Member States, and where there is freedom to offer financial services. See, M. MIKITA, ‘EU Single Financial Market – Prospects for changes’ [2012] *e-Finanse: Financial Internet Quarterly* 8(1), 53. Synonyms used throughout the paper are *internal & integrated* market.

² A. HENNESSY, ‘Redesigning financial supervision in the European Union (2009-2013)’ [2014] *Journal of European Public Policy* 21(2), (151) 153; I. BEGG, ‘Regulation and Supervision of Financial Intermediaries in the EU: The Aftermath of the Financial Crisis’ [2009] *Journal of Common Market Studies* 47(5), (1107) 1108.

³ European Parliament, ‘Factsheet: European System of Financial Supervision’ (2018), available at: <http://www.europarl.europa.eu/factsheets/en/sheet/84/european-system-of-financial-supervision-esfs->

⁴ O.J. ERDÉLYI, *Twin Peaks for Europe: State-of-the-Art Financial Supervisory Consolidation. Rethinking the Group Support Regime Under Solvency II* (Springer 2015), 48-50; E. FERRAN, *Building an EU Securities Market* (CUP 2004), 204-205.

⁵ Systemic risk means the risk that the financial system, nationally or globally, will break down. See, H.S. SCOTT, ‘Reducing systemic risk through the reform of capital regulation’ [2007] *Journal of International Economic Law* 13(3), (763) 764.

⁶ Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board [2010] OJ L331/1 (hereafter, “ESRB Regulation”) and Council Regulation (EU) 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board, [2010] OJ L331/162. Art. 3(1) ESRB Regulation states that “The ESRB shall be responsible for the macro-prudential oversight of the financial system within the Union in order to contribute to the prevention or mitigation of systemic risks to financial stability in the Union that arise from developments within the financial system and taking into account macroeconomic developments, so as to avoid periods of widespread financial distress. It shall contribute to the smooth functioning of the internal market and thereby ensure a sustainable contribution of the financial sector to economic growth.”

of business supervision (COB) that targets the principles of conduct which financial institutions should apply in order to protect their consumers⁷ interests⁸. Both dimensions involve the supranational level as well as the national level. At the supranational level, three European Supervisory Authorities (ESAs) are responsible, each for a different financial sector.⁹ For the banking sector, the European Banking Authority (EBA) is in place¹⁰; for the insurance sector, the responsibility lies with the European Insurance and Occupational Pensions Authority (EIOPA)¹¹; for the investment sector, the European Securities and Markets Authority (ESMA)¹² is at the helm. Cross-sectoral issues are addressed in the Joint Committee (JC) through cooperation of all three Authorities.¹³ Although denominated ‘supervisory authorities’, the ESAs are actually round tables for cooperation between the national competent authorities (NCAs), with the aim of converging their supervisory practices. Indeed, in accordance with the subsidiarity principle¹⁴, day-to-day micro-supervision takes place at Member State level.

Another chapter of financial supervision was written in response to the sovereign debt crisis (2010-2011). As part of the Banking Union (BU), the Single Supervisory Mechanism (SSM) shifted micro-prudential supervision of credit institutions¹⁵ within the eurozone to the European Central Bank (ECB) – thereby partially abrogating the principle of bottom-level supervision. While the eurozone NCAs remain competent only for COB supervision, the non-eurozone NCAs

⁷ It is crucial to make a difference between the term consumer and the term customer. Every consumer can be seen as a customer, but not every customer is a consumer. Customers also comprise the notion of investors. A consumer specifically refers to ‘a natural person who is acting for purposes which are outside his trade, business or profession. See, art. 3, § 1, (a) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L133/72. In the context of financial services, consumers generally need (additional) protection. In order to facilitate the reading of it, the paper uses the term ‘consumer’.

⁸ IOSCO, ‘A Resolution on International Conduct of Business Principles’ (1990), 5, marginal 18.

⁹ R. HERRING and J. CARMASSI, ‘The Structure of Cross-Sector Financial Supervision’ [2008] *Financial Markets, Institutions & Instruments* 17(1), (51) 53.

¹⁰ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) [2010] OJ L331/15 (hereafter, “EBA Regulation”).

¹¹ Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) [2010] OJ L331/48 (hereafter, “EIOPA Regulation”).

¹² Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) [2010] OJ L331/84 (hereafter, “ESMA Regulation”).

¹³ Another joint body of the ESAs is the Board of Appeal of which the purpose is to protect the rights of the parties that are impacted by the ESAs’ decisions (art. 58-60 ESAs’ Regulations). On the Board of Appeal see, E. WYMEERSCH, ‘The European Financial Supervisory Authorities or ESAs’ in E. WYMEERSCH, K. HOPT and G. FERRARINI, *Financial Regulation and Supervision: A post-crisis analysis*, (OUP 2012), 292-297, marginal 9.219-9.237; S. VERHELST, ‘Renewed Financial Supervision in Europe – Final or Transitory?’ (2001) *Egmont Paper* 44, 37.

¹⁴ Art. 5(3) Treaty of the European Union (hereafter, “TEU”).

¹⁵ The terms ‘credit institution’ and ‘bank’ are used interchangeably in this paper.

remain in charge of both this and micro-prudential supervision.¹⁶ The result is a complex, “alphabet soup”¹⁷ of supervisory bodies that continues to be under construction.¹⁸

2. Holding onto an old relic: the ESA’s sectoral structure

Sectoral European model... The above “factsheet” displays a sectoral structure for the organization of European micro-supervision.¹⁹ This is in line with the traditional separation of financial services into the banking, the insurance and the investment sector.²⁰ It accordingly follows that the sector to which an institution belongs, determines the applicable rules and the supervisor that will monitor the implementation of and adherence to the rules.²¹ The alternatives to such a sectoral structure are firstly, integrated supervision and secondly, objectives-based “twin peaks” supervision. The integrated model consists of a single supervisor that exercises prudential as well as COB oversight of the banking, insurance and the investment sectors together²²; the twin peaks model features two distinct supervisors, one for prudential oversight and one for COB surveillance.²³ Where there is a twin peaks system, both supervisors oversee all three market segments.²⁴

¹⁶ C.V. GORTSOS, ‘The Role of the European Banking Authority (EBA) after the Establishment of the Single Supervisory Mechanism (SSM)’ in M. ANDENAS and G. DEIPENBROCK, *Regulating and Supervising European Financial Markets* (Springer 2016), (277) 293; CMS, ‘The European System of Financial Supervision after the Banking Union’ (2014), available at: <https://www.cms-lawnow.com/-/media/files/regzone-reports/smart-pdf/the-european-system-of-financial-supervision.pdf>.

¹⁷ A term invented by TAYLOR. See, M.W. TAYLOR, “‘Twin Peaks’: A Regulatory Structure for the New Century’ (1995) Centre for the Study of Financial Innovation (CSFI) Working Paper 20, 7.

¹⁸ The ECB is deliberately disregarded as being one of the current European Supervisory Authorities, since its supervisory powers are limited to the eurozone. Therefore, the paper (sometimes) refers to the tripartite structure of the ESAs.

¹⁹ The sectoral approach can be reflected in an institutional and a functional model. The former relates to the business lines according to which institutions differs from each other; the latter relates to the activities performed by the institutions. This paper solely uses the general notion of “sectoral supervision”. See, The Group of Thirty, ‘The structure of Financial Supervision: Approaches and Challenges in a Global Marketplace’ (2008), 24 (also referred to as the “Volcker report”, see n 444).

²⁰ E. WYMEERSCH, ‘The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors’ [2007] *European Business Organization Law Review* 8(2), (237) 252.

²¹ D. CALVO, J. CRISANTO, S. HOHL and O. GUTIERREZ, ‘Financial supervisory architecture: what has changed after the crisis?’ (2018) *FSI Papers* 8, 4; E. WYMEERSCH, ‘The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors’ [2007] *European Business Organization Law Review* 8(2), (237) 251.

²² The Group of Thirty, ‘The structure of Financial Supervision Approaches and Challenges in a Global Marketplace’ (2008), 24.

²³ In fact, the ESFS currently casts a kind of twin peaks model: it has one peak for macro-supervision (ESRB) and one peak for micro-supervision (ESAs).

²⁴ M. ČIHÁK and R. PODPIERA, ‘Is One Watchdog Better Than Three? International Experience with Integrated Financial Sector Supervision’ (2006) *IMF Working Paper* 57, 5.

... **versus opposition.** Preservation of the ESAs' sectoral structure has required shielding against criticism from all directions. Firstly, since the end of the twentieth century, the traditional business lines that distinguish the different sectors from each other, have faded.²⁵ Financial services providers have entered each other's domain at product, distribution and organizational levels. In such a changed environment, the sectoral approach does not seem to fit modern requirements any longer and poses considerable challenges in terms of efficiency and effectiveness.²⁶ Secondly, consumer protection, being one of the many cross-sectoral concerns affecting all sectors, demands robust supervision. Hesitation exists as to whether the sectoral split-up can deliver this.²⁷ Thirdly, the financial system is forced to keep up with a number of exciting developments that impact all three sectors. A cross-sectoral approach seems to be the most adequate way to address the challenges and opportunities.²⁸ Finally, the ESFS has become sort of a hodge-podge of responsible bodies, with the ESAs in the middle of the chaos. This raises multiple questions regarding, *inter alia*, the interaction between the ESAs and the national supervisory models²⁹, many of them without a sectoral structure.³⁰

... **at a standstill.** Taken together, the above issues appear to build a convincing case to abandon the ESAs' sectoral structure. Yet, to date, no concrete steps towards a cross-sectoral supervisory model are noticeable.³¹ The departure point remains sectoral; a cross-sectoral dimension is only observable in the JC, the forum through which the ESAs develop a common vision.³² This standstill raises curiosity to uncover the reasons for maintaining the tripartite division. It may be stated that the reasons are manifold, of a diverse sort (historical, political, constitutional, structural, etc.), and indeed revelatory for the presence of the ESAs' sectoral structure. This observation in turn leads to another question: to what extent can the arguments in favour of a

²⁵ E. WYMEERSCH, 'The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors' [2007] *European Business Organization Law Review* 8(2), (237) 253.

²⁶ M. ONADO, 'The Consequences of European Financial Integration for the Regulatory Authorities' [1999] *Tijdschrift voor Economie en Management* 3, (233) 242.

²⁷ BEUC, Better Finance, Finance Watch, AGE Platform Europe, EFIN and COFACE Families Europe, 'Proposal for the EU financial supervisory reform' (2017) Open letter, 4-6.

²⁸ The developments that will be discussed are: anti-money laundering, Brexit, fintech and sustainable finance.

²⁹ N. 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' [2011] *European Business Organization Law Review* 12(2), (177) 217.

³⁰ D. CALVO, J. CRISANTO, S. HOHL and O. GUTIERREZ, 'Financial supervisory architecture: what has changed after the crisis?' (2018) *FSI Papers* 8, 36.

³¹ E. MONTANARO, 'The process towards centralisation of the European financial supervisory architecture: the case of the banking union' [2016] *PSL Quarterly Review* 69, (135) 144.

³² S. VERHELST, 'Renewed Financial Supervision in Europe – Final or Transitory?' (2001) *Egmont Paper* 44, 36-37.

sectoral structure supersede the arguments against a sectoral structure? In other words: to which side does the balance tip?

B. Research objectives, relevance and research question

1. Research objectives and relevance

Research objectives and relevance. The first objective of the research paper is to understand *why* a sectoral structure was ever adopted and *why* at present, it is still in place. This objective aims to gain an insight into the development of the European (micro-)supervisory model. The purpose is not to repeat what has already been extensively described in literature but to linger over those occasions at which institutional choices have been made and the rationale thereto related. In that way, the first objective sheds a different light on the evolution of European supervision. The second objective is to learn about the arguments that compel a change in the institutional set-up, and the arguments for maintaining the *status quo*. The added value of this objective lies in the perspective from which the topic is approached. Legal doctrine mainly consists of studies relating to financial law that describe the different supervisory models *in abstracto*, discussing the benefits and drawbacks of each of them.³³ This paper intends to look at the European micro-supervisory structure *in concreto*, by concentrating on the arguments against a sectoral approach *and* the arguments in favour of it. It wants to grasp the potential bottlenecks that hinder a cross-sectoral approach and discover whether or not these are surmountable. This leads to the third objective which is to predict the future supervisory model on the basis of the assembled information. Where could it lead to, taking account of European plans? And where should it lead to, taking account of existing opportunities and concerns? The overall aim is of course to design a structure that ensures at least the same, or a higher level of efficiency and effectiveness.

2. Research question

Research question. The following research question serves to attain the aforementioned research objectives: “What (sh)(c)ould the future institutional architecture of the European Supervisory Authorities look like?”

Sub-questions. An answer to the main research question should be found by filling in the following sub-questions:

³³ For example, see the literary contributions of, *inter alia*, ČIHÁK and PODPIERA (2006), FLAMÉE and WINDELS (2009), HERRING (2010), LANNON (2001) and WYMEERSCH (2007).

- “What are the historical reasons explaining the ESAs’ sectoral structure?” (Chapter I)
- “What are the arguments against and in favour of preserving the ESAs’ sectoral structure? (Chapter II)
- “Which modifications to the ESAs’ structure could and/or should be proposed in order to enhance their operational performance?” (Chapter III)

C. Methodology

Multidisciplinary approach. The research adopts an inductive, multidisciplinary and evaluative approach. It analyzes the ESAs’ institutional structure, discusses how the sectoral architecture has managed to stand the test of time, and assembles the various arguments *contra* and *pro* the current structure. On the basis of an evaluation of these arguments, an institutional formula for European micro-supervision is devised.

Contours. Although supervision and regulation might conceptually be different³⁴, the research topic is of a nature to bring the two components closely together. For that reason, the regulatory component is touched upon wherever useful. Furthermore, since the paper concentrates on the structure of the ESAs, there is no in-depth overview of the other bodies that form part of the ESFS – being the ESRB, the ECB and the NCAs.

Chapter I: The development of a sectoral European single market

Content, methodology and sources. The first chapter sets up a timeline to inform the reader of how financial supervision has developed as an autonomous policy, initially at national level and subsequently at European level. Simultaneously, the reader learns about the most important events that have triggered decisions regarding the structural organization of supervision. To make the timeline as complete as possible, profound historical research is carried out. For that purpose, literature regarding the history of Europe and the single market for financial services has been consulted.

Chapter II: Arguments against and in favour of sectoral supervision

Content, methodology and sources. The second chapter elaborates on the arguments *contra* and *pro* the ESAs’ sectoral architecture. Because of the multidisciplinary nature of these arguments, a thorough literature study is indispensable, going beyond the field of legal doctrine,

³⁴ WYMEERSCH emphasizes the importance of distinguishing between regulation and supervision. Regulation concerns the drafting of rules; supervision concerns applying the rules. See, E. WYMEERSCH, ‘The Future of Financial Regulation and Supervision in Europe’ [2005] Common Market Law Review 42(4), (987) 988.

extending to the domains of law and economics, politics and political economy. A significant source of “inside” information regarding the ESAs’ institutional set-up is the feedback that the Commission recently received from various stakeholders³⁵, in response to a public consultation on the ESAs’ operations.³⁶ In addition to a literature study, comparative research has been conducted. The chapter looks at the US’s financial supervisory architecture where the question concerning the most apt design for efficient and effective supervision has also been debated.³⁷ The selection of the US’s financial framework for comparative study is justified by the federal dimension that characterizes the legal system.³⁸ A parallel can be drawn between the US’s state and federal levels and the EU’s national and supranational levels.

Chapter III: Reshaping Europe’s micro-supervisory model

Content, methodology and sources. The last chapter is of a descriptive sort. On the basis of the arguments assembled in the second chapter, the third chapter discusses the future of European micro-supervision. It makes a thoughtful estimate about the course set by the European legislator (what could it look like?), but also looks at the subject from a normative perspective (what should it look like?). The comparative research method has also been used for this chapter: the US’s current supervisory model could serve as a valuable and instructive “school” in the contemplation of the future European model.

³⁵ I use the term stakeholders to indicate all parties that have responded to the Commission’s consultation; I do not intend to specifically refer to the actual stakeholder groups of the ESMA, the EBA and the EIOPA. See, art. 37 ESAs’ Regulations.

³⁶ The Commission has the duty to triennially review the ESAs’ operations (art. 81 ESAs’ Regulations). The last review dates from 2017. Amongst other elements, the Commission surveyed the ESAs’ institutional architecture. All responses are publicly available. For the Commission’s questionnaire, see, Commission ‘Public Consultation on Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (the “EBA Regulation”); Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (the “EIOPA Regulation”); and Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (the “ESMA Regulation”)’ (2017), 21-22 ([hereafter](https://ec.europa.eu/eusurvey/publication/esas-operations-2017?surveylanguage=en), “Commission, ‘Public Consultation on the ESAs’ Regulations’, n 36”). All answers be retrieved from the Commissions’ website. See: <https://ec.europa.eu/eusurvey/publication/esas-operations-2017?surveylanguage=en>.

³⁷ The suggestion has also been made by several stakeholders. See, BEUC, Better Finance, Finance Watch, AGE Platform Europe, EFIN and COFACE Families Europe, ‘Proposal for the EU financial supervisory reform’ (2017) Open letter, 6, footnote 9.

³⁸ A. MARCACCI, *Regulating Investor Protection under EU Law. The Unbridgeable Gaps with the U.S. and the Way Forward* (Palgrave 2018), vii.

CHAPTER I: THE DEVELOPMENT OF A SECTORAL EUROPEAN SINGLE MARKET

Introduction. The first chapter functions as a preparatory guide for the other chapters. Before exploring the reasons against and for a sectoral perspective on European supervision, it is essential to first situate both perspectives in a broader context. The reason for doing so, lies in the past: it is curious to observe that the moment at which the European sectoral legal framework for banking, securities and insurance services started to develop, more or less coincides with the emergence of a cross-sectoral rapprochement between these financial services. By way of a timeline, the following sections discuss these two paradoxical evolutions which cross each other at a significant point in European history: the establishment of the single market.

A. Historical roots of sectoral financial law

Historical roots of sectoral financial law. Never has there been an individual who prescribed the division in financial law (regulation and supervision) between a banking sector, a securities sector and an insurance sector. On the contrary, the story behind this typical separation is one of historical events.³⁹

Banking. Banks, in particular their financial stability, started to cause tumult in the Interbellum; ever since then, they have been vigilantly watched. The Great Depression of 1929 had an international domino-effect of bank failures. National responses thereupon widely differed: in the UK, self-regulation by a ‘club’ of banks was the norm⁴⁰ whereas in Germany, banking regulation and supervision immediately emerged.⁴¹ In France, the existing rules were tightened.⁴² Traces of international initiatives in the banking sector are noticeable half a decade later when the Basel Committee issued the famous Basel Standards.⁴³

³⁹ V. COLAERT, ‘European Banking, Securities and Insurance Law: Cutting Through Sectoral Lines?’ [2015] *Common Market Law Review* 52(6), (1579) 1580-1581.

⁴⁰ C. PROCTOR, *The law and practice of international banking* (OUP 2015), 4, marginal 1.04; P. RAWLINGS, A. GEORGOSOULI and C. RUSSO, ‘Regulation of financial services: aims and methods’ (2014) *Queen Mary University Centre for Commercial Law Studies*, 9-10; J. PEETERS, ‘Re-Regulation of the Financial Services Industry in the United Kingdom’ [1988] *University of Pennsylvania Journal of Business Law* 10(3), (371) 395.

⁴¹ D. DETZER and H. HERR, ‘Financial Regulation in Germany’ (2014) FESSUD (Financialization Economy Society and Sustainable Development) Working Paper Series 55, 10; D. DIETRICH and U. VOLMER, ‘Are universal banks bad for financial stability? Germany during the world financial crisis’ [2012] *The Quarterly Review of Economics and Finance* 52(2), (123) 126; E. SCHEBEN, ‘Comment’ in D. MAYES and G.E. WOOD, *The Structure of Financial Regulation* (Routledge 2007), (65) 65-66.

⁴² C. BLOT, J. CREEL, A. DELATTE, F. LABONDANCE and S. LEVASSEUR, ‘Structural evolutions and reforms of the French banking and financial system since the 1980s: Relationship with the legal process of European integration’ (2014) FESSUD (Financialization Economy Society and Sustainable Development) Working Paper Series 66, 5.

⁴³ The Basel Committee on Banking Supervision, residing under the Bank for International Settlements, has issued (non-binding, but highly influential) international standards regarding capital requirements for banks.

Securities. Thought to rules relating to securities was given in terms of investor protection, especially with regard to the provision of information. Again, a link can be constituted with the Great Depression.⁴⁴ At that point in time, it was presumed that buyers of securities were well informed about the risks; specific legislation did not seem necessary.⁴⁵ Yet, the opposite holds true.⁴⁶ As a result, national securities legislation concerning disclosure of information and prospectuses was established in, *inter alia*, the USA and Belgium; in the UK, self-regulation again prevailed.⁴⁷ At the international level, the International Organization of Securities Commissions (IOSCO) published a first series of influencing standards in 1989.⁴⁸

Insurance. Insurance was not always the fully fledged financial service as it is perceived to be at present.⁴⁹ Three reasons explain this peculiarity. First of all, the history of insurance lies in maritime and mercantile (commercial) insurance as a consequence of which the rules governing the insurance contract have developed differently compared to general contract law.⁵⁰ Secondly, it took some time before insurance contracts had shaken off their inherent aleatory (speculative) nature, a quality for which they had always been approached with some suspicion.⁵¹ Lastly, for a long time, two “cultures” of insurance could be distinguished in Europe that appraised

These standards have also shaped European legislation (the Capital Requirements Directives I-IV and the Capital Requirements Regulation). See, A. KOPAS and M. MAGNUS, ‘The Basel Committee on Banking Supervision (BCBS): A De Facto Standard Setter in Banking Legislation’ (2017) Briefing of the European Parliament, 1-6; L. DRAGOMIR, *European Prudential Banking Regulation and Supervision: the legal dimension* (Routledge 2010), 125-151.

⁴⁴ A. HUDSON, *Securities Law* (Sweet & Maxwell 2008), 145.

⁴⁵ M. ONADO, ‘The Consequences of European Financial Integration for the Regulatory Authorities’ [1999] *Tijdschrift voor Economie en Management* 3, (233) 238.

⁴⁶ C.J. SIMON, ‘The Effect of the 1933 Securities Act on Investor Information and the Performance of New Issues’ [1989] *The American Economic Review* 79(3), (295) 296.

⁴⁷ S.A. PEREZ and J. WESTRUP, ‘Finance and the macroeconomy: the politics of regulatory reform in Europe’ [2010] *Journal of European Public Policy* 17(8), (1171) 1179; M. ONADO, ‘The Consequences of European Financial Integration for the Regulatory Authorities’ [1999] *Tijdschrift voor Economie en Management* 3, (233) 240; H.-M. KRAUS, ‘Securities Regulation in Germany? Investors’ Remedies for Misleading Statements by Issuers’ [1984] *International Lawyer* 18, 109; S. SUCKOW, ‘The European Prospectus’ [1975] *The American Journal Of Comparative Law* 23(1), (50) 50-51.

⁴⁸ IOSCO, ‘Capital Adequacy Standards for Securities Firms’ (1989), 1-27; IOSCO, ‘International Equity Offers. Summary of reports’ (1989), 1-16; For more information, see the website of IOSCO, <https://www.iosco.org> (accessed on 4 August 2019).

⁴⁹ H. COUSY, ‘Changing Insurance Contract Law: An Age-Old, Slow and Unfinished Story’ in P. MARANO and M. SIRI (eds.), *Insurance Regulation in the European Union. Solvency II and Beyond* (Palgrave 2017), (31) 32.

⁵⁰ P. HELLWEGE, ‘A Comparative History of Insurance Law in Europe’ in P. HELLWEGE, *A Comparative History of Insurance Law in Europe. A Research Agenda* (Duncker & Humblot 2018), 223; A.C. SCHREIBER, ‘Lord Mansfield – The Father of Insurance Law’ [1960] *Insurance Law Journal*, 766; W.R. VANCE, ‘Early History of Insurance Law’ [1908] *Columbia Law Review* 8(1), (1) 8-9.

⁵¹ H. COUSY, ‘Changing Insurance Contract Law: An Age-Old, Slow and Unfinished Story’ in P. MARANO and M. SIRI (eds.), *Insurance Regulation in the European Union. Solvency II and Beyond* (Palgrave 2017), (31) 32.

insurance law from a different angle.⁵² For this reason, distinct national rules with different accents were adopted.⁵³ International attention for the insurance sector initially came from the International Association of Insurance Supervisors (IAIS).⁵⁴

In a nutshell, before there was the European Union (EU), the tripartite segmentation of markets was well rooted at the national level as well as on the international level.⁵⁵

B. Towards a single financial market

Single market on paper. The 1957 Treaty of Rome set course towards a ‘Single European Market’ which it furnished with the well known four freedoms of goods, services (and establishment), persons and capital^{56, 57}. On paper, all requisites were present to instantly achieve European financial integration. In practice, a number of obstacles hampered the desired pace.

Removal of barriers. Even after the freedoms of establishment and provision of services gained direct effect on 1 January 1970⁵⁸, the actual freedom proved to be quite limited. Financial services providers intending to operate throughout the Union, had to comply with divergent national laws since in the pre-single market era legislative responses to historical incidents took place at a national level.⁵⁹ Therefore, the first banking and insurance Directives (1970s)⁶⁰ had to

⁵² The Alpine culture of insurance was different from the maritime culture of insurance. Both cultures stressed different elements of insurance and laid different accents with regard to regulation and supervision. See, J.M. SMITS (ed.), *Elgar Encyclopedia of Comparative Law* (Elgar 2006), 320; H. COUSY, ‘The European internal insurance market anno 2003’ in D. HEREMANS, S. PROOST, J. STUYCK and E. TERRY (eds.), *Current Developments in Financial Integration. Financial Services Transport Policy* (Leuven University Press 2004), (91) 91-92.

⁵³ V. COLAERT, ‘European Banking, Securities and Insurance Law: Cutting Through Sectoral Lines?’ [2015] *Common Market Law Review* 52(6), (1579) 1582.

⁵⁴ IAIS was established in 1994. The first ‘Insurance Core Principles’ date back from 2003. For more information, see the IAIS’ website: <http://iaisweb.org> (accessed on 15 May 2019).

⁵⁵ L. QUAGLIA, ‘Setting the Pace? Private Financial Interests and European Financial Market Integration’ [2008] *The British Journal of Politics and International Relations* 10(1), (46) 51 (“The financial system in Britain is highly developed, with the traditional distinction between the three segments of the financial market receding earlier than in the rest of Europe”).

⁵⁶ Today, these freedoms are incorporated in artt. 28-66 of the Treaty on the Functioning of the European Union (TFEU).

⁵⁷ K. ALEXANDER, ‘ECB and Banking Supervision: Does Single Supervisory Mechanism Provide an Effective Regulatory Framework’ in M. ANDENAS and G. DEIPENBROCK, *Regulating and Supervising European Financial Markets* (Springer 2016), (253) 258.

⁵⁸ It took another twenty-five years before the freedom of capital – an indispensable complement to cross-border establishment and provision of services – gained direct effect. See, W. SCHÖN, ‘Free Movement of Capital and Freedom of Establishment’ [2016] *European Business Organization Law Review* 17(3), (229) 231.

⁵⁹ J. STORY and I. WALTER, *Political economy of financial integration in Europe. The battle of the systems* (Manchester University Press 1997), 26.

⁶⁰ First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance [1979] OJ L63/1; First Council Directive 77/780/EEC of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions [1977] OJ

demolish the existing, often restrictive legal barriers and ensure harmonized rules.⁶¹ The first Directives regulating the securities sector⁶² followed after the Segré report which enumerated the prerequisites for a European capital market.⁶³

(D)(R)eregulation. European top-down harmonization added fuel to the on-going process of national bottom-up deregulation. In order to participate in an increasingly competitive financial world and to maintain a level playing field, national regulators started to deregulate their financial industries.⁶⁴ Governments had no option but to choose the track of domestic and cross-border financial liberalization (“the fear of being the odd man out”⁶⁵).⁶⁶ Naturally, if restrictions disappear, risks appear.⁶⁷ Financial intermediaries could navigate the territories of other financial sectors with which they were less familiar and, simultaneously, they could explore the markets of close and distant neighbour countries.⁶⁸ As a consequence, deregulation had to evolve towards reregulation in the form of harmonized rules complemented by effective supervision, in order to

L322/30; First Council Directive of 24 July 1973 73/239/EEC on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance [1973] OJ L228/3.

⁶¹ K. LIEBSCHER, ‘Financial deregulation in the EU – chances and challenges for financial stability’ (Innsbruck, 18 November 2005), Speech at the Fifth Annual CSI Conference “New Agenda of the WTO: Challenge and Contribution of the European Union”, 1; J. STORY and I. WALTER, *Political economy of financial integration in Europe. The battle of the systems* (Manchester University Press 1997), 14.

⁶² These Directives contained measures regarding stock exchanges and prospectuses. See, Council Directive 80/390/EEC of 17 March 1980 coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing [1980] OJ L100/1; Council Directive 79/279/EEC of 5 March 1979 coordinating the conditions for the admission of securities to official stock exchange listing [1979] OJ L66/21; R. VEIL, *European Capital Markets Law* (Hart 2013), 3-4.

⁶³ C. SEGRÉ, ‘The Development of a European Capital Market. Report of a Group of experts appointed by the EEC Commission’ (1966), 237-238 (‘The Segré Report’).

⁶⁴ C. BLAIR, ‘Financial Services and Markets Bill’ (1999) Research Paper House of Commons 68, 7; L.A.A. VAN DEN BERGHE, K. VERWEIRE and S.M.W. CARCHON, ‘Convergence in the financial services industry’ (1999) OECD Paper, 49-50; N. GENETAY and P. MOLYNEUX, *Bancassurance* (Palgrave 1998), 222-224; H. INGHAM and S. THOMPSON, ‘Structural Deregulation and Market Entry: The Case of Financial Services’ [1993] *Fiscal Studies* 14(1), (1) 4.

⁶⁵ C.J. BENNETT, ‘How States Utilize Foreign Evidence’ [1991] *Journal of Public Policy* 11(1), (31) 43.

⁶⁶ D. MASCIANDARO and M. QUINTYN, ‘The Evolution of Financial Supervision: The Continuing Search for The Holy Grail’ in M. BALLING and E. GNAN, *50 Years of Money and Finance: Lessons and Challenges* (Larcier 2013), (263) 271; P. DE GRAUWE, ‘The Banking Crisis: Causes, Consequences and Remedies’ (2008) CEPS Policy brief 178, 2; D. KNIGHTS and G. MORGAN (eds.), *Regulation and Deregulation in European Financial Services* (MacMillan 1997), 4.

⁶⁷ D. MASCIANDARO and M. QUINTYN, ‘The Evolution of Financial Supervision: The Continuing Search for The Holy Grail’ in M. BALLING and E. GNAN, *50 Years of Money and Finance: Lessons and Challenges* (Larcier 2013), (263) 271-272; D. DIETRICH and U. VOLMER, ‘Are universal banks bad for financial stability? Germany during the world financial crisis’ [2012] *The Quarterly Review of Economics and Finance* 52(2), (123) 125.

⁶⁸ J. GODDARD, P. MOLYNEUX and J. WILSON, ‘Banking in the European Union: Deregulation, Crisis and Renewal’ in A. BERGER, P. MOLYNEUX and J. WILSON (eds.), *The Oxford Handbook of Banking* (2nd edn, OUP 2015), (849) 851; H. INGHAM and S. THOMPSON, ‘Structural Deregulation and Market Entry: The Case of Financial Services’ [1993] *Fiscal Studies* 14(1), (1) 5 and 14.

successfully lead the process of European integration.⁶⁹ For that purpose, Europe put forth the White Paper of 1985.⁷⁰ From that moment on, financial supervision manifested itself as an autonomous policy.⁷¹

White Paper 1985. The White Paper explicates three essential pillars that buttress the single market: (i) home state supervision, (ii) mutual recognition and (iii) minimum harmonization.⁷² If Member States implement the same minimum standards (minimum harmonization), this will allow them to trust and rely on each other's regulatory and supervisory framework (mutual recognition)⁷³, adherence to which is subsequently verified by only one supervisor, namely the supervisor of the financial institution's home state (home state supervision).⁷⁴ In order to safeguard the effect of harmonization and thereby avoid supervisory arbitrage⁷⁵, it is vital that the NCAs cooperate. This cooperation was effected on the basis of informal bilateral memoranda of understanding (MOU).⁷⁶

⁶⁹ I. BEGG, 'Commentary: The Single Market' [1998] *National Institute Economic Review* 2, 7. Also see, L. QUAGLIA, 'The politics of financial services regulation and supervision reform in the European Union' [2007] *European Journal of Political Research* 46(2), (269) 273.

⁷⁰ R. VEIL, *European Capital Markets Law* (Hart 2013), 4.

⁷¹ D. MASCIANDARO and M. QUINTYN, 'The Governance of Financial Supervision: Recent Developments' [2016] *Journal of Economic Surveys* 30(5), 982.

⁷² E. WYMEERSCH, 'Financial Regulation: its objectives and their implementation in the European Union' (2019) *European Banking Institute Working Paper Series* 36, 4; J. STORY and I. WALTER, *Political economy of financial integration in Europe. The battle of the systems* (Manchester University Press 1997), 15-17.

⁷³ Commission, 'Completing the internal market. White Paper from the Commission to the European Council', COM(85) 310 final, 28, marginal 103 (hereafter, "White Paper 1985, n 73"); A. VAN LOON, 'Domestic politics and national differences in restructuring EU financial supervision' [2018] *European politics and society* 19(3), (247) 252; E. MONTANARO, 'The process towards centralisation of the European financial supervisory architecture: the case of the banking union' [2016] *PSL Quarterly Review* 69, (135) 135-136.

⁷⁴ This principle has addressed the burdensome situation whereby financial institutions were subject to both the home state supervisor and the host state supervisor. See, J. DE LAROSIÈRE, 'The New European Financial Supervision Framework Applied to Cross-border Banks and the Possible Specific Implications for Small Countries' [2010] *Droit Bancaire et Financier* 1, 3; D. SCHOENMAKER and S. OOSTERLOO, 'Cross-border issues in European financial supervision' in D.G. MAYES and G.E. WOOD, *The Structure of Financial Regulation* (Routledge 2007), (264) 278-279; X. FREIXAS, P. HARTMANN and C. MAYER, 'The Assessment: European Financial Integration' [2004] *Oxford Review of Economic Policy* 20(4), (475) 477-478.

⁷⁵ Supervisory arbitrage implies that financial institutions establish themselves in those member states where the (home) supervisor is the least rigid or intrusive. This endangers the preservation of a level playing field. See, S. MAIJOOR, '[Closing keynote on progress made in achieving the Capital Markets Union]' (Brussels, 11 April 2017) *Speech at CMU Mid-Term Review Public Hearing Speech*, 3-4; D. MASCIANDARO and M. QUINTYN, 'The Evolution of Financial Supervision: The Continuing Search for The Holy Grail' in M. BALLING and E. GNAN, *50 Years of Money and Finance: Lessons and Challenges* (Larcier 2013), (263) 266;

⁷⁶ E. WYMEERSCH, 'The Future of Financial Regulation and Supervision in Europe' [2005] *Common Market Law Review* 42(4), (987) 995-997; G. WALKER, *International Banking Regulation: Law, Policy and Practice* (Kluwer 2001), 239-242.

⁷⁶ M. LAMANDINI, 'When More Is Needed: The European Supervisory Reform and Its Legal Basis' [2009] *European Company Law* 6(5), (197) 198-199.

C. Integration of financial services

Integration of financial services. The establishment of the single European (financial) market combined with deregulation appears to have contributed to the process by which the traditional dividing lines between the banking, the investment and the insurance sector increasingly vanish.⁷⁷ Such process is commonly referred to as the “integration” or the “blurring” of financial sectors.⁷⁸ This trend has seeped through at the level of products, of distribution and of organization.⁷⁹

Product level. A fine illustration of a product having cross-sectoral features is unit-linked life insurance, *i.e.* life insurance policies that contain an investment component. In a pure life insurance contract, the insurer commits itself, in exchange for a premium, to pay a fixed capital to the beneficiary designated in the contract, either at the moment of the insured’s death or at the moment that the insured survives a certain (stipulated) age.⁸⁰ Unit-linked life insurance implies the investment of the premium in a fund which does not entail a fixed return, but a return that is dependent on the performance of the financial asset to which the contract is linked.⁸¹ As a result, the investment risk shifts from the insurer to the policyholder.⁸² For clients, the range of like opportunities to allocate savings to, expands.⁸³

Distribution level. In order to reach clients, the different financial sectors have also found their way to each other’s distribution channels.⁸⁴ The occurrence of bancassurance and universal

⁷⁷ N. GENETAY and P. MOLYNEUX, *Bancassurance* (Palgrave 1998), 222.

⁷⁸ A.C. FAWCETT, ‘Examining the Objectives of Financial Regulation’ in E. FERRAN and C. GOODHART, *Regulating Financial Services and Markets in the Twenty First Century* (Hart 2001), (37) 39-40.

⁷⁹ I. VAN LELYVELD and A. SCHILDER, ‘Risk in Financial Conglomerates: Management and Supervision’ [2003] *Brookings-Wharton Papers on Financial Services*, (195) 198-199; C. BRIAULT, ‘The Rationale for a Single National Financial Services Regulator’ (1999) FSA Occasional Paper 2, 12.

⁸⁰ Art. 2(3)(a)(i) of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) [2009] OJ L335/18. Also see, M. HARDY, *Investment Guarantees: Modeling and Risk Management for Equity-Linked Life Insurance* (John Wiley & Sons 2003), 1.

⁸¹ N. DACEV, ‘The necessity of legal arrangement of unit-linked life insurance products’ [2017] *UTMS Journal of Economics* 8(3), (259) 260; C. CIUMAS, D.-M. CHIŞ and R.A. COCA, ‘Unit-linked life insurance contracts with investment guarantees – a proposal for Romanian life insurance market’ [2014] *Journal of Public Administration, Financial and Law – Special Issue 1*, (19) 20.

⁸² P. SCHUERMANS, ‘Great expectations. Perspectives on insurance regulation and supervision’ in F. BRISON, J. DELVOIE, R. FELTKAMP and A. FRANÇOIS (a.o.), *Liber amicorum Michel Flamée – Schuim op de branding* (die Keure 2017), (491) 492.

⁸³ V. COLAERT, ‘European Banking, Securities and Insurance Law: Cutting Through Sectoral Lines?’ [2015] *Common Market Law Review* 52(6), (1579) 1583; G. BENOIST, ‘Bancassurance: The new challenges’ [2003] *The Geneva Papers on Risk and Insurance* 27(3), (295) 295-296; N. GENETAY and P. MOLYNEUX, *Bancassurance* (Palgrave 1998), 7.

⁸⁴ V. COLAERT, ‘European Banking, Securities and Insurance Law: Cutting Through Sectoral Lines?’ [2015] *Common Market Law Review* 52(6), (1579) 1583.

banks confirms this development. Bancassurance⁸⁵ involves banks that engage in the sale of insurance products.⁸⁶ Research demonstrates the popularity of bancassurance to distribute life insurance contracts throughout Europe (appendix 1).⁸⁷ Universal banks are financial institutions offering commercial and investment banking services.⁸⁸ While universal banks have been common in Europe⁸⁹, the US only allowed this combination of services in 1999.⁹⁰ In the wake of the financial crisis, there has been some debate whether or not to separate these activities from each other again.⁹¹ The advantages flowing from these sectoral interconnections are well documented. Amongst the motives mentioned are: the cost-benefit advantage, the competitive advantage of the bank as distribution channel and a stronger client loyalty.⁹²

⁸⁵ Bancassurance must be distinguished from assurfinance. Assurfinance encompasses insurance companies and intermediaries that expand their product range to banking products. It is claimed that assurfinance is a less popular formula which could explain the fact that it is less frequently discussed in literature. For a discussion of assurfinance, see, S. ILLEGEMS and N. PORTUGAELS, 'Distributiekanalen' in B. WEYTS en T. VANSWEEVELT, *Handboek Verzekeringsrecht* (Intersentia 2016), (67) 91; G. BENOIST, 'Bancassurance: The new challenges' [2003] *The Geneva Papers on Risk and Insurance* 27(3), (295) 299-300; L. VAN DEN BERGE and K. VERWEIRE, 'Convergence in the Financial Industry' [2001] *The Geneva Papers on Risk and Insurance* 26(2), (173) 174.

⁸⁶ Bancassurance can either comprise banks that sell insurance products or can encompass a stronger cross-sectoral linkage whereby banks and insurance companies or intermediaries join forces to offer insurance products to the banks' clients. See, O. RICCI, 'The Development of Bancassurance in Europe' in F. FIORDELISI and O. RICCI (eds.), *Bancassurance in Europe: Past, Present and Future* (Palgrave 2012), 5; M. TEUNISSEN, 'Bancassurance: Tapping into the Banking Strength' [2008] *The Geneva Papers on Risk and Insurance* 33, 408; L. VAN DEN BERGE and K. VERWEIRE, 'Convergence in the Financial Industry' [2001] *The Geneva Papers on Risk and Insurance* 26(2), (173) 174.

⁸⁷ Appendix 1 can be found at page 83. Also see, N. GENETAY and P. MOLYNEUX, *Bancassurance* (Palgrave 1998), 72-96.

⁸⁸ D. SCHOENMAKER and N. VÉRON, 'A 'twin peaks' vision for Europe' (2017) Bruegel Policy Contribution 30, 2; J. SCHILDBACH, 'Universal banks: Optimal for clients and financial stability. Why it would be wrong to split them up' (2012) Deutsche Bank Research, 3.

⁸⁹ Germany is commonly mentioned in this regard as it has always allowed the universal banking model. See A.D. MORRISON, 'Universal banking' in A. BERGER, P. MOLYNEUX and J. WILSON (eds.), *The Oxford Handbook of Banking* (2nd edn, OUP 2015), (113) 122; D. DIETRICH and U. VOLMER, 'Are universal banks bad for financial stability? Germany during the world financial crisis' [2012] *The Quarterly Review of Economics and Finance* 52(2), (123) 126.

⁹⁰ In that year, the Gramm-Leach-Bliley Act repealed the Glass-Steagall Act of 1933. The Glass-Steagall Act made it mandatory to separate commercial banking activities from investment banking services. See, P. DE GRAUWE, 'The Banking Crisis: Causes, Consequences and Remedies' (2008) CEPS Policy brief 178, 2; R.R. BLISS, 'Multiple regulators and insolvency regimes. Obstacles to efficient supervision and resolution' in D. MAYES and G.E. WOOD, *The Structure of Financial Regulation* (Routledge 2007), (132) 135-136.

⁹¹ Two European reports are worth mentioning. On the one hand, the Liikanen report reflected on possible structural reforms in the banking sector. It proposed the separation of trading from the banking activities of large financial institutions into two entities. See, High-level Expert Group on reforming the structure of the EU banking sector, 'Final report' (2012), v and 100-103. (hereafter, 'Liikanen Report n 91'). Also see, P. DE GRAUWE, 'The Banking Crisis: Causes, Consequences and Remedies' (2008) CEPS Policy brief 178, 5. On the other hand, there was the proposition from Michel Barnier (EU Commissioner) which puts forth a ban on proprietary trading for the big banks in Europe. See, Commission, 'Proposal for a Regulation of the European Parliament and of the Council on structural measures improving the resilience of EU credit institutions' COM(2014) 43 final, 1-65. Also see, J.P. KRAHNEN, 'On the European Commission's Proposal for a Structural Reform of Banking' (2014) Sustainable Architecture for Finance in Europe (SAFE) Press Article, 2-3.

⁹² Liikanen Report, n 91, 42; J. SCHILDBACH, 'Universal banks: Optimal for clients and financial stability. Why it would be wrong to split them up' (2012) Deutsche Bank Research, 4-16; M. TEUNISSEN,

Corporate level. Financial liberalization has also facilitated to club the financial services into a financial conglomerate, *i.e.* “any group of companies under common control whose exclusive or predominant activities consist of providing significant services in at least two different financial sectors (banking, securities, insurance)”.⁹³ In most cases, financial conglomerates represent a combination of banking and insurance.⁹⁴ They are widespread throughout Europe and regularly operate cross-border.⁹⁵ As a result, financial conglomerates have become financial synergetic giants, highly responsive to consumer needs.⁹⁶

D. Europe’s sectoral approach

Europe sectoral framework. By 1 January 1993, the necessary measures had been adopted to constructively put the single market in place.⁹⁷ The European legislator realized the importance of a firm regulatory⁹⁸ and supervisory framework relating to financial services. The legislative initiatives to create such framework naturally followed the nationally rooted sectoral point of view. Logically, supervision was structured accordingly. Almost three decades later, characterized by expeditious market developments, the framework has remained *status quo*. To date, the banking, the securities and the insurance sector are addressed separately.⁹⁹ In respect of regulation, this is rather predictable since most Member States structure the majority of their national rules in a sectoral way¹⁰⁰. In respect of supervision, however, Member States did not stick to the tripartite organization: sectorally responsible supervisors have made room for cross-

‘Bancassurance: Tapping into the Banking Strength’ [2008] *The Geneva Papers on Risk and Insurance* 33, 408; K. LANNOO, ‘Challenges to the structure of financial supervision in the EU’ in M. BALLING, E.H. HOCHREITER and E. HENNESSY, *Adapting to Financial Globalisation* (Routledge 2001), (259) 264; N. GENETAY and P. MOLYNEUX, *Bancassurance* (Palgrave 1998), 7.

⁹³ The Tripartite Group of bank, securities and insurance regulators, ‘Report on the supervision of financial conglomerates’ (1995), 13. Different corporate structures of financial conglomerates exist, ranging from complete integration to complete operational separateness. For an extensive overview, see, R. HERRING and A. SANTOMERO, ‘The Corporate Structure of Financial Conglomerates’ [1990] *Journal of Financial Services Research* 4(4), (471) 481-489.

⁹⁴ D. SCHOENMAKER and N. VERON, ‘A ‘twin peaks’ vision for Europe’ (2017) *Bruegel Policy Contribution* 30, 5.

⁹⁵ Joint Committee of the European Supervisory Authorities, ‘List of financial conglomerates with the head of group in the EU/EEA’ (2018), 1-7.

⁹⁶ R. HERRING and A. SANTOMERO, ‘The Corporate Structure of Financial Conglomerates’ [1990] *Journal of Financial Services Research* 4(4), (471) 475.

⁹⁷ White Paper 1985, n 73, 3; Single European Act [1987] OJ L169/1.

⁹⁸ J. STORY and I. WALTER, *Political economy of financial integration in Europe. The battle of the systems* (Manchester University Press 1997), 23 (“With liberalization of capital movements serving as a catalyst linking all domains of financial services and monetary union, the EU process spun a seamless web of legislation”).

⁹⁹ E. WYMEERSCH, ‘Financial Regulation: its objectives and their implementation in the European Union’ (2019) *European Banking Institute Working Paper Series* 36, 7.

¹⁰⁰ V. COLAERT, ‘European Banking, Securities and Insurance Law: Cutting Through Sectoral Lines?’ [2015] *Common Market Law Review* 52(6), (1579) 1594.

sectoral supervisory models. Therefore, one would have expected a parallel movement at European level.

The Commission noticed the cross-sectoral dimension. Such expectation is certainly justified when observing the Commission's perspective of twenty years ago. In the Financial Services Action Plan of 1999 (FSAP), the Commission stated that *“Increasing cross sectoral complexities underline the need for clarity in supervisory roles. Many themes (...) cut across all financial sectors. There is therefore a pressing need for increased collaboration, monitoring and better understanding of experiences and risks in all sectors, including those that would normally go beyond individual banking, insurance or securities supervisory perspective. (...) A piecemeal and reactive approach to proposing and designing actions is inadequate in a situation where financial conglomerates are common-place and the boundaries between financial services are blurred. A holistic, cross-sectoral view is required in setting regulatory priorities, in avoiding tensions between policy objectives in different segments of the financial markets and in expanding the range of policy solutions (...).”*¹⁰¹

The Commission – primarily intending to advance the integration of the securities sector, building on the launch of a single currency¹⁰² – clearly considered the enlarging cross-sectoral dimension in financial services, but the FSAP's promising words have largely remained a dead letter. The ambition of creating ‘state of the art’ supervision to ensure “stability and confidence in an era of changing market structures and globalisation” abated the establishment of sectoral European supervisory committees.¹⁰³

1. CESR, CEBS and CEIOPS

CESR, CEBS and CEIOPS. In inventing the Lamfalussy process, *i.e.* a four-level legislative apparatus for fast and flexible rulemaking and for consistent implementation of the rules¹⁰⁴,

¹⁰¹ Commission, ‘Implementing the framework for financial markets: action plan’ COM(1999) 232 final, 11 and 13 (hereafter, “Financial Services Action Plan, n 101”).

¹⁰² X. FREIXAS, P. HARTMANN and C. MAYER, ‘The Assessment: European Financial Integration’ [2004] Oxford Review of Economic Policy 20(4), (475) 475-477; J. STORY and I. WALTER, *Political economy of financial integration in Europe. The battle of the systems* (Manchester University Press 1997), 21-22.

¹⁰³ Financial Services Action Plan, n 101, 24-25.

¹⁰⁴ The Lamfalussy procedure separates the decision-making process regarding the main legal principles from the process of the implementing measures. Level 1 involves the traditional legislative proposal of the Commission, followed by the co-decision procedure that involves the European Parliament and the Council, and results into level 1 principles. Subsequently, the Commission is mandated to develop the technical details at level 2, which results in so-called level 2 delegated or implementing acts (art. 290 resp. 291 TFEU). Level 2 proceeds on the basis of the so-called comitology procedure, *i.e.* the process according to which the Commission is empowered to adopt legislation. It obliges the Commission to consult a committee consisting of representatives of every EU Member State who provide an opinion regarding the implementing measures proposed by the Commission. Apart from getting advice from regulatory committees – to which the Lamfalussy procedure also gave birth – the Commission is also assisted by the CESR, the CEBS and the CEIOPS as technical advisors. However, the latter's most important role takes place at level 3, hence their common denomination as

Alexandre Lamfalussy and his committee of wise men truly took the need for effective harmonization to heart. Informal and spontaneous cooperation amongst national supervisors, did not suffice any longer.¹⁰⁵ For that reason, it was decided to install committees at level 3 of the process (the so-called 3L3 committees)¹⁰⁶ wherein the relevant NCA's representatives would gather and agree upon common guidelines and recommendations in order to create a European-wide supervisory philosophy.¹⁰⁷ Notwithstanding the integration of the banking, the investment and the insurance sector, sectoral committees were established, named the Committee of European Securities Regulators (CESR), the Committee of European Banking Supervisors (CEBS) and the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS).¹⁰⁸ For cross-sectoral matters, the 3L3 Committees set up 3L3 work programmes.¹⁰⁹

Nevertheless, the Lamfalussy report anticipated a worst-case scenario: in case the four-level approach failed to deliver the preconceived results, due consideration could be given to the idea of a single EU authority.¹¹⁰ According to LASTRA, LAMFALUSSY intended the term 'single' to be understood as an integrated European supervisor covering all three sectors.¹¹¹

3L3 Committees. Level 4 envisages a compliance check by the Commission. To date, the Lamfalussy procedure is still being used. More information can be found in A. LAMFALUSSY e.a., 'Final report of the committee of wise men on the regulation of European securities markets' (2001), 6 (summary) and 22-40 (details) (hereafter, 'Lamfalussy report', n 104). Also see, R. VEIL, *European Capital Markets Law* (Hart 2013), 6-7; D. VITKOVA, 'Level 3 of the Lamfalussy process: an effective tool for achieving pan-European regulatory consistency?' [2008] *Law and Financial Markets Review* 2(2), 159-161; E. FERRAN, *Building an EU Securities Market* (CUP 2004) 61-84.

¹⁰⁵ For instance, through the Forum of European Securities Commissions (FESCO). See, P.G. TEIXEIRA, 'The Regulation of the European Financial Market after the Crisis' in P.D. POSTA and L.S. TALANI, *Europe and the Financial Crisis* (Palgrave 2011), (9) 12; E. FERRAN, *Building an EU Securities Market* (CUP 2004), 79; F. DEMARIGNY, 'The Forum of European Securities Commissions (Fesco): an Answer to the Needs of a European Single Market for Financial Services' [2000] *Revue d'économie financière* 60, 125-133.

¹⁰⁶ Initially, the Lamfalussy process was designed only for the securities sector, following the FSAP's focus thereon. In 2003, the process was extended to the banking and insurance sector. See, Commission, 'Financial services: Commission presents measures to improve regulation of banking, insurance and investment funds' Press Release (6 November 2003), 1-3.

¹⁰⁷ Lamfalussy report, n 104, 31-34 and 37-38.

¹⁰⁸ Commission Decision 2004/5/EC of 5 November 2003 establishing the Committee of European Banking Supervisors [2004] OJ L3/28; Commission Decision 2004/6/EC of 5 November 2003 establishing the Committee of European Insurance and Occupational Pensions Supervisors [2004] OJ L3/30; Commission Decision 2001/527/EC of 6 June 2001 establishing the Committee of European Securities Regulators [2001] OJ L191/43. Also see, L. QUAGLIA, 'Setting the Pace? Private Financial Interests and European Financial Market Integration' [2008] *The British Journal of Politics and International Relations* 10(1), (46) 53; E. WYMEERSCH, 'The Future of Financial Regulation and Supervision in Europe' [2005] *Common Market Law Review* 42(4), (987) 989-990.

¹⁰⁹ On the basis of joint protocols. See, N. MOLONEY, 'The Committee of European Securities Regulators and level 3 of the Lamfalussy Process' in M. TISON, H. DE WULF, C. VAN DER ELST and R. STEENNOT (eds.), *Perspectives in Company Law and Financial Regulation. Essays in Honour of Eddy Wymeersch* (CUP 2009), (449) 461-462.

¹¹⁰ Lamfalussy report, n 104, 39.

¹¹¹ R.M. LASTRA, 'The Governance Structure for Financial Regulation and Supervision in Europe' [2003] *Columbia Journal of European Law* 10(1), (49) 52.

2. ESMA, EBA and EIOPA

De Larosière report. The financial crisis of 2007-2008 exposed a long list of regulatory and supervisory defects.¹¹² A reformative tsunami was set in motion by the de Larosière report which fabricated a new institutional maquette for European financial supervision¹¹³, - one that “builds on existing structures”.¹¹⁴ The report accentuated the linkage and essential equilibrium between macro-supervision and micro-supervision. For that purpose, it proposed to install a specific macro-supervisory body¹¹⁵ – the ESRB – and to upgrade the 3L3 committees into agencies since the former had reached their “expiry date”.¹¹⁶ The successors are well known: the ESMA, the EBA and the EIOPA.¹¹⁷ Until recently, the ESAs’ seats were located respectively in Paris, London and Frankfurt am Main.¹¹⁸ Due to Brexit, the EBA had to transfer its seat; ultimately, the banking watchdog landed in Paris (see *infra*).

ESMA, EBA and EIOPA. Under the ESAs’ roofs, the NCAs continue to work towards supervisory convergence and financial stability. Contrary to their predecessors, the ESAs are no longer “paper tigers”¹¹⁹: they have been delegated comprehensive powers to accomplish their extensive task package which naturally strengthens their authority role.¹²⁰ Their status as

¹¹² A. VAN LOON, ‘Domestic politics and national differences in restructuring EU financial supervision’ [2018] *European politics and society* 19(3), (247) 252; N. MOLONEY, ‘Supervision in the wake of the financial crisis: effective ‘law in action’ – A challenge for the EU’ in E. WYMEERSCH, K. HOPT and G. FERRARINI, *Financial Regulation and Supervision: A post-crisis analysis* (OUP 2012), 72, marginal 4.03.

¹¹³ High-Level Group on Financial Supervision in the EU, ‘de Larosière report’ (2009) (hereafter, “de Larosière report, n 113”) 42, marginal 166, and 57. Also see, Commission, ‘European financial supervision’ COM(2009) 252 final, 1-17; Commission, ‘Driving European recovery’ COM(2009) 114 final, 3-8.

¹¹⁴ De Larosière report, n 111, 4 and 48, marginal 189; N. MOLONEY, *EU Securities and Financial Markets Regulation* (3rd edn, OUP 2014), 960-961.

¹¹⁵ De Larosière report, n 113, 44-46, marginal 177-172.

¹¹⁶ De Larosière report, n 113, 75; O.J. ERDÉLYI, *Twin Peaks for Europe: State-of-the-Art Financial Supervisory Consolidation. Rethinking the Group Support Regime Under Solvency II* (Springer 2015), 64; C. DI NOIA and M.C. FURLO, ‘The new structure of financial supervision in Europe: what’s next?’ in E. WYMEERSCH, K. HOPT and G. FERRARINI, *Financial Regulation and Supervision: A post-crisis analysis* (OUP 2012), 177-178, marginal 7.24-7.25. On the working of CEBS and the possible enhancements to this Committee, see, European Central Bank, ‘Review of the Lamfalussy framework’ (2007), Eurosystem contribution, 7-14.

¹¹⁷ Contrary to the 3L3 committees and unlike the ESRB, the ESAs do have legal personality. As for the ESRB, its functioning is supported by the ECB. See artt. 114 *j*° 127(6) TFEU; S. KERJEAN, ‘The European Systemic Risk Board (ESRB)’ [2011] *Euredia* 3, (303) 308-312.

¹¹⁸ E. FERRAN, ‘Understanding the new institutional architecture of EU financial market supervision’ in E. WYMEERSCH, K. HOPT and G. FERRARINI, *Financial Regulation and Supervision: A post-crisis analysis* (OUP 2012), (111) 133, marginal 5.42.

¹¹⁹ E. WYMEERSCH, ‘Europe’s New Financial Regulatory Bodies’ [2011] *Journal of Corporate Law Studies* 11(2), (443) 444.

¹²⁰ This suggestion was made in the report of the Inter-Institutional Monitoring Group that assessed the Lamfalussy framework. See, Inter-Institutional Monitoring Group, ‘Final Report Monitoring the Lamfalussy Process’ (2007), 15-19. Also see, I. CHUI, ‘Power and Accountability in the EU Financial Regulatory Architecture: Examining Inter-Agency Relations, Agency Independence and Accountability’ in M. ANDENAS and G. DEIPENBROCK, *Regulating and Supervising European Financial Markets* (Springer 2016), (67); J. DE

supervisory authorities needs to be nuanced. In accordance with the principle of subsidiarity¹²¹, the ESAs – save for the ESMA¹²² – do not carry out the day-to-day supervision of financial institutions and market actors.¹²³ For this task, the NCAs are considered to be in the best position as they stand the closest to the financial intermediaries that are to be surveilled.¹²⁴ Nonetheless, in some circumstances, the ESAs do have the power to directly address market players.¹²⁵ Between the NCAs, colleges of supervisors are formed in order to enhance the supervision of cross-border financial groups, which can count on the ESAs' support.¹²⁶

As far as their *regulatory* role is concerned, the ESAs no longer have to limit themselves to issuing (authoritative) soft law: they now have the power to develop technical standards which become binding after endorsement by the Commission (because of the *Meroni* case, see *infra*). In this way, the ESAs contribute to the creation of single EU rulebooks which are considered to be the cornerstones of EU single market integration as they contain EU-wide rules and standards that are directly applicable to all financial institutions active in the single market.¹²⁷ Thus, *de facto*, the ESAs also have their share in regulatory convergence. Worthwhile to mention as well

LAROSIÈRE, 'The New European Financial Supervision Framework Applied to Cross-border Banks and the Possible Specific Implications for Small Countries' [2010] *Droit Bancaire et Financier* 1, 6;

¹²¹ See page 2, footnote 14. Also see, N. MOLONEY, *EU Securities and Financial Markets Regulation* (3rd edn, OUP 2014), 961.

¹²² ESMA directly supervises credit rating agencies and trade repositories. See, art. 14 of Regulation No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies [2009] OJ L302/1 ("Credit Rating Agency Regulation"); art. 55 and following of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories [2012] OJ L201/1 ("European Market Infrastructure Regulation"). Also see, P. SCHAMMO, 'The European Securities and Markets Authority: lifting the veil on the allocation of powers' [2011] *Common Market Law Review* 48(6), (1879) 1887-1888.

¹²³ Recital 9 of the EBA and ESMA Regulation, and Recital 8 of the EIOPA Regulation; P. SCHAMMO, 'EU Day-to-Day Supervision or Intervention-based Supervision: Which Way Forward for the European System of Financial Supervision?' [2012] *Oxford Journal of Legal Studies* 32(4), (771) 774.

¹²⁴ Basel Committee on Banking Supervision, 'Principles for effective supervisory colleges' (2014) Bank for International Settlements, 1-26.

¹²⁵ More specifically, in case of a breach of Union law by the NCAs; emergency situations; and disagreement between NCA in cross-border situations which the ESAs try to settle. See, artt. 17-19 ESAs' Regulations; C. DI NOIA and M.C. FURLO, 'The new structure of financial supervision in Europe: what's next?' in E. WYMEERSCH, K. HOPT and G. FERRARINI, *Financial Regulation and Supervision: A post-crisis analysis* (OUP 2012), (172) 180-181, marginal 7.36-7.40.

¹²⁶ Art. 21 ESAs' Regulations; E. WYMEERSCH, 'The European Financial Supervisory Authorities or ESAs' in E. WYMEERSCH, K. HOPT and G. FERRARINI, *Financial Regulation and Supervision: A post-crisis analysis* (OUP 2012), 282-283, marginal 9.187-9.189.

¹²⁷ Council of the European Union, 'Agreed Council conclusions on Strengthening EU Financial Supervision' (Brussels, 10 June 2009) 10862/09, 5. Also see, D. CALVO, J. CRISANTO, S. HOHL and O. GUTIERREZ, 'Financial supervisory architecture: what has changed after the crisis?' (2018) FSI Papers 8, 28.

are the ESAs' competences regarding consumer protection, such as the power to embargo financial activities and products.¹²⁸

The de Larosière report signaled that someday a twin peaks model with two Authorities could be considered.¹²⁹ Until then, “the path of least resistance” is chosen.¹³⁰ The EBA, the ESMA and the EIOPA follow up on cross-sectoral matters through formal cooperation in the JC.¹³¹ Four sub-committees reside under the JC, specifically established for financial conglomerates, consumer protection and financial innovation, anti-money laundering and financial stability risks.¹³² Attention should be paid to the fact that the JC is a mere forum, not a common decision-making body.¹³³

E. “More Europe”

More Europe. Upgrading the status of the committees to agencies (‘agencification’¹³⁴), as described above, concurs with the trend of centralization of governance.¹³⁵ Soon, however, the slogan of “more Europe” made itself heard in another context, that of centralization of powers.¹³⁶

¹²⁸ Art. 9(5) ESAs' Regulations; C. DI NOIA and M.C. FURLO, ‘The new structure of financial supervision in Europe: what's next?’ in E. WYMEERSCH, K. HOPT and G. FERRARINI, *Financial Regulation and Supervision: A post-crisis analysis* (OUP 2012), (172) 183, marginal 7.50-7.53.

¹²⁹ De Larosière report, n 113, 58, marginal 216.

¹³⁰ Commission, ‘Communication from the Commission: European financial supervision’ COM(2009) 252 final, 12; D. MASCIANDARO and M. QUINTYN, ‘Regulating the Regulators: The Changing Face of Financial Supervision Architectures before and after the Crisis’ [2012] *European Company Law* 6(5), (187) 191.

¹³¹ Art. 58-61 ESAs' Regulations; Joint Committee of the European Supervisory Authorities, ‘Towards European supervisory convergence’ (2016), 7-8.

¹³² Art. 57, § 4 ESAs' Regulations; N. MOLONEY, *The Age of ESMA: Governing EU Financial Markets* (Hart 2018), 318; F. DEMARIGNY, J. MCMAHON and N. ROBERT, ‘Review of the New European System of Financial Supervision (ESFS). Part 1: The Work of The European Supervisory Authorities (EBA, EIOPA and ESMA) – The ESFS'S Micro-Prudential Pillar’ (2013) Study for the ECON Committee, 108.

¹³³ E. WYMEERSCH, ‘The European Financial Supervisory Authorities or ESAs’ in E. WYMEERSCH, K. HOPT and G. FERRARINI, *Financial Regulation and Supervision: A post-crisis analysis* (OUP 2012), 289, marginal 9.208.

¹³⁴ For more literature on agencification, see M. BOŽINA BEROŠ, *Agencies in European Banking: A Critical Perspective* (Palgrave 2018), 15-43; M. BOŽINA BEROŠ and I. BAJAKIĆ, ‘Examining agency governance in the European Union financial sector – a case-study of the European Securities and Markets Authority’ [2017] *Economic Research-Ekonomska Istraživanja* 30(1), 1743-1757.

¹³⁵ N. MOLONEY, ‘The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (1) Rule-Making’ [2011] *European Business Organization Law Review* 12(1), (41) 49.

¹³⁶ MOLONEY mentions a remark made by the European Parliament on the final plenary vote on the ESMA Regulation: “the ESAs will be able to grow as events require”. See, N. MOLONEY, ‘The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (1) Rule-Making’ [2011] *European Business Organization Law Review* 12(1), (41) 49. Also see, M. BOŽINA BEROŠ and I. BAJAKIĆ, ‘Examining agency governance in the European Union financial sector – a case-study of the European Securities and Markets Authority’ [2017] *Economic Research-Ekonomska Istraživanja* 30(1), (1743) 1744; M. TONVERONACHI, ‘The ECB and the Single European Financial Market: a Proposal to Repair Half of a Flawed Design’ (2014) *Levy Economics Institute of Bard College Public Policy Brief* 137, 6.

Banking Union and the SSM. When the financial crisis flowed into a sovereign debt crisis, Europe shifted into sixth gear to ensure that such scenarios would not repeat themselves.¹³⁷ In relatively no time, the BU was formed, where the first pillar¹³⁸ - the SSM¹³⁹ - did away with the principle of home state supervision that had not prevented banks from collapsing.¹⁴⁰ The SSM has since reallocated the micro-prudential oversight¹⁴¹ of credit institutions within the eurozone to the ECB.¹⁴² Nevertheless, the picture deserves some nuance. The SSM reflects a partnership between the ECB and the eurozone NCAs.¹⁴³ The latter remain responsible for other prudential tasks that the SSM has left untouched, as well as for certain non-prudential tasks such as COB supervision.¹⁴⁴ The EBA – not considered apt to assume the supervisory job for which the ECB was elected¹⁴⁵ – received a “consolation prize” of additional powers which underpin its

¹³⁷ L. QUAGLIA, ‘European Union Financial Regulation, Banking Union, Capital Markets Union and the UK’ (2017) Sheffield Political Economy Research Institute (SPERI) Paper 38, 9; E. MONTANARO, ‘The process towards centralisation of the European financial supervisory architecture: the case of the banking union’ [2016] PSL Quarterly Review 69, (135) 138.

¹³⁸ The two other pillars are the Single Resolution Mechanism (SRM; this pillar became operational in 2016) and the European Deposit Insurance Scheme (EDIS). For an overview, see C.V. GORTSOS, ‘A brief overview of the European Banking Union’ [2017] L’Europe en formation 383-384, (61) 66-73.

¹³⁹ Art. 127(6) TFEU has been used as a legal basis to establish the SSM: “The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.” Also see, Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63 (hereafter, “SSM Regulation”).

¹⁴⁰ G. BOCCUZZI (ed.), *The European Banking Union. Supervision and Resolution* (Palgrave 2016), 18-20; J. LAWSON, S. BARNES and M. SOLLIE, ‘Financial Market Stability in the European Union. Enhancing Regulation and Supervision’ (2009) OECD Economics Department Working Papers 670, 9-11.

¹⁴¹ Via art. 5 SSM Regulation, the ECB is involved in the macro-prudential policy for the BU. As this extends beyond the paper’s scope, it will not be discussed further. See, R.M. LASTRA, *International Financial and Monetary Law* (OUP 2015), 395, marginal 11.44.

¹⁴² C.V. GORTSOS, ‘The Role of the European Banking Authority (EBA) After the Establishment of the Single Supervisory Mechanism (SSM)’ in M. ANDENAS and G. DEIPENBROCK, *Regulating and Supervising European Financial Markets* (Springer 2016), (277) 293; S. VERHELST, ‘Assessing The Single Supervisory Mechanism: Passing the Point of No Return for Europe’s Banking Union’ (2013) Egmont Paper 58, 14-15.

¹⁴³ While the ECB occupies itself with the direct supervision of the more significant (*i.e.* larger, often cross-border active/systemically relevant) banks, the NCAs supervise the less significant banks but they do this under the all-seeing eye of the ECB which possesses the power to steal away an NCA’s responsibility. See G. BOCCUZZI (ed.), *The European Banking Union. Supervision and Resolution* (Palgrave 2016), 32-35; G. LO SCHIAVO, ‘From National Banking Supervision to a Centralized Model of Prudential Supervision in Europe: The Stability Function of the Single Supervisory Mechanism’ [2014] Maastricht Journal of European and Comparative Law 21, (110) 131-132; S. VERHELST, ‘Assessing The Single Supervisory Mechanism: Passing The Point of No Return for Europe’s Banking Union’ (2013) Egmont Paper 58, 18-20.

¹⁴⁴ Recitals 28–29 SSM Regulation. Also see, G. BOCCUZZI (ed.), *The European Banking Union. Supervision and Resolution* (Palgrave 2016), 32-36.

¹⁴⁵ C.V. GORTSOS, ‘Competence Sharing Between the ECB and the National Competent Supervisory Authorities Within the Single Supervisory Mechanism (SSM)’ [2015] European Business Organization Law Review 16(3), (401) 406; G. LO SCHIAVO, ‘From National Banking Supervision to a Centralized Model of Prudential Supervision in Europe: The Stability Function of the Single Supervisory Mechanism’ [2014] Maastricht Journal of European and Comparative Law 21(1), (110) 137-138; E. FERRAN and V. BABIS, ‘The European Single Supervisory Mechanism’ [2013] Journal of Corporate Law Studies 13(2), (255) 256.

coordinating and converging role inside *and* outside the eurozone (see *infra*).¹⁴⁶ In order not to undermine the ECB's independency in defining the eurozone's monetary policy¹⁴⁷, a Chinese wall has been installed to separate the ECB's supervisory tasks from its policy-setting tasks.¹⁴⁸ Nonetheless, this makeshift measure has not been able to entirely quash the criticism voiced in respect of the ECB's dual role.¹⁴⁹

Future projects strengthen the ESAs: the CMU and the PEPP. Europe's latest projects clearly postulate more powers for the ESAs. As we speak, the realization of the Capital Markets Union (CMU) occupies the agenda.¹⁵⁰ The CMU will attempt to pierce through Europe's "bank bias" and attempts to shift the focus away from banks to other funding alternatives.¹⁵¹ To attain "single market opportunities for financial entities and investors"¹⁵², the CMU brings along fortification of the European supervisory framework (see *infra*). Longer term, the idea of a European Capital Markets Supervisor should develop.¹⁵³ The ESMA seems the most suitable

¹⁴⁶ Art. 1(5) and (14) of Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013 [2013] OJ L287/5; E. MONTANARO, 'The process towards centralisation of the European financial supervisory architecture: the case of the banking union' [2016] PSL Quarterly Review 69, (135) 158.

¹⁴⁷ J. PISANI-FERRY, A. SAPIR, N. VERON and G.B. WOLFF, 'What Kind of European Banking Union?' (2012) Bruegel Policy Contribution 12, 12.

¹⁴⁸ Art. 25, and recitals 65 and 66 SSM Regulation. Also see, C.V. GORTSOS, 'Chinese walls' within the European Central Bank after the establishment of the Single Supervisory Mechanism' (2015), Paper presented at the conference The Europeanisation of the Payment System, II Edition, 1-18.

¹⁴⁹ It is interesting to know that de Larosière report disapproved of the idea of the ECB as micro-prudential supervisor and mentioned, amongst other arguments, the incompatibility of banking supervision with the monetary policy. See, de Larosière report, n 113, 43-44, marginal 169-172. Also see, A. KERN, 'ECB and Banking Supervision: Does Single Supervisory Mechanism Provide an Effective Regulatory Framework' in M. ANDENAS and G. DEIPENBROCK, *Regulating and Supervising European Financial Markets* (Springer 2016), (253) 272-274; E. MONTANARO, 'The process towards centralisation of the European financial supervisory architecture: the case of the banking union' [2016] PSL Quarterly Review 69, (135) 144; R.M. LASTRA, *International Financial and Monetary Law* (OUP 2015), 123-126, marginal 3.51-3.57.

¹⁵⁰ With CMU, Europe reorients its focus on capital markets, which was the priority of the Segré Report (see n 63). See, N. MOLONEY, 'Capital markets union: "ever closer union" for the EU financial system' [2016] European Law Review 41(3), (307) 310.

¹⁵¹ Whereas capital markets have always occupied a prominent place in the US, finance on the continent was more dependent on banks. Too dependent, as the crisis demonstrated. CMU attempts to address this issue. See Commission, 'Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. Reinforcing integrated supervision to strengthen Capital Markets Union and financial integration in a changing environment' COM(2017) 542 final, 2-8. Also see, A. SAPIR, N. VÉRON and G. WOLFF, 'Making a reality of Europe's Capital Markets Union' (2018) Policy Contribution 7, 3-4; S. LANGFIELD and M. PAGANO, 'Bank bias in Europe: effects on systemic risk and growth' (2015) ECB Working Paper 1797, 2.

¹⁵² Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review of the Capital Markets Union Action Plan' COM(2017) 292 final, 10.

¹⁵³ Commission, 'Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. Reinforcing integrated supervision to strengthen Capital Markets Union and financial integration in a changing environment'

candidate.¹⁵⁴ Another project is the Single market for Personal Pension Products (PPP), accompanied by a Pan-European Personal Pension Product (PEPP).¹⁵⁵ This next move towards integration is linked to the CMU as “retail savings held directly or indirectly through asset managers, life assurance companies and pension funds are key to unlocking capital markets”.¹⁵⁶ For the EIOPA – a strong supporter of the project¹⁵⁷ – a basket of new competences might be on its way.¹⁵⁸

F. Conclusion

Conclusion. The walls standing between the banking, the securities and the insurance sector have been elevated by historical events and national reactions. Because divergent approaches do not square with a single market environment, the European legislator commenced a harmonizing crusade. Not only did this accelerate the process of deregulation and financial liberalization, it also largely demolished the sectoral division in practice. Despite this evolution, sectorally structured ESAs have been set up to guarantee a common European supervisory philosophy. As LASTRA said, European financial supervision is shaped by “decentralization, co-operation and segmentation”¹⁵⁹ – although the latest reforms have partially rescinded the first component. Future prospects also reflect the “more Europe”-formula, but do not overhaul the ESAs’ sectoral architecture.

With reference to Chapter II. Unlike the institutional structure of the European micro-supervisory framework, the financial system did not stand still. As a consequence, the European sectoral approach has come under fire. The arguments against sectoral authorities are abundant but so are the arguments pleading in favour of it. The next chapter reviews both lines of arguments.

COM(2017) 542 final, 9-10; J.-C. JUNCKER, D. TUSK, J. DIJSSELBLOEM, M. DRAGHI and M. SCHULZ, ‘Completing Europe’s Economic and Monetary Union’ (2015), 12 (Also referred to as ‘The Five Presidents’ Report’).

¹⁵⁴ A. SAPIR, N. VÉRON and G. WOLFF, ‘Making a reality of Europe’s Capital Markets Union’ (2018) Policy Contribution 7, 8-9; M. LAMANDINI, ‘A supervisory architecture fit for CMU: Aiming at a moving target?’ (2018) European Capital Markets Institute Commentary 55, 5-6.

¹⁵⁵ Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on a pan-European Personal Pension Product (PEPP)’ COM(2017) 343 final, 1-79 (hereafter, “PEPP Proposal, n 155”); EIOPA, ‘Final Report on Public Consultation No. CP-15/006 on the creation of a standardised Pan-European Personal Pension product (PEPP)’ (2016), 1-711.

¹⁵⁶ Commission, ‘Action plan on building a capital markets union’ COM(2015) 468 final, 5 and 19-20.

¹⁵⁷ EIOPA, ‘EIOPA’s advice on the development of an EU Single Market for personal pension products (PPP)’ (2016), 1-108.

¹⁵⁸ PEPP Proposal, n 155, 12; F. DEMARIGNY and K. LANNOO, ‘Navigating the minefield of the ESA review’ (2018) European Capital Markets Institute Commentary 49, 3.

¹⁵⁹ R.M. LASTRA, ‘The Governance Structure for Financial Regulation and Supervision in Europe’ [2003] Columbia Journal of European Law 10(1), (49) 50.

CHAPTER II: ARGUMENTS AGAINST AND IN FAVOUR OF SECTORAL SUPERVISION

Introduction. The second chapter has the ESAs' sectoral architecture at its core. The goal is to assemble the arguments that plead against and in favour of the sectoral model. This will allow to make a truthful estimate about the future institutional architecture of the ESAs, assessing whether or not the European supervisory model should be equipped with cross-sectoral features. The chapter's structure is as follows. Part A is devoted to (the relevance of) the institutional structure as such; the arguments *contra* sectoral supervision are listed in section B; the arguments *pro* are catalogued under section C.

A. Preliminary: relevance of institutional structure

The influence of structure. It is assumed that the structure according to which the ESAs are organized, can influence their operational efficiency and effectiveness.¹⁶⁰ ABRAMS and TAYLOR contend that the institutional structure should mirror the structure of the industry it regulates.¹⁶¹ Other commentators limit the significance of structure to the macro-prudential dimension of supervision, to avoid systemic risk and maintain financial stability.¹⁶² To counter the latter assertion, it is valuable to cite the de Larosière report wherein it is stated that “both [micro- and macro-prudential supervision] are intertwined, in substance as well as in operational terms”¹⁶³. Moreover, as the repercussions from the financial turmoil are still tangible, all parties

¹⁶⁰ D.T. LLEWELLYN, ‘Institutional Structure of Financial Regulation and Supervision: The Basic Issues’ (2006) Paper for the World Bank Seminar - Aligning Supervisory Structures with Country Needs, 11-13; K. LANNOO, ‘Financial Supervision in EMU’ [1998] Yearbook of International Financial and Economic Law 3, (145) 151. Of course, other variables also have a share in improving (or distorting) the efficiency and effectiveness of supervision. See, J. ARMOUR (a.o.), *Principles of Financial Regulation* (OUP 2016), 614.

¹⁶¹ R.K. ABRAMS and M.W. TAYLOR, ‘Issues in the Unification of Financial Sector Supervision’ (2000) IMF Working Paper 13, 8. This statement has been frequently echoed in literature. For example, see, M. FLAMÉE and P. WINDELS, ‘Restructuring Financial Sector Supervision’ [2009] The Geneva Papers on Risk and Insurance 34, (9) 13; R.M. LASTRA, ‘The Governance Structure for Financial Regulation and Supervision in Europe’ [2003] Columbia Journal of European Law 10(1), (49) 51; J.C. MARQUARDT, ‘Financial Market Supervision: Some Conceptual Issues’ (1987) BIS Economic Papers 19, 3. For an opposite (but maybe slightly outdated) opinion, see, S. LUMPKIN, ‘Supervision of financial services in the OECD area’ [2002] OECD Journal Financial Market Trends 81, (81) 84.

¹⁶² J. ARMOUR (a.o.), *Principles of Financial Regulation* (OUP 2016), 614; A. HENNESSY, ‘Redesigning financial supervision in the European Union (2009-2013)’ [2014] Journal of European Public Policy 21(2), (151) 152.

¹⁶³ De Larosière report, n 113, 38, marginal 145. Also see, M. VAN HENGEL, P. HILBERS and D. SCHOENMAKER, ‘Experiences with the Dutch Twin Peaks Model: Lessons for Europe’ in A.J. KELLERMAN, J. DE HAAN and F. DE VRIES, *Financial supervision in the 21st century* (Springer 2013), (185) 186.

involved can only gain from investigating whether structural reform could potentially boost the quality of supranational micro-supervision.¹⁶⁴

The waves of the debate. What a supervisory model should look like, has been the focal point of a debate that has ebbed and flowed since the UK stationed in 1997 an integrated supervisor, namely the Financial Supervisory Authority (FSA).¹⁶⁵ Many other Member States followed Europe's financial hub¹⁶⁶, causing a first wave of establishing new supervisory models which did not go unheeded in literature.¹⁶⁷ The financial crisis has initiated a second wave of national governments transforming their supervisory bodies. For a second time in an admittedly short period the UK modified their supervisory structure, to a twin peaks model – again, a non-singular event when looking at the UK's peers in the rest of Europe.¹⁶⁸ Still, sectoral models of supervision have not completely disappeared (see *infra*).¹⁶⁹ In summary, governments generally opt either for a one-, two- or three-pillar model.¹⁷⁰ Why is there no superior model? The main reason is straightforward: none of the models is without flaws.

¹⁶⁴ A. SCHMULOW, 'Twin Peaks: A Theoretical Analysis' (2015) Centre for International Finance and Regulation Research Working Paper Series 64, 1.

¹⁶⁵ D. MASCIANDARO and M. QUINTYN, 'The Evolution of Financial Supervision: The Continuing Search for The Holy Grail' in M. BALLING and E. GNAN, *50 Years of Money and Finance: Lessons and Challenges* (Larcier 2013), (263) 276-277; S.A. PEREZ and J. WESTRUP, 'Finance and the macroeconomy: the politics of regulatory reform in Europe' [2010] *Journal of European Public Policy* 17(8), (1171) 1179; J.J. NORTON, 'Global Financial Sector Reform: The Single Financial Regulator Model Based on the United Kingdom FSA Experience – A Critical Reevaluation' [2005] *Policy International Lawyer* 39(1), (15) 17-21.

¹⁶⁶ Belgium initially (see n 168 below) opted for an integrated supervisor as well, namely the Banking Finance and Insurance Commission. See, A. GODWIN, T. HOWSE and I. RAMSAY, 'A jurisdictional comparison of the twin peaks model of financial regulation' [2017] *Journal of Banking Regulation* 18(2), (103) 109.

¹⁶⁷ Amongst others, see, J.W. MARKHAM, 'Merging the SEC and CFTC – A Clash of Cultures' [2009] *University of Cincinnati Law Review* 78, (537) 544-547; J. STORY and I. WALTER, *Political economy of financial integration in Europe. The battle of the systems* (Manchester University Press 1997), 279-280.

¹⁶⁸ The Netherlands already introduced the twin peaks model in 2002. The main catalysts for change were the blurring of sectors, and the increasing number of complex financial products. See, M. VAN HENGEL, P. HILBERS and D. SCHOENMAKER, 'Experiences with the Dutch Twin Peaks Model: Lessons for Europe' in A.J. KELLERMAN, J. DE HAAN and F. DE VRIES, *Financial supervision in the 21st century* (Springer 2013), 185-199; The Group of Thirty, 'The structure of Financial Supervision: Approaches and Challenges in a Global Marketplace' (2008), 198-203. Belgium also evolved towards a twin peaks model; France's supervisory framework has twin peaks features; Ireland has recently approved to adopt a twin peaks model; other Member States, like Portugal and Spain, are thinking about installing a twin peaks structure. For Portugal, see, Banco de Portugal, 'White Paper on the regulation and supervision of the financial system' (2016), 29. For Spain, see, F. RESTOY, 'The organisation of financial supervision' (Madrid, 18 January 2016) Speech at the presentation of the "Guide to the Spanish Financial System", 4-5; The Group of Thirty, 'The structure of Financial Supervision: Approaches and Challenges in a Global Marketplace' (2008), 117.

¹⁶⁹ Luxemburg, Bulgaria and Slovenia continue to apply a sectoral model. See, D. CALVO, J. CRISANTO, S. HOHL and O. GUTIERREZ, 'Financial supervisory architecture: what has changed after the crisis?' [2018] *FSI Papers* 8, 36. Another useful oversight is the list of 'foreign supervisory authorities' published on the website of the German Federal Financial Supervisory Authority (BaFin). See, https://www.bafin.de/EN/Internationales/-BilateraleZusammenarbeit/AuslaendischeAufsicht/auslaendischeaufsicht_node_en.html (accessed on 14 July 2019).

¹⁷⁰ A lot of hybrid supervisory models exist as well, but these models will not be discussed.

None of the models stands out. A majority of commentators contend that none of the supervisory models is free from flaws.¹⁷¹ A colossal amount of literature extensively discusses the advantages and disadvantages inherent to each of the institutional set-ups.¹⁷² Not one model has proved to be more efficient.¹⁷³ Furthermore, none of the models can guarantee that supervisory failures are ruled out in the future.¹⁷⁴

Two other reasons explain why Member States do not share one common model. The first is that Member States are not obliged to adopt the same model.¹⁷⁵ The de Larosière report embraces this autonomy by stating that “the ESFS should be neutral with respect to national supervisory structures”.¹⁷⁶ The report mentions a second reason for the diversity, namely that “national supervisory structures have been chosen for a variety of reasons”.¹⁷⁷ Preference for a specific structure is indeed based on more considerations than a mere tradeoff of advantages, and should be placed in its historical and political context.¹⁷⁸ This is evidenced throughout the chapter.

Connection to other aspects. The design of the most apt institutional architecture for supervision is intertwined with other questions. A connected preliminary question concerns the extent to which the central bank should be involved in financial supervision.¹⁷⁹ At a national level, e.g. in the UK and Belgium, central banks seem to have made a comeback in the domain of supervision after the financial crisis; before that, their involvement was either small or non-existent as they had not prevented some of the bank failures that occurred in the 1990s.¹⁸⁰ Europe

¹⁷¹ Amongst others, see, D. CALVO, J. CRISANTO, S. HOHL and O. GUTIERREZ, ‘Financial supervisory architecture: what has changed after the crisis?’ [2018] FSI Papers 8, 22-23, marginal 54; E. FERRAN, ‘The Break-up of the Financial Services Authority’ [2011] Oxford Journal of Legal Studies 31(3), (455) 468; D.T. LLEWELLYN, ‘Institutional Structure of Financial Regulation and Supervision: The Basic Issues’ (2006) Paper for the World Bank Seminar - Aligning Supervisory Structures with Country Needs, 7; R.K. ABRAMS and M.W. TAYLOR, ‘Issues in the Unification of Financial Sector Supervision’ (2000) IMF Working Paper 13, 8.

¹⁷² See the references made in footnote 33.

¹⁷³ Banco de Portugal, ‘White Paper on the regulation and supervision of the financial system’ (2016), 118; R.M. LASTRA, ‘The Governance Structure for Financial Regulation and Supervision in Europe’ [2003] Columbia Journal of European Law 10(1), (49) 52-53.

¹⁷⁴ O.J. ERDÉLYI, *Twin Peaks for Europe: State-of-the-Art Financial Supervisory Consolidation. Rethinking the Group Support Regime Under Solvency II* (Springer 2015), 219.

¹⁷⁵ K. ALEXANDER, ‘Reforming European financial supervision: adapting EU institutions to market structures’ [2011] *ERA Forum* 12(2), (229) 233; K. LANNOO, ‘Challenges to the structure of financial supervision in the EU’ in M. BALLING, E.H. HOCHREITER and E. HENNESSY, *Adapting to Financial Globalisation* (Routledge 2001), (259) 272.

¹⁷⁶ De Larosière report, n 113, 48, marginal 189.

¹⁷⁷ Ibid.

¹⁷⁸ R.M. LASTRA, *International Financial and Monetary Law* (OUP 2015), 133, marginal 3.86.

¹⁷⁹ T. PADOA-SCHIOPPA, ‘Financial supervision: inside or outside central banks?’ in J. KREMERS, D. SCHOENMAKER and P. WIERTS (eds.), *Financial Supervision in Europe* (Elgar 2003), (160) 160-173.

¹⁸⁰ D. MASCIANDARO and D. ROMELLI, ‘Central bankers as supervisors: Do crises matter?’ [2018] *European Journal of Political Economy* 52, 120; K. LANNOO, ‘The Roadmap to Banking Union: a call for consistency’ (2012) CEPS Commentary, 3; H. PRAST and I. VAN LELYVELD, ‘The Netherlands’ in D.

is exemplary in this regard given that the crisis called the ECB to stage (see *supra*). Opinion is divided as to whether the central bank should act as a (micro-prudential) supervisor, and there is something to be said for both the proponents' and the opponents' camp. Both perspectives are set out in the bulk of literature that discusses the topic.¹⁸¹

Another intertwined question is the appropriate level to organize supervision on.¹⁸² This question is pertinent in dealing with cross-border externalities.¹⁸³ On the one hand, the principle of decentralized supervision has been put to trial¹⁸⁴; on the other, the crucial role of the NCAs has repeatedly been stressed, certainly with regard to consumer protection.¹⁸⁵ For now, the principle of decentralized supervision still holds true for the securities and insurance sector; with regard to the banking sector, the principle has been partially abrogated, due to the SSM.¹⁸⁶ In view of the CMU and following the ESAs review, it has recently been decided to reinforce the ESAs' role, and to widen the ESMA's direct supervisory powers.¹⁸⁷ However, the prospect of gradually

MASCIANDARO (ed.), *Handbook of Central Banking and Financial Authorities in Europe. Architectures in the Supervision of Financial Markets* (Elgar 2005) (311) 331.

¹⁸¹ See, M. AMPUDIA, T. BECK, a.o., 'The architecture of supervision' (2019) ECB Working Paper Series no 2287, 9-23; J. PISANI-FERRY, A. SAPIR, N. VERON and G.B. WOLFF, 'What Kind of European Banking Union?' (2012) Bruegel Policy Contribution 12, 11-12; G. DI GIORGIO and C. DI NOIA, 'Should banking supervision and monetary policy tasks be given to different agencies?' [1999] *International Finance* 2(3), 361-378; C. BRIAULT., 'The Rationale for a Single National Financial Services Regulator' (1999) FSA Occasional Paper 2, 27-30.

¹⁸² D. SCHOENMAKER and S. OOSTERLOO, 'Cross-border issues in European financial supervision' in D.G. MAYES and G.E. WOOD, *The Structure of Financial Regulation* (Routledge 2007), (264) 265.

¹⁸³ M. AMPUDIA, T. BECK a.o., 'The architecture of supervision' (2019) ECB Working Paper Series no 2287, 41-47; D. SCHOENMAKER and S. OOSTERLOO, 'Cross-border issues in European financial supervision' in D.G. MAYES, *The Structure of Financial Regulation* (Routledge 2007), (264) 284-285.

¹⁸⁴ BINI SMAGHI and SCHOENMAKER state that national supervisory autonomy is a stumbling block in attaining the objectives of financial integration and financial stability. SCHOENMAKER sees this as a financial "trilemma". See, D. SCHOENMAKER, 'The financial trilemma' [2011] *Economics Letters* 111(1), 57-59; L. BINI SMAGHI, 'Europe cannot ignore its financial trilemma' *Financial Times* (London, 21 June 2009), <https://www.ft.com/content/068622e0-5e8c-11de-91ad-00144feabdc0> (accessed on 9 May 2019). Also see, K. TSATSARONIS, 'The supervision of an integration European banking sector. Theory, practice and challenges' in X. FREIXAS, P. HARTMANN and C. MAYER, *European Financial Markets and Institutions* (OUP 2008), (668) 686; N. THYGESEN, 'Comments on the Political Economy of Financial Harmonisation in Europe' in J. KREMERS, D. SCHOENMAKER and P. WIERTS (eds.), *Financial Supervision in Europe* (Elgar 2003), (142) 145.

¹⁸⁵ A. SPENDZHAROVA, 'Is More 'Brussels' the Solution? New European Union Member States' Preferences about the European Financial Architecture' [2012] *Journal of Common Market Studies* 50(2), (315) 318.

¹⁸⁶ V. COLAERT, 'European Banking, Securities and Insurance Law: Cutting Through Sectoral Lines?' [2015] *Common Market Law Review* 52(6), (1579) 1592 and 1608.

¹⁸⁷ The Commission had proposed several changes, which have recently been (partially) adopted. See, European Parliament, 'Provisional legislative resolution of 16 April 2019 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority); Regulation (EU) No 345/2013 on European venture capital funds; Regulation (EU) No 346/2013 on European social entrepreneurship funds; Regulation (EU) No 600/2014 on markets in financial instruments; Regulation (EU) 2015/760 on European long-term investment funds; Regulation (EU) 2016/1011 on indices used as benchmarks

empowering the Authorities cannot count on Union-wide support (see *infra*). In any case, if supervision is ever centralized at the European level, the proportionality and subsidiarity test will have to be passed.¹⁸⁸

Whatever the correct answers – if there are any – to the above questions may be, they naturally influence the architecture of the supervisory model.

Final remark. It should be borne in mind that adapting the institutional supervisory architecture is never a goal in itself, and should never be used as a safety net for ineffective regulation.¹⁸⁹ In connection to this, I agree with COLAERT that the debate regarding the optimal institutional architecture should not revolve only around supervision; the structure of regulation matters at least as much.¹⁹⁰ With this important lesson in mind, this chapter thoughtfully considers the arguments against and in favour of a sectoral model.

in financial instruments and financial contracts or to measure the performance of investment funds; Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market; and (EU) Directive 2015/849 on the prevention of the use of the financial system for the purposes of money-laundering or terrorist financing (COM(2018)0646 – C8- 0409/2018 – 2017/0230(COD))’ (2019), 1-251 (*hereafter*, “European Parliament, ‘Provisional legislative resolution of 16 April 2019 on the European Supervisory Authorities and financial markets’ (2019), n 187”); Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Market Authority); Regulation (EU) No 345/2013 on European venture capital funds; Regulation (EU) No 346/2013 on European social entrepreneurship funds; Regulation (EU) No 600/2014 on markets in financial instruments; Regulation (EU) 2015/760 on European long-term investment funds; Regulation 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds; and Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market’, COM(2017) 536 final, 2 (*hereafter*, “Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending the ESAs’ Regulations’ COM(2017) 536 final, n 187”); Commission, ‘Capital Markets Union: Creating a stronger and more integrated European financial supervisory architecture, including on anti-money laundering’ (2019) Fact Sheet, http://europa.eu/rapid/press-release_MEMO-19-1928_en.htm (accessed on 27 July 2019).

¹⁸⁸ Art. 5(3) TEU; LANNOO argues that centralized supervision should be justified by the inability of national or local supervisors to adequately perform their tasks. See, K. LANNOO, ‘Challenges to the structure of financial supervision in the EU’ in M. BALLING, E.H. HOCHREITER and E. HENNESSY, *Adapting to Financial Globalisation* (Routledge 2001), (259) 286. Also see, A. BARAN, P. ECKHARDT, C. SCHMIDT and B. VAN ROOSEBEKE, ‘European Supervisory Authorities. Room for improvement at Level 2 and Level 3’ (2016) CEP study, 21-26.

¹⁸⁹ D.T. LLEWELLYN, ‘Institutional structure of financial regulation and supervision: the basic issues’ (2006) Paper for the World Bank Seminar - Aligning Supervisory Structures with Country Needs, 26.

¹⁹⁰ V. COLAERT, ‘European Financial Regulation: Levelling the Cross-Sectoral Playing Field. A Research Agenda’ in V. COLAERT, D. BUSCH and T. INCALZA, *European Financial Regulation: Levelling the cross-sectoral playing field* (Hart 2019, forthcoming), 4, draft available via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3153754. In the same sense, see, The Group of Thirty, ‘The structure of Financial Supervision: Approaches and Challenges in a Global Marketplace’ (2008), 51; European Central Bank, ‘Review of the Lamfalussy framework’ (2007), Eurosystem contribution, 9 and 11; M. ČIHÁK and R. PODPIERA, ‘Is One Watchdog Better Than Three? International Experience with Integrated Financial Sector Supervision’ (2006) IMF Working Paper 57, 10.

B. Arguments against the ESAs' sectoral model

Introduction. The following four subsections contain the arguments that buttress an overhaul of the ESAs' sectoral architecture.

1. Discrepancy between sectoral supervision and a cross-sectoral financial reality

As 'static' is an antonym for 'dynamic', so too does sectoral supervision seem to turn into an antonym of a cross-sectorally organized financial system. This growing discrepancy brings along plenty of challenges (1.1.) that have triggered adaptive (re)action (1.2).

1.1. Challenges

A handful of issues. The process by which the barriers separating the financial sectors are vanishing, has been instrumental for intermediaries in search of synergies and client-tailored services, yet it has caused a handful of concerns. These concerns have affected the financial industries, and have impacted the way in which financial supervision has been organized.

a) Matching the product to the supervisor

Qualification determines supervisor. What was previously perceived as a sector-specific financial product¹⁹¹ and treated accordingly, now intrinsically shows a cross-sectoral mix of features. As a result, it has become increasingly difficult to attribute financial products either to the banking, the investment or the insurance sector.¹⁹² Yet, it is such qualification that determines the applicable rules and the responsible supervisor.¹⁹³ The possibility arises that the financial product receives a wrong label and consequently, ends up residing with the "wrong" supervisor meaning that the latter may be less familiar with the particularities of the product.¹⁹⁴ Remember the example given above of unit-linked life insurance. While the insurance contract as such falls within the EIOPA's hands, the ESMA occupies itself with the unit-linked products.¹⁹⁵ Such separation could impede an efficacious oversight whereby product-specific risks might be disregarded. In light of consumer protection, this is far from desirable.

¹⁹¹ In this research paper, the term 'financial product' comprises a product as well as a service.

¹⁹² R.J. HERRING and J. CARMASSI, 'The Structure of Cross-Sector Financial Supervision' [2008] *Financial Markets, Institutions & Instruments* 17(1), (51) 63; J. BENJAMIN, *Financial Law* (OUP 2007), 9-10; E. WYMEERSCH, 'The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors' [2007] *European Business Organization Law Review* 8(2), (237) 253.

¹⁹³ V. COLAERT, 'European Banking, Securities and Insurance Law: Cutting Through Sectoral Lines?' [2015] *Common Market Law Review* 52(6), (1579) 1583-1584.

¹⁹⁴ J. ARMOUR (a.o.), *Principles of Financial Regulation* (OUP 2016), 607; J. DE LUNA MARTINEZ and T. ROSE, 'International Survey of Integrated Financial Sector Supervision' (2003) *World Bank Policy Research Working Paper* 3096, 7.

¹⁹⁵ EBA Banking Stakeholder Group, 'Consultation on the operations of the European Supervisory Authorities: General Comments and Replies to Questions' (2017), 28.

b) Burden on financial institutions

The burden of fragmentation. TISON observes that it is possible to structure one and the same investment product either as a banking product or an actual investment product or a (life) insurance product without there being considerable functional differences amongst them.¹⁹⁶ Nevertheless, they are divided into separate legal compartments, characterized by different sets of rules. This burdens financial institutions that offer a range of different financial products since they have to implement multiple procedures with the same aim, compliance with which is controlled by multiple supervisors.¹⁹⁷ Such fragmentation induces a significant (costly) burden for financial institutions.¹⁹⁸

c) Regulatory arbitrage

Avoidance of rules. Having to subject to various rules has incentivized financial institutions to engage into regulatory arbitrage¹⁹⁹, (ab)using “the gap between the economic substance of a transaction and its legal or regulatory treatment”.²⁰⁰ The example of unit-linked life insurance has demonstrated how easy it is to let a financial product assume a different guise. A similar observation goes for a credit default swap (CDS).²⁰¹ From an economic point of view, this

¹⁹⁶ M. TISON, ‘Regulering en distributie van (gestructureerde) beleggingsproducten’ in Instituut voor Financieel Recht, *Financiële regulering in de kering* (Intersentia 2012), (367) 367-368 (“eenzelfde beleggingsproduct kan, zonder aanzienlijke functionele verschillen, juridisch gestructureerd worden onder de vorm van hetzij een bancaire product (gestructureerde rekeningen), een eigenlijk beleggingsproduct (een schuldeffect, collectieve beleggingsstructuur) of een levensverzekeringsovereenkomst (tak 21 of tak 23-verzekering)”).

¹⁹⁷ Illustrative is the observation that asset managers that are part of a banking group, must adhere to four separate sectoral pieces of legislation: AIFMD, CRD, MiFID II and the forthcoming prudential legislation on investment firms. This contradicts recital 20 of the Proposal for a Directive of the European Parliament and of the Council on the Prudential Supervision of Investment Firms, wherein it is stressed that investment firms and credit institutions differ from each other. See, Council of the European Union, ‘Proposal for a Directive of the European Parliament and of the Council on the Prudential Supervision of Investment Firms’ (Brussels, 4 January 2019) 5022/19, 10, marginal 20. Also see, AMUNDI, ‘Amundi answers to the public consultation by the European Commission on the operations of the European Supervisory Authorities’ (2017), 14.

¹⁹⁸ A. VAN ROSSUM, ‘Appendix 2A – Comments by Anton van Rossum’ in J. KREMERS, D. SCHOENMAKER and P. WIERTS (eds.), *Financial Supervision in Europe* (Elgar 2003), (49) 50; R.K. ABRAMS and M.W. TAYLOR, ‘Issues in the Unification of Financial Sector Supervision’ (2000) IMF Working Paper 13, 11.

¹⁹⁹ M.H. MILLER, ‘Financial innovation: The last twenty years and the next’ [1986] *Journal of Financial and Quantitative Analysis* 21(4), (459) 460 (“The major impulses to successful financial innovations over the past twenty years have come, I am saddened to have to say, from regulations and taxes”).

²⁰⁰ V. FLEISCHER, ‘Regulatory arbitrage’ [2010] *Texas Law Review* 89(2), (227) 229; J. KREMERS, D. SCHOENMAKER and P. WIERTS, ‘Cross-Sector Supervision: Which Model?’ in R.J. HERRING and R.E. LITAN (eds.), *Brookings-Wharton Papers on Financial Services: 2003* (Brookings Institution Press 2003), (225) 241.

²⁰¹ A CDS involves one party (the seller of protection) agreeing to assume the credit risk – stemming from a reference obligation or asset – that the other party (the buyer of protection) wants to transfer in exchange for a single or recurrent payment(s). See, art. 2(1)(c) of Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps [2012] OJ L86/8; H. COUSY, ‘CDS, Swap or Insurance?’ in L. CORNELIS, *Finance and Law: Twins in Trouble* (Intersentia 2015), (139) 143-144.

derivative instrument functions the same as a credit insurance contract²⁰²; from a legal point of view, a CDS and a credit insurance contract are approached from a different regulatory angle.²⁰³ For instance, when financial institutions offer CDS agreements, there is no obligation to build up the necessary reserves; when insurance companies sell credit insurance, Solvency II does impose this obligation upon them.²⁰⁴ Thus, by offering one or the other product, financial entities are likely to have a competitive advantage.²⁰⁵ The growing number of options to channel capital into, is not necessarily accompanied by a higher level of protection and prudence.²⁰⁶ These risks only worsen when financial institutions unbundle and repackage products (“securitization”)²⁰⁷, making it hard for supervisors to continue to see the forest for the trees.²⁰⁸

d) Financial conglomerates

Numerous risks. Where banks, investment companies and insurance companies are grouped together under the roof of a financial conglomerate²⁰⁹ (see *supra*), the number of challenges increases even more. A commonly raised issue is the risk of “contagion”, that financial distress in a small part of the conglomerate can contaminate other parts.²¹⁰ If in addition, the financial

²⁰² At least in case the buyer of the CDS also owns the reference asset, *i.e.* in case of a covered CDS. If instead the CDS is uncovered – “naked” – it is often bought for speculation purposes, hence the regular categorization of the CDS as an investment product. See, T. SOMANATHAN and V. NAGESWARAN, *The Economics of Derivatives* (CUP 2015), 174; H. COUSY, ‘CDS, Swap or Insurance?’ in L. CORNELIS, *Finance and Law: Twins in Trouble* (Intersentia 2015), (139) 147.

²⁰³ E. HOWELL, ‘Regulatory Intervention in the European Sovereign Credit Default Swap Market’ [2016] *European Business Organization Law Review* 17(3), (319) 337.

²⁰⁴ M.T. HENDERSON, ‘Credit Derivatives Are Not “Insurance”’ (2009) John M. Olin Program in Law and Economics Working Paper No. 476, 26-27.

²⁰⁵ R.K. ABRAMS and M.W. TAYLOR, ‘Issues in the Unification of Financial Sector Supervision’ (2000) IMF Working Paper 13, 11.

²⁰⁶ J. HILL, ‘Bringing financial services back to the people they serve’ (Frankfurt am Main, 3 June 2015) Keynote speech at the 3rd Joint ESAs Consumer Protection Day, 10-11; J. DELMAS-MARSALET, ‘Rapport relatif à la commercialisation des produits financiers’ (2005) Rapport pour le Gouvernement de la République française, 18. (“Ainsi un producteur français dont un produit risqué et complexe présenté sous forme d’OPCVM, avait fait l’objet d’une restriction de commercialisation par l’AMF, a pu opter pour une autre enveloppe juridique et commercialiser, sans être soumis au contrôle du régulateur, un produit structuré identique, tout aussi risqué et complexe, dans le cadre d’un contrat d’assurance-vie en unités de compte, en le faisant émettre et coter par sa filiale dans un autre Etat membre. Or, il s’avère que cette cotation n’était nullement accompagnée de la création d’un véritable marché et avait pour seul but de contourner les règles de commercialisation en France”).

²⁰⁷ D. MASCIANDARO, ‘Divide et impera: Financial supervision unification and central bank fragmentation effect’ [2007] *European Journal of Political Economy* 23(2), (285) 287; C. BRIAULT., ‘The Rationale for a Single National Financial Services Regulator’ (1999) FSA Occasional Paper 2, 13-14.

²⁰⁸ CEIOPS, ‘CEIOPS Advice for Level 2 Implementing Measures on Solvency II: Repackaged Loans Investment’ (2010) Consultation Paper 59/10, 3.

²⁰⁹ M. GRUSON, ‘Supervision of financial conglomerates in the European Union’ [2004] *Journal of International Banking Law and Regulation* 19, (363) 367-370.

²¹⁰ N. GENETAY and P. MOLYNEUX, *Bancassurance* (Palgrave 1998), 236-238; The Tripartite Group of Bank, Securities and Insurance Regulators, ‘Report on the supervision of financial conglomerates’ (1995), 18-27.

conglomerate is of a considerably large size and active throughout the Union²¹¹, it might unfold as a “too big to fail” entity. This development might make it vulnerable to systemic risk.²¹² In such scenario the risk multiplies.²¹³ Therefore, it is paramount that there is no ‘double gearing’, *i.e.* using the same amount of capital twice to constitute a buffer.²¹⁴ To comprehensively monitor all of these aspects, transparency is imperative. Yet, this is not self-evident as conglomerates often have a complex intertwined structure.²¹⁵ Not only does this hinder a holistic overview, it also increases the chance of seizing regulatory and supervisory arbitrage opportunities. In such case, assets are artificially (re)allocated within the different parts of the entity for the purpose of escaping specific rules and the designated supervisor.²¹⁶

1.2. Adaptive (re)action

a) In theory: cross-sectoral supervision

Cross-sectoral supervision. All of these issues indicate that in order to efficiently supervise an integrated financial market, the supervisor will need to pull out all the stops.²¹⁷ For that reason, a majority of scholars plead for cross-sectoral – preferably integrated – supervision.²¹⁸ In addition

²¹¹ See the JC’s list of financial conglomerates referred to in footnote 95. Also see, H. PRAST and I. VAN LELYVELD, ‘The Netherlands’ in D. MASCIANDARO (ed.), *Handbook of Central Banking and Financial Authorities in Europe. Architectures in the Supervision of Financial Markets* (Elgar 2005), (311) 326-327.

²¹² V. PELECKIENĖ, K. PELECKIS and G. DUDZEVIČIŪTĖ, ‘New Challenges Of Supervising Financial Conglomerates’ [2011] *Intellectual Economics* 5(2), (298) 299.

²¹³ I. VAN LELYVELD and A. SCHILDER, ‘Risk in Financial Conglomerates: Management and Supervision’ [2003] *Brookings-Wharton Papers on Financial Services*, (195) 205-206.

²¹⁴ D. SCHOENMAKER and N. VÉRON, ‘A ‘twin peaks’ vision for Europe’ (2017) Bruegel Policy Contribution 30, 5-6; The Tripartite Group of Bank, Securities and Insurance Regulators, ‘Report on the supervision of financial conglomerates’ (1995), 17-18.

²¹⁵ F. DIERICK, ‘The Supervision of Mixed Financial Services Groups in Europe’ (2004) ECB Occasional Paper Series 20, 15; L. VAN DEN BERGHE (ed.), *Financial Conglomerates: New Rules for New Players?* (Springer 1995), 71; The Tripartite Group of Bank, Securities and Insurance Regulators, ‘Report on the supervision of financial conglomerates’ (1995), 28-29.

²¹⁶ Recital 20 of the Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council [2003] OJ L35/1-27 (hereafter, “Financial Conglomerates Directive”); J. KREMERS, D. SCHOENMAKER and P. WIERTS, ‘Cross-Sector Supervision: Which Model?’ in R.J. HERRING and R.E. LITAN (eds.) *Brookings-Wharton Papers on Financial Services*, (Brookings Institution Press 2003), (225) 241; The Tripartite Group of Bank, Securities and Insurance Regulators, ‘Report on the supervision of financial conglomerates’ (1995), 34-35. For an extensive discussion, see, X. FREIXAS, G. LORANTH and A.D. MORRISON, ‘Regulating financial conglomerates’ [2007] *Journal of Financial Intermediation* 16, (479) 480-512.

²¹⁷ The Tripartite Group of Bank, Securities and Insurance Regulators, ‘Report on the supervision of financial conglomerates’ (1995), 16-38; R. HERRING and A. SANTOMERO, ‘The Corporate Structure of Financial Conglomerates’ [1990] *Journal of Financial Services Research* 4(4), (471) 480.

²¹⁸ D. SCHOENMAKER and N. VERON, ‘EBA relocation should support a long-term ‘twin peaks’ vision’ (2017) Bruegel blog post, <http://bruegel.org/2017/04/eba-relocation-should-support-a-long-term-twin-peaks-vision/> (accessed on 4 April 2019) (“Since the European Union does not appear to envisage a tighter regulatory separation between banking and insurance, it should move towards more integrated prudential supervision of

to pooling sectoral expertise, a single supervisor could facilitate a fluent flow of information, alleviate the burden for financial institutions and diminish the loopholes for regulatory arbitrage.²¹⁹ It is also felt that a single supervisor has the necessary capacity and the sufficient resources to cope with the intricacies of financial conglomerates.²²⁰ And lastly, a single supervisor may be less prone to overlook non-trivial aspects.

b) In practice: European sectoral supervision

Sectoral supervision at European level. So far, Europe clings to the traditional tripartite division of financial law to pursue the objectives of financial supervision. As financial conglomerates constitute a cross-sectoral topic, matters thereto related affect the JC's agenda, and in particular the agenda of the specific sub-committee (see *supra*).²²¹ There also exists specific legislation in relation to financial conglomerates, which can be found in the Financial Conglomerates Directive (FICOD)²²² Although the FICOD's text evidences that market developments have been taken into account²²³, its philosophy departs from sectoral "solo" supervision²²⁴ and adds to that a supplementary layer of supervision.²²⁵

The sectoral model found at European level is at odds with the supervisory models that Member States have adopted in reaction to the blurring of sectors and the rise of financial conglomerates. Exemplary are the Scandinavian countries (Denmark, Norway and Sweden): they already opted

both sectors"); E. MONTANARO, 'The process towards centralisation of the European financial supervisory architecture: the case of the banking union' [2016] PSL Quarterly Review 69, (135) 141; C. BRIAULT, 'The Rationale for a Single National Financial Services Regulator' (1999) FSA Occasional Paper 2, 15-17.

²¹⁹ M. FLAMÉE and P. WINDELS, 'Restructuring Financial Sector Supervision' [2009] The Geneva Papers on Risk and Insurance 34, (9) 14; M. ČIHÁK and R. PODPIERA, 'Experience with Integrated Supervisors: Governance and Quality of Supervision' in D. MASCIANDARO and M. QUINTYN (eds.), *Designing Financial Supervision Institutions. Independence, Accountability and Governance* (Elgar 2007), (309) 316-317;

²²⁰ The Tripartite Group of Bank, Securities and Insurance Regulators, 'Report on the supervision of financial conglomerates' (1995), 16-38; R. HERRING and A. SANTOMERO, 'The Corporate Structure of Financial Conglomerates' [1990] Journal of Financial Services Research 4(4), (471) 480.

²²¹ Artt. 21a (2b) and (2c) Financial Conglomerates Directive mandate the ESAs to jointly develop, through the JC, uniform conditions of application of the supervisory overview. See, Joint Committee of the European Supervisory Authorities, 'EBA, EIOPA and ESMA's Response to the European Commission's Call for Advice on the Fundamental Review of the Financial Conglomerates Directive' (2012), 3. Also see, D. CALVO, J. CRISANTO, S. HOHL and O. GUTIERREZ, 'Financial supervisory architecture: what has changed after the crisis?' (2018) FSI Papers 8, 28.

²²² See the references made in footnote 216 and 221.

²²³ Recital 2 Financial Conglomerates Directive.

²²⁴ M. GRUSON, 'Supervision of financial conglomerates in the European Union' [2004] Journal of International Banking Law and Regulation 19, (363) 363-364.

²²⁵ C.V. GORTSOS, 'Identifying Groups as 'Financial Conglomerates' under European Financial Law (Directive 2002/87/EC): A not so straightforward exercise' (2017), 9, available at SSRN: <https://ssrn.com/abstract=3066037>; F. DIERICK, 'The Supervision of Mixed Financial Services Groups in Europe' (2004) ECB Occasional Paper Series 20, 10-11.

for integrated supervision in the 1980s.²²⁶ Other national governments, such as the UK (see *supra*) and Germany, shared the opinion that sectoral supervision did not suffice any longer and thereupon welcomed a single supervisor.²²⁷

Criticism. SCHOENMAKER and VERON advocate integrated prudential supervision of financial conglomerates. To realize this plan, the authors conceptualize an alliance of the ECB and the EIOPA.²²⁸ However, their proposal finds little support in the banking and insurance sector (see *infra*).

2. Consumer protection demands more effort

The lack of consumer protection. Effective consumer protection is truly a *sine qua non* of financial stability. The financial crisis exposed that when complex financial products were offered, consumer protection largely fell by the wayside.²²⁹ Mis-selling scandals have been numerous²³⁰; investors did not and could not understand the risks associated with complex products and faced huge losses.²³¹ Equally troublesome were irresponsible lending practices, leading to mountainous debt levels for indigent consumers.²³² Such experiences profoundly

²²⁶ J.J. NORTON, 'Global Financial Sector Reform: The Single Financial Regulator Model Based on the United Kingdom FSA Experience – A Critical Reevaluation' [2005] *Policy International Lawyer* 39(1), (15) 16-17; C. BRIAULT 'The Rationale for a Single National Financial Services Regulator' (1999) *FSA Occasional Paper* 2, 11-12; M.W. TAYLOR and A. FLEMING, 'Integrated Financial Supervision Lessons of Scandinavian Experience' [1999] *Finance and Development*, (42) 42-43.

²²⁷ M. ČIHÁK and R. PODPIERA, 'Experience with Integrated Supervisors: Governance and Quality of Supervision' in D. MASCIANDARO and M. QUINTYN (eds.), *Designing Financial Supervision Institutions. Independence, Accountability and Governance* (Elgar 2007), (309) 310-312; R.M. LASTRA, 'The Governance Structure for Financial Regulation and Supervision in Europe' [2003] *Columbia Journal of European Law* 10(1), (49) 50-51.

²²⁸ D. SCHOENMAKER and N. VERON, 'A 'twin peaks' vision for Europe' (2017) *Bruegel Policy Contribution* 30, 2 and 5-8.

²²⁹ J. HILL, 'Bringing financial services back to the people they serve' (Frankfurt am Main, 3 June 2015) Keynote speech at the 3rd Joint ESAs Consumer Protection Day, 3 ("Trust is the bedrock of the financial system. It needs to be won back after the financial crisis and some of the scandals we have seen. I think that everyone in this room – the industry, regulators and supervisors has a part to play in helping make that happen.").

²³⁰ Unfortunately, mis-selling scandals are no recent phenomenon. One can recall the British large private pension mis-selling case of the 1990s which was an important brick in the construction of the FSA as single supervisor. Clearly, the establishment of an integrated supervisor was not the magic solution: the ever-latent problem returned to the surface following the financial crisis and until today, newspapers have regularly featured alarming headlines. See, J. THOMPSON, 'Fears mount over mis-selling of ESG-labelled products' *Financial Times* (London, 20 January 2019), <https://www.ft.com/content/2d3f7683-65a6-3171-8cbb-66ff5ab34405> (accessed on 18 July 2019). Also see, Better Finance, 'A major enforcement issue: the mis-selling of financial products' (2017), Briefing Paper, 11-20; S.A. PEREZ and J. WESTRUP, 'Finance and the macroeconomy: the politics of regulatory reform in Europe' [2010] *Journal of European Public Policy* 17(8), (1171) 1181.

²³¹ K. ALEXANDER, 'Mis-selling of Financial Products: Marketing, Sale and Distribution' (2018) *Study for the ECON Committee*, 8-15.

²³² In this regard, see, Financial Services User Group, 'Responsible Consumer Credit Lending. FSUG opinion and recommendations for the review of the Consumer Credit Directive' (2019), 4-5.

undermine consumers' trust in the market, and more than that, jeopardize financial stability which justifies continuous action and reaction.

The need for a cross-sectoral framework. Over the last ten years, efforts in the field of consumer protection have increased but, as stakeholders have broached, results have been fairly humble. The European consumer organization BEUC, like many others, denounces very clearly the fragmented sectoral legislation and the shortcomings of supervision in the convergence of national supervisory practices.²³³ Consumer protection aspects indeed have a horizontal dimension, crossing the boundaries of the financial sectors.²³⁴ Consistency across the sectors is a key for success.²³⁵ In order for the CMU to succeed, it shall be quintessential to realize effective consumer and investor protection.²³⁶

A first sign of cross-sectoral legislation. In 2017, the European legislator deviated for the first time from the traditional²³⁷ sectoral structure of legislation when it produced the PRIIPs Regulation. With its cross-sectoral scope, the Regulation responds to the blurring of sectors: it surpasses a financial product's legal qualification by focusing on the economic purpose.²³⁸ The intention to put forth cross-sectoral legislation deserves to be applauded, certainly in response to the issue of regulatory arbitrage, yet the final version of the Regulation does not convince. Originally, the Regulation would have been titled 'PRIPs' (with only *one* 'I'), *i.e.* packaged retail investment products, the return of which depends on fluctuating reference assets. This term comprises a range of financial products, including unit-linked life insurance. Nevertheless, it was decided to insert an additional, specific definition of an 'insurance-based investment product',

²³³ BEUC has designed a website specifically for publicly denouncing the lack of consumer protection and stressing the impact of bad advice. See, <https://www.thepriceofbadadvice.eu> (accessed on 1 August 2019).

²³⁴ A. BARAN, P. ECKHARDT, C. SCHMIDT and B. VAN ROOSEBEKE, 'European Supervisory Authorities. Room for improvement at Level 2 and Level 3' (2016) CEP study, 26.

²³⁵ Better Finance, 'A major enforcement issue: the mis-selling of financial products' (2017), Briefing Paper, 9-10; EFAMA, 'Response to the EC Consultation on Operations of the European Supervisory Authorities' (2017), 6.

²³⁶ European Parliament, 'Provisional legislative resolution of 16 April 2019 on the European Supervisory Authorities and financial markets' (2019), n 187, 17, marginal 43; ESMA Securities and Markets Stakeholder Group, 'MSG Advice to the European Commission. Response to the Public Consultation on the Operations of the European Supervisory Authorities' (2017), 5; S. MAIJOR, ['Topics on the agenda of the Joint ESAs Consumer Protection Day'] (Frankfurt am Main, 3 June 2015), Opening speech at the 3rd Joint ESAs Consumer Protection Day, 2; J. HILL, 'Bringing financial services back to the people they serve' (Frankfurt am Main, 3 June 2015) Keynote speech at the 3rd Joint ESAs Consumer Protection Day, 10.

²³⁷ F. DEMARIGNY, J. MCMAHON and N. ROBERT, 'Review of the New European System of Financial Supervision (ESFS). Part 1: The Work of The European Supervisory Authorities (EBA, EIOPA and ESMA) – The ESFS'S Micro-Prudential Pillar' (2013) Study for the ECON Committee, 111.

²³⁸ Commission, 'Communication of the Commission to the European Parliament and the Council. Packaged Retail Investment Products' COM(2009) 204 final, 2. Also see, V. COLAERT, 'The Regulation of PRIIPs: Great Ambitions, Insurmountable Challenges?' [2016] Journal of Financial Regulation 2, (203) 205-206.

hence the double ‘II’ in ‘PRIIPs’. This finding indicates how strongly the supranational framework is attached to the sectoral division.²³⁹

(Cross-)sectoral supervision. Since consumer protection is of a cross-sectoral nature, the ESAs also cooperate in the JC.²⁴⁰ So far, the achieved results have been poor.²⁴¹ It has also been noticed that the ESAs’ individual efforts have differed: while the ESMA and the EIOPA have achieved the most results in the domain of consumer protection, the EBA has mostly concentrated on financial stability.²⁴² On the other hand, the JC has not fulfilled the desired expectations, e.g. in respect of the PRIIPs Regulation.²⁴³

Twin peaks model. The preceding reasons have served as a “leg up” to propose a twin peaks model wherein COB, included therein consumer protection, is casted as a fully fledged mandate.²⁴⁴ This concept is underpinned by an argument found in legal doctrine that prioritizes the difference between prudential and COB supervision over the differences between sectors.²⁴⁵

²³⁹ V. COLAERT, ‘MiFID II in Relation to Other Investor Protection Regulation: Picking Up the Crumbs of a Piecemeal Approach’ in D. BUSCH and G. FERRARINI (eds.), *Regulation of the EU financial markets: MiFID II and MiFIR* (OUP 2017), 598-599, marginal 21.25-21.26.

²⁴⁰ Joint Committee of the European Supervisory Authorities, ‘2019 Work Programme’ (2018), 1-2.

²⁴¹ Commission Staff, ‘Commission staff working document, accompanying the document ‘Report from the European Commission to the European Parliament and Council’ on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)’ SWD(2014) 261 final, 14; BEUC, Better Finance, Finance Watch, AGE Platform Europe and COFACE Families Europe, ‘Reform of the European Supervisory Authorities and financial consumer protection’ (2019) Letter to the Council, 1-2; Financial Services User Group, ‘Proposal for the EU financial supervisory reform’ (2018) Open letter, 1-4; N. MOLONEY, *EU Securities and Financial Markets Regulation* (3rd edn, OUP 2014), 852 .

²⁴² EBA itself acknowledges this. See, EBA, ‘Opinion of the European Banking Authority on the public consultation on the operation of the European Supervisory Authorities’ (2017), 4-5. Some commentators see interpret the differing efforts as a *de facto* objectives-based approach. Also see, E. WYMEERSCH, ‘Financial Regulation: its objectives and their implementation in the European Union’ (2019) European Banking Institute Working Paper Series 36, 8-12; J. ARMOUR (a.o.), *Principles of Financial Regulation* (OUP 2016), 543. See however, I. CHIU, ‘Power and Accountability in the EU Financial Regulatory Architecture: Examining Inter-Agency Relations, Agency Independence and Accountability’ in M. ANDENAS and G. DEIPENBROCK, *Regulating and Supervising European Financial Markets* (Springer 2016), (67) 85.

²⁴³ It proved to be very difficult for the ESAs to jointly develop the draft regulatory technical standards. A compromise was reached, but it was perceived as the “least bad” solution, and subsequently it has been rejected by the European Parliament (which is an unicum in the ESAs’ history). See, European Parliament, ‘Position of the European Parliament of 1 December 2016’, http://www.europarl.europa.eu/doceo/document/TA-8-2016-0458_EN.html?redirect (accessed on 14 May 2019); EIOPA, EBA and ESMA, ‘Letter to the European Commission: ESAs’ response to the intention of the European Commission to amend the draft Regulatory Technical Standards (RTS) jointly submitted by EBA, ESMA and EIOPA under Articles 8(5), 10(2) and 13(5) of Regulation (EU) No 1286/2014’ (2016), 1-2. Also see, N. MOLONEY, *The Age of ESMA: Governing EU Financial Markets* (Hart 2018), 143-145; AMUNDI, ‘Amundi answers to the public consultation by the European Commission on the operations of the European Supervisory Authorities’ (2017) 4.

²⁴⁴ Note that consumer protection can also be achieved by prudential rules and supervision, and not only through the development of solid COB rules and adequate supervision (by the NCAs). This is reflected in art. 9 ESAs’ Regulations.

²⁴⁵ D. SCHOENMAKER and N. VERON, ‘EBA relocation should support a long-term ‘twin peaks’ vision’ (2017) Bruegel blog post, <http://bruegel.org/2017/04/eba-relocation-should-support-a-long-term-twin-peaks-vision/> (accessed on 5 July 2019).

Following this reasoning, there is much to be gained from having two authorities in place, each of which focuses on one objective, rather than holding on to three authorities which focus on – progressively blurring – sectors. For financial institutions, the twin peaks model might feel more burdensome as two supervisory authorities will each control one aspect²⁴⁶, but from a consumer’s point of view one can see the advantages of the four-eyes principle, as in that case, less can escape the supervisors’ attention.

ESMA as COB supervisor. Following the perspective of the European legislator, the ESMA seems to be in pole position to fill in the vacancy of COB supervisor.²⁴⁷ The ESMA itself has also signaled its willingness to take up a wider mandate.²⁴⁸ The financial industry’s opinions are more divided on this issue (*see infra*).²⁴⁹ One point that should not be overlooked is that the ESMA is currently not competent for other financial matters than investment issues.²⁵⁰

3. Fitting in current and upcoming challenges

Coverage of discussion. The market evolves at an incredibly fast pace. New developments require an expedient follow-up, and it is doubtful whether a sectoral structure passes muster. Below are discussed: (3.1.) Anti-money laundering; (3.2.) Brexit “Brexodus”; (3.3.) Fintech; (3.4.) Sustainable finance.

3.1. Anti-money laundering (AML)

AML framework under attack. Over the years, the number of dossiers concerning money laundering scandals²⁵¹ has multiplied²⁵², yet so has the criticism on the European regulatory and

²⁴⁶ O.J. ERDÉLYI, *Twin Peaks for Europe: State-of-the-Art Financial Supervisory Consolidation. Rethinking the Group Support Regime Under Solvency II* (Springer 2015), 207.

²⁴⁷ P. BERÉS, ‘First step towards ‘twin peaks’ model of financial supervision’ (2010) <https://www.euractiv.com/section/euro-finance/opinion/first-step-towards-twin-peaks-model-of-financial-supervision/> (accessed on 13 July 2019).

²⁴⁸ ESMA, ‘ESMA response to the public consultation on the operations of the European Supervisory Authorities’ (2017) Letter to the European Commission, 3.

²⁴⁹ Compare, European Savings and Retail Banking Group (ESBG), ‘ESBG response to the European Commission consultation on ESAs Operations’ (2017), 8; with, International Center for Insurance Regulation, ‘The Benefits of Consolidating Financial Supervision in Europe – A Plea for a Single Integrated European Supervisory Authority’ (2017) Response from the ICIR of Goethe University Frankfurt to the European Commission, 2.

²⁵⁰ BEUC, ‘Review Of The European Financial Supervisors BEUC: Response to the Commission Consultation’ (2017), 10.

²⁵¹ The European Commission defines money laundering as “the process by which criminal proceeds are ‘cleaned’ so that their illegal origins are hidden. It is usually associated with the types of organized crime that generate huge profits in cash, such as trafficking in drugs, weapons and human beings as well as fraud.”. See, <https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/money-laundering-en> (accessed on 28 June 2019).

²⁵² The most recently vexed scandal probably being Danske bank. See a.o., J. GARSIDE, ‘Is money-laundering scandal at Danske Bank the largest in history?’ *The Guardian* (London, 21 September 2018),

supervisory framework.²⁵³ With regard to supervision, the problem is associated with the above-mentioned question of the appropriate level of organization of AML supervision.

Divergent national supervision. Enforcement of anti-money laundering measures – labelled as COB measures²⁵⁴ – takes place at national level.²⁵⁵ However, the problem transcends national borders: money laundering often involves several actors, located inside and outside the Union.²⁵⁶ It is, therefore, essential that national supervisors homogeneously approach money laundering practices, a precondition for this being a fluent exchange of information.²⁵⁷ Due to a minimally harmonized AML framework, and the discretion for implementation thereof, such convergence is absent today.²⁵⁸ Moreover, not every Member State can or is willing to devote a sufficient

<https://www.theguardian.com/business/2018/sep/21/is-money-laundering-scandal-at-danske-bank-the-largest-in-history> (accessed on 28 June 2019). With regard to other money laundering cases, see, H. HUIZINGA, ‘The supervisory approach to anti-money laundering: an analysis of the Joint Working Group’s reflection paper’, (2018) Study for the ECON committee, 5; T. INCALZA, ‘National anti-money laundering legislation in a unified Europe: Jyske’ [2014] Common Market Law Review 51(6), (1829) 1829-1850.

²⁵³ Member States already face the implementation of a fifth Anti-Money Laundering Directive (AMLD). Contrary to what one may expect from the Directive’s denomination, this piece of legislation also serves as a legal basis to counter terrorism financing. To facilitate reading of the paper, AML has to be understood as including the fight against terrorist financing. Note, however, that the Directive’s provisions are mainly written for anti-money laundering purposes and are less apt to adequately approach terrorist financing. As there are some considerable differences between both practices, it indeed seems a challenge to address both of them under one and the same package of rules. See, Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L156/43. Also see, J. KIRSCHENBAUM and N. VERON, ‘A better European Union architecture to fight money laundering’ (2018) Bruegel Policy Contribution 19, 9; Joint Committee of the European Supervisory Authorities, ‘Joint Opinion on the risks of money laundering and terrorist financing affecting the Union’s financial sector’ (2017), 4.

²⁵⁴ Attention must be paid to the fact that AML supervision cannot be isolated from prudential supervision. Both aspects are complementary, and reinforce each other’s effects. See, Commission, ‘Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the Economic and Social committee and the Committee of the Regions. Strengthening the Union framework for prudential and anti-money laundering supervision for financial institutions’ COM(2018) 645 final, 3.

²⁵⁵ A comprehensive diagram concerning the prevention of money laundering and terrorist financing across the EU can be found on the Commission’s website: https://ec.europa.eu/info/sites/info/files/diagram-aml_2018.07_ok.pdf (accessed on 30 June 2019). Also see, M. VAN DEN BROECK, ‘Designing Supervision under the Preventive Anti-Money Laundering Policy in the European Union’ [2014] Utrecht Law Review 10(5), (151) 152-167.

²⁵⁶ T. KEATINGE, ‘Cross-border money laundering cannot be fought with domestic tools’ Financial Times (London, 10 September 2018), <https://www.ft.com/content/0397fc40-b281-11e8-87e0-d84e0d934341> (accessed on 30 June 2019).

²⁵⁷ ESAs and SSM Chairs, ‘Reflection paper on possible elements of a Roadmap for seamless cooperation between Anti Money Laundering and Prudential Supervisors in the European Union’ (2018), 1; J. KIRSCHENBAUM and N. VERON, ‘A better European Union architecture to fight money laundering’ (2018) Bruegel Policy Contribution 19, 10-11.

²⁵⁸ Commission, ‘Fight against money laundering and terrorist financing: Commission assesses risks and calls for better implementation of the rules’ Press Release (24 July 2019), http://europa.eu/rapid/press-release_IP-19-4452_en.htm (accessed on 26 July 2019); Commission, ‘Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the Economic and Social committee and the Committee of the Regions. Strengthening the Union framework for prudential and anti-money laundering supervision for financial institutions’ COM(2018) 645 final, 3; The Greens/European Free Alliance,

amount of resources to fight money laundering operations.²⁵⁹ There may also be a risk of regulatory capture (see *infra*).²⁶⁰ The number of incidents, spread over several Member States, confirms the suspicion that decentralized supervision undermines the effectiveness of Europe's AML policy.²⁶¹

AML supervision at European level. The deficiencies inherent to decentralized supervision serve to build a case for a specialized AML entity at European level.²⁶² Could this responsibility then not be assigned to the ECB? The answer is no, the reason for that being very straightforward: AML does not constitute a prudential matter.²⁶³ Moreover, the ECB's authority does not extend beyond the eurozone.²⁶⁴ Finally, the ECB has supervisory powers only with regard to banks which is a too narrow scope considering that money laundering is a concern of the securities and insurance sector as well.

Europe's preference for the EBA. Just in April 2019, a decision was adopted to upgrade the EBA's AML powers.²⁶⁵ Before, all ESAs were equally mandated to act for the purpose of supervisory convergence in their respective sectors, and AML issues were discussed by them in the JC²⁶⁶. In the future, the EBA will poach on the AML territory of the ESMA and the EIOPA²⁶⁷; the latter will only be consulted in case the EBA decides in respect of NCAs or financial institutions falling within the remit of its sister authorities.²⁶⁸ This will create a mix of sectoral

'Supervisory hearing: ESMA and EIOPA are doing nothing to fight money laundering' (2018), <https://sven-giegold.de/esma-eiopa-money-laundering/> (accessed on 13 July 2019).

²⁵⁹ Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the Economic and Social committee and the Committee of the Regions. Strengthening the Union framework for prudential and anti-money laundering supervision for financial institutions' COM(2018) 645 final, 5.

²⁶⁰ J. KIRSCHENBAUM and N. VERON, 'A better European Union architecture to fight money laundering' (2018) Bruegel Policy Contribution 19, 14.

²⁶¹ ESAs and SSM Chairs, 'Reflection paper on possible elements of a Roadmap for seamless cooperation between Anti Money Laundering and Prudential Supervisors in the European Union' (2018), 4.

²⁶² H. HUIZINGA, 'The supervisory approach to anti-money laundering: an analysis of the Joint Working Group's reflection paper' (2018) Study for the ECON committee, 9-10.

²⁶³ R. HERRING and J. CARMASSI, 'The Structure of Cross-Sector Financial Supervision' [2008] Financial Markets, Institutions & Instruments 17(1), (51) 53.

²⁶⁴ J. KIRSCHENBAUM and N. VERON, 'A better European Union architecture to fight money laundering' (2018) Bruegel Policy Contribution 19, 18.

²⁶⁵ J. VALERO, 'EU watchdog gains new powers to fight money launderers' Euractiv (Brussels, 2 April 2019), <https://www.euractiv.com/section/economy-jobs/news/eu-watchdog-gains-new-powers-to-fightmoneylaunderers/> (accessed on 9 May 2019).

²⁶⁶ Joint Committee of the European Supervisory Authorities, '2019 Work Programme' (2018), 1; J. KIRSCHENBAUM and N. VERON, 'A better European Union architecture to fight money laundering' (2018) Bruegel Policy Contribution 19, 9.

²⁶⁷ J. KIRSCHENBAUM and N. VERON, 'A better European Union architecture to fight money laundering' (2018) Bruegel Policy Contribution 19, 10.

²⁶⁸ European Parliament, 'Provisional legislative resolution of 16 April 2019 on the European Supervisory Authorities and financial markets' (2019), n 187, 11-12, marginal 15d.

authorities and exclusive cross-sectoral powers, which in all probability will lead to confusion. Besides this, EBA is just not the most suitable candidate to fill in the vacancy of AML supervisor. Money laundering activities occur outside the financial sector as well²⁶⁹, so that the EBA's arms do not stretch far enough.²⁷⁰ Moreover, the Authority's credibility has been questioned because of its lukewarm reaction to the Danske Bank scandal.²⁷¹

A new authority for AML. KIRSCHENBAUM and VERON have evaluated potential candidates to become AML supervisor, and favour the inception of a brand-new AML authority.²⁷² The ECB, the EBA's chairman and some Members of the European Parliament have expressed a similar opinion.²⁷³ In the affirmative, the ESFS will welcome a new member which presumably will add complexity and costs. One also wonders what competences would be left for the EBA, if the Authority would be relieved from AML matters. After all, the banking

²⁶⁹ Amongst others, money laundering practices also occur in some non-financial sectors such as legal services, accountancy service providers, property and estate agencies. See, art. 2 of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L141/83 ("Fourth AMLD").

²⁷⁰ The European Parliament itself has ordered the Commission to investigate the possibility of conferring AML responsibilities to a specialized agency. See, ECON Committee, 'Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority); Regulation (EU) No 345/2013 on European venture capital funds; Regulation (EU) No 346/2013 on European social entrepreneurship funds; Regulation (EU) No 600/2014 on markets in financial instruments; Regulation (EU) 2015/760 on European long-term investment funds; Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds; Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market; and (EU) Directive 2015/849 on the prevention of the use of the financial system for the purposes of money-laundering or terrorist financing' (2018), 10, marginal 24ac.

²⁷¹ C. BINHAM and M. ARNOLD, 'Europe's banking watchdog warns on wave of dirty money' Financial Times (London, 10 June 2019), <https://www.ft.com/content/fecc4006-8b59-11e9-a24d-b42f641eca37> (accessed on 14 July 2019); The Greens/European Free Alliance, 'Danske Bank: European Commission must now investigate money laundering scandal after EU Member States have put the brakes on the EBA' (2019), <https://sven-giegold.de/danske-bank-european-commission-must-now-investigate/> (accessed on 13 July 2019).

²⁷² J. KIRSCHENBAUM and N. VERON, 'A better European Union architecture to fight money laundering' (2018) Bruegel Policy Contribution 17-20.

²⁷³ F. GUARASCIO and J. STRUPCZEWSKI, 'ECB's Coeuré says EU should have agency to fight money laundering' Reuters (London, 7 September 2018), <https://www.reuters.com/article/us-eu-banks-moneylaundering/ecb-calls-for-eu-agency-to-combat-money-laundering-idUSKCN1LN1KZ> (accessed on 13 July 2019). For the opinion of the EBA's chairman José Manuel Campa, see [X], 'EBA Nominee Sees Need for 'More Integration' on AML' (2019), <https://www.riskscreen.com/kyc360/news/eba-nominee-sees-need-for-more-integration-on-aml/> (accessed on 13 July 2019). For the opinion of Sven Giegold (one of the Members of the European Parliament), see, The Greens/European Free Alliance, 'European supervisory authorities trilog conclusion: EU governments including Germany prevent much needed fundamental governance overhaul' (2019), <https://sven-giegold.de/supervisory-authorities-conclusion/> (accessed on 13 July 2019).

watchdog has already lost micro-prudential banking supervision to the ECB.²⁷⁴ It is clear that a new, specialized authority would trigger some thinking exercises.

3.2. Brexodus

Exodus to the continent. After having been confronted with a financial crisis and a sovereign debt crisis, Europe now faces a crisis of membership. Due to Brexit, UK-based financial firms are eager to relocate themselves in one of the twenty-seven remaining Member States. This “Brexodus”²⁷⁵ ruffles more than a few feathers, including one that has continuously worried financial supervisors: supervisory arbitrage (see *supra*). The idea that Member States will compete with each other to attract as much business as possible is absolutely not far-fetched.²⁷⁶ The supervisory challenge attached to interstate competition is to produce a race to the top (competition on quality) instead of a race to the bottom (competition on flexibility).²⁷⁷

A case for twin peaks supervision. SCHOENMAKER and VERON regard Brexit as the momentum to fulfill the ambition of CMU in a EU27 environment. On top of the single rulebook, they envisage an “ESMA 2.0”, a muscular and bolstered version of the Authority that is operating at present. Departing from the idea that the ESMA already *de facto* represents a COB supervisor – considering its enhanced work thereon – the authors judge centralized market supervision by a strengthened ESMA to be an effective means for avoiding supervisory fragmentation in the post-Brexit climate.²⁷⁸ Taking this concept together with their aforementioned suggestion to ally the ECB and the EIOPA in order to cover micro-prudential supervision of financial conglomerates (see *supra*), it can be noticed that the authors fabricate a twin peaks model.

A case for merging EBA with EIOPA. The Commission’s review of the ESAs of 2017 indicates that there might be room for a merger between the EBA and the EIOPA, a hypothesis that was

²⁷⁴ E. FERRAN and V. BABIS, ‘The European Single Supervisory Mechanism’ [2013] *Journal of Corporate Law Studies* 13(2), (255) 278-279. Also see, L. TEMPLER, ‘First Banking Union, then ‘Brexit’: Is the EBA dead?’ (2017) *Regulation-Y* blogpost, https://regulation-y.com/2017/03/31/first-the-ssm-then-brexit-is-the-eba-dead/#_ftn4 (accessed on 13 July 2019).

²⁷⁵ H. JONES, ‘Paris neck-and-neck with Frankfurt in Brexit race: French lobbyist’ *Reuters* (Paris, 15 February 2018), <https://www.reuters.com/article/us-britain-eu-banks/paris-neck-and-neck-with-frankfurt-in-brexit-race-french-lobbyist-idUSKCN1FZ234> (accessed on 2 July 2019).

²⁷⁶ A. SAPIR, D. SCHOENMAKER and N. VERON, ‘Making the best of Brexit for the EU27 financial system’ (2017) *Policy Contribution Issue 1*, 6.

²⁷⁷ S. MAIJOOR, ‘Brexit – the regulatory challenges’ (Dublin, 13 February 2019) *Speech at the European Financial Forum*, 2; EIOPA, ‘Opinion on supervisory convergence in light of the United Kingdom withdrawing from the European Union’ (2017), 2; ESMA, ‘General principles to support supervisory convergence in the context of the United Kingdom withdrawing from the European Union’ (2017), 1-2.

²⁷⁸ D. SCHOENMAKER and N. VÉRON, ‘A ‘twin peaks’ vision for Europe’ (2017) *Bruegel Policy Contribution 30*, 8.

not yet present in the review of 2014.²⁷⁹ Nevertheless, it seems that the possibility has been stored away when it was decided that the EBA would exchange the UK for Paris.

The EBA's move to Paris. A special emigrant that already left the “soon to be a third country” UK, is the EBA. Because of the potential stimuli for the local economy²⁸⁰, many Member States (e.g. Germany, France, Ireland and some non-eurozone countries such as the Czech Republic) have tendered for the EBA's relocation to their territory.²⁸¹ In the end, Paris has been selected to accommodate the banking Authority's headquarters.²⁸² Several reasons explaining the preference for the French capital circulate, some being more symbolic than others.²⁸³ Another contender for the EBA, was Frankfurt. Had the EBA moved its offices to “Mainhattan”, the home city of the ECB and the EIOPA, a merger between the EBA and the EIOPA would have been more realistic – such move being backed up by the German government²⁸⁴. Learning, however, that Frankfurt having lost the battle, was not even a case of bad luck – the final battle was held between Dublin and Paris²⁸⁵ – is an interesting observation. Keeping the EBA's seat at a distance from the EIOPA's seat might be interpreted as a deliberate signal, which communicates the abandonment of a merger between them.²⁸⁶ Meanwhile, a merger between the ECB and the EIOPA (hypothetically) remains possible.

²⁷⁹ Compare, Commission, Public Consultation on the ESAs' Regulations', n 36, 21-22; with, Commission, 'Public Consultation on the Review of the European System of Financial Supervision' (2013), https://ec.europa.eu/finance/consultations/2013/esfs/docs/consultation-document_en.pdf (accessed on 10 August 2019).

²⁸⁰ Bruegel (a European think tank, of which several contributions have been consulted for this paper) sums up probable benefits, being “high-quality jobs in financial services, expansion of ancillary services such as legal support and consultancy, better access to finance for corporates, higher tax revenues for the government, and prestige for the city and country.” See, D. SCHOENMAKER, ‘Stealing London's financial crown would bring both benefits and responsibilities’ (2016) Bruegel blog post, <http://bruegel.org/2016/11/stealing-londons-financial-crown-would-bring-both-benefits-and-responsibilities/> (accessed on 2 July 2019).

²⁸¹ For the different offers of the Member States and an infographic on the EU agencies relocation, see the European Council's website, <https://www.consilium.europa.eu/en/infographics/eu-relocation-agencies/> (accessed on 2 July 2019).

²⁸² Regulation (EU) 2018/1717 of the European Parliament and of the Council of 14 November 2018 amending Regulation (EU) No 1093/2010 as regards the location of the seat of the European Banking Authority [2018] OJ L291/1.

²⁸³ Originally, the EBA was granted to the UK, as a recognition of London being the Union's financial center. Today, Paris has become a strong financial hub as well which may have been one of the reasons for moving the Authority there. See, F. MAXWELL and B. SMITH-MEYER, ‘Frankfurt's plan to snatch EU bank regulator from London’ PoliticoPro (Brussels, 21 March 2017), <https://www.politico.eu/pro/frankfurts-plan-to-snatch-eu-bank-regulator-from-london/> (accessed on 2 July 2019).

²⁸⁴ F. MAXWELL and B. SMITH-MEYER, ‘Frankfurt's plan to snatch EU bank regulator from London’ PoliticoPro (Brussels, 21 March 2017), <https://www.politico.eu/pro/frankfurts-plan-to-snatch-eu-bank-regulator-from-london/> (accessed on 2 July 2019).

²⁸⁵ P. SMYTH, ‘Paris pips Dublin in race to win post-Brexit European Banking Authority’ The Irish Times (Brussels, 20 November 2017), <https://www.irishtimes.com/business/economy/paris-pips-dublin-in-race-to-win-post-brexit-european-banking-authority-1.3298881> (accessed on 1 August 2019).

²⁸⁶ See *a contrario*, J. MULDER, ‘Let's Build a European Financial Consumer Authority in Paris’ (2017) Blogpost for Better Europe, <https://www.bettereurope.eu/2017/05/efca-paris/> (accessed on 13 July 2019).

3.3. Fintech

Fintech. None of the financial sectors are immune for the ongoing (r)evolution in financial technology, abbreviated “fintech”. Fintech captures “technology-enabled innovation in financial services” and affects the *modus operandi* of financial services providers.²⁸⁷ Although the term might sound rather futuristic, examples of fintech are not far-off. One can think of virtual currencies, crowdfunding platforms, mobile payments or robo-advising.²⁸⁸ Fintech generates opportunities as well as challenges for the financial industry, the regulator and the supervisor.

Opportunities. Being the most frequent users of digital technologies, the financial sectors and their participants are likely to benefit from the opportunities generated by fintech.²⁸⁹ Fintech-based products and services might respond better to consumer needs²⁹⁰, and enhance the safety and efficiency of financial transactions.²⁹¹ Speed and costs of financial services may respectively increase and decrease.²⁹² Furthermore, offer and demand of capital may also be matched more easily (e.g. by enhancing access to funding²⁹³).²⁹⁴ All these advantages are undeniably important to attain financial inclusion in the single financial market.²⁹⁵ It is also interesting to briefly refer to “Regtech” by which is meant the use of fintech by financial services providers to comply with

²⁸⁷ The Financial Stability Board defines fintech as “technology-enabled innovation in financial services that could result in new business models, applications, processes or products with an associated material effect on the provision of financial services”. See, Financial Stability Board, ‘Financial Stability Implications from FinTech. Supervisory and Regulatory Issues that Merit Authorities’ Attention’ (2017), 7.

²⁸⁸ M. DEMERTZIS, S. MERLER and G.B. WOLFF, ‘Capital Markets Union and the fintech opportunity’ (2017) Bruegel Policy Contribution 22, 7-8; European Parliamentary Research Service, ‘Financial technology (fintech): Prospects and challenges for the EU’ (2017), 2.

²⁸⁹ Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions: FinTech Action plan: For a more competitive and innovative European financial sector’ COM(2018) 109 final, 2.

²⁹⁰ D. HE, R. LECKOW e.a. (IMF Staff Team), ‘Fintech and Financial Services: Initial Considerations’ (2017) IMF Staff Discussion Note, 7, marginal 1; B. NICOLETTI, *The Future of FinTech Integrating Finance and Technology in Financial Services* (Palgrave 2017), 5.

²⁹¹ Commission, ‘Summary of contributions to the ‘Public Consultation on FinTech: a more competitive and innovative European financial sector’ (2017), 4.

²⁹² Financial Stability Board, ‘Financial Stability Implications from FinTech. Supervisory and Regulatory Issues that Merit Authorities’ Attention’ (2017), 6 and 11.

²⁹³ Commission, ‘FinTech: Commission takes action for a more competitive and innovative financial market’ Press release (8 March 2018), http://europa.eu/rapid/press-release_IP-18-1403_en.htm (accessed on 3 July 2019) (“New technologies are transforming the financial industry by revolutionizing the way people access financial services. Alternative sources of funding, such as crowdfunding or peer-to-peer lending, directly link savings with investments. They make the market more accessible for innovative entrepreneurs, start-ups and small companies. This objective is at the heart of the Capital Markets Union.”). Also see, Commission, ‘Commission Staff Working Document. Crowdfunding in the EU Capital Markets Union’ SWD(2016) 154 final, 3-4.

²⁹⁴ G. FERRARINI, ‘Regulating Fintech: Crowdfunding and Beyond’ [2018] *European Economy* 3(2), (121) 123-125.

²⁹⁵ A. FRAILE CARMONA, A. GONZÁLEZ-QUEL LOMBARDO e.a., ‘Competition issues in the Area of Financial Technology (FinTech)’ (2018) Study for the ECON Committee, 16.

regulatory requirements²⁹⁶, and to “Suptech” which stands for supervisory technology that enhances the monitoring process of supervisory agencies.²⁹⁷

Challenges. A first challenge stems from the observation that fintech-driven entities are in a position to disrupt traditional financial intermediation, bringing about a climate of disintermediation.²⁹⁸ Through crowdfunding platforms, for instance, companies and investors can directly connect with each other, and skip the middleman.²⁹⁹ Fintech clearly intensifies competition, pushing long-established financial institutions to step up their game.³⁰⁰ A second challenge is the possibility of supervisory gaps: in case a new product is created, which of the three ESAs will be responsible?³⁰¹ A third challenge brought forward by fintech is the exposure of the financial system to cyber risks.³⁰² Although cyber risks extend beyond fintech, a fintech-based environment naturally produces an attractive breeding ground; if cyber risks materialize, financial stability may be on the edge and any value created by fintech may be destroyed.³⁰³ A fourth challenge is to guarantee at all times a sufficient level of consumer and investor protection.³⁰⁴

²⁹⁶ Commission, ‘Summary of contributions to the ‘Public Consultation on FinTech: a more competitive and innovative European financial sector’ (2017), 5-6; European Parliamentary Research Service, ‘Financial technology (fintech): Prospects and challenges for the EU’ (2017), 3.

²⁹⁷ For more information on ‘Suptech’, see, D. BROEDERS and J. PRENIO, ‘Innovative technology in financial supervision (suptech) – the experience of early users’ (2018) FSI Insights on policy implementation 9, 1-26.

²⁹⁸ M. DEMERTZIS, S. MERLER and G.B. WOLFF, ‘Capital Markets Union and the fintech opportunity’ (2017) Bruegel Policy Contribution 22, 3.

²⁹⁹ D. HE, R. LECKOW a.o. (IMF Staff Team), ‘Fintech and Financial Services: Initial Considerations’ (2017) IMF Staff Discussion Note, 14-15, marginal 21.

³⁰⁰ D. HE, R. LECKOW a.o. (IMF Staff Team), ‘Fintech and Financial Services: Initial Considerations’ (2017) IMF Staff Discussion Note, 9, marginal 9; B.NICOLETTI, *The Future of FinTech Integrating Finance and Technology in Financial Services* (Palgrave 2017), 6 and 33.

³⁰¹ V. COLAERT, ‘European Banking, Securities and Insurance Law: Cutting Through Sectoral Lines?’ [2015] *Common Market Law Review* 52(6), (1579) 1607.

³⁰² ‘Cyber risk’ comprises “operational risks to information and technology assets that have consequences affecting the confidentiality, availability, or integrity of information or information systems”. See, A. BOUVERET, ‘Cyber Risk for the Financial Sector: A Framework for Quantitative Assessment’ (2018) IMF Working Paper 143, 4.

³⁰³ Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions: FinTech Action plan: For a more competitive and innovative European financial sector’ COM(2018) 109 final, 2-3; Financial Stability Board, ‘Financial Stability Implications from FinTech. Supervisory and Regulatory Issues that Merit Authorities’ Attention’ (2017), 19; D. HE, R. LECKOW a.o. (IMF Staff Team), ‘Fintech and Financial Services: Initial Considerations’ (2017) IMF Staff Discussion Note, 15, marginal 22.

³⁰⁴ BEUC, ‘Fintech: A More Competitive and Innovative European Financial Sector. BEUC Response to Commission Consultation’ (2017), 7-9.

Adequate regulation and supervision. Europe is well aware of the significant contribution fintech can make to the CMU and to the ultimate realization of a ‘Single Digital Market’.³⁰⁵ The road towards that goal should be guided by a firm regulatory and supervisory framework.³⁰⁶ For some fintech aspects, European legislation is already in place; for others, preparatory work has been carried out.³⁰⁷ Where supranational rules are not yet in place, national legislation matters.³⁰⁸ In order to effectuate supervisory convergence, the regulator shall (again) need the ESAs’ assistance.³⁰⁹ Here as well, fintech complicates things as the products and services as well as the providers are not necessarily operative alongside the sectoral lines.³¹⁰ So far, cross-sectoral action is on the back burner.³¹¹ In view of the existing concerns and the dynamic developments, more joint supervisory initiatives could and probably should come forth, such being requested by various stakeholders as well.³¹²

A single Fintech supervisor. A minority opinion in literature hypothesizes a single European entity to supervise fintech. In this scenario, the honor would again fall to the ESMA’s lot as the postulated COB supervisor. And again, it appears that the concept would amount to separating COB supervision from prudential supervision, adopting a twin peaks structure.³¹³

3.4. Sustainable finance

Sustainable finance. Sustainability is and should be occupying the policy agenda, and rightly it also intrudes the financial system. By sustainable finance is meant “the process of taking due account of environmental and social considerations in investment decision-making, leading to

³⁰⁵ Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions: FinTech Action plan: For a more competitive and innovative European financial sector’ COM(2018) 109 final, 2.

³⁰⁶ M. DEMERTZIS, S. MERLER and G.B. WOLFF, ‘Capital Markets Union and the fintech opportunity’ (2017) Bruegel Policy Contribution 22, 10.

³⁰⁷ European Parliamentary Research Service, ‘Financial technology (fintech): Prospects and challenges for the EU’ (2017), 6-8.

³⁰⁸ *Ibid.*, 3.

³⁰⁹ V. COLAERT, ‘European Financial Regulation: Levelling the Cross-Sectoral Playing Field. A Research Agenda’ in V. COLAERT, D. BUSCH and T. INCALZA, *European Financial Regulation: Levelling the cross-sectoral playing field* (Hart 2019, forthcoming), 7, draft available via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3153754.

³¹⁰ Commission, ‘Summary of contributions to the ‘Public Consultation on FinTech: a more competitive and innovative European financial sector’ (2017), 9.

³¹¹ In the context of robo-advising, see, Financial Stability Board, ‘Financial Stability Implications from FinTech. Supervisory and Regulatory Issues that Merit Authorities’ Attention’ (2017), 44 (“At this stage [2017], however, they see no need for cross-sectoral regulatory or supervisory action”).

³¹² Commission, ‘Summary of contributions to the ‘Public Consultation on FinTech: a more competitive and innovative European financial sector’ (2017), 9.

³¹³ M. DEMERTZIS, S. MERLER and G.B. WOLFF, ‘Capital Markets Union and the fintech opportunity’ (2017) Bruegel Policy Contribution 22, 12.

increased investments in longer-term and sustainable activities”.³¹⁴ Like fintech, sustainability perfectly fits into the project of the CMU.³¹⁵ Also like fintech, sustainability is a concern of all financial sectors. Following the review of the ESAs’ Regulations, the watchdogs have been given the explicit obligation “to take account of risks related to environmental, social and governance factors [ESG] when carrying out their tasks”.³¹⁶ This should empower the ESAs to “monitor how financial institutions identify, report, and address risks that environmental, social and governance factors may pose to financial stability”.³¹⁷ As the topic of sustainability will only gain more influence, it is likely that the ESAs will receive additional powers to cope with the challenges thereto related. Furthermore, the ESAs shall have to cooperate closely with each other: indeed, sustainable finance reaches out to all three sectors. Unless, of course, this modern development once more offers room for a cross-sectoral supervisory structure.

4. Alphabet soup of supervisory actors

Coverage of discussion. This subtitle covers more than one load; it encompasses two components. Firstly, the multiplicity of supervisors could mean a drawback for their efficient operation and necessary cooperation (4.1.). Secondly, the diversity of supervisory models is likely to impede the NCAs’ appropriate representation in the ESAs (4.2.).

4.1. Multiplicity of supervisors

Too much of a good thing. By now, it is unmistakably clear that a supervisory blanket must cover the supranational, elaborate rulebook that regulates the financial activity. The present, complex state of the financial system absolutely prevents a return to the days of self-regulation³¹⁸; simultaneously, the system does not benefit from “too much of the good thing”³¹⁹

³¹⁴ Commission, ‘Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. Action Plan: Financing Sustainable Growth’ COM(2018) 97 final, 2.

³¹⁵ Ibid., 1.

³¹⁶ Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending the ESAs’ Regulations’ COM(2017) 536 final, n 187, 108.

³¹⁷ Ibid., 19.

³¹⁸ I. CHIU, ‘Power and Accountability in the EU Financial Regulatory Architecture: Examining Inter-Agency Relations, Agency Independence and Accountability’ in M. ANDENAS and G. DEIPENBROCK, *Regulating and Supervising European Financial Markets* (Springer 2016), (67) 68-69.

³¹⁹ Wording from Danièle NOUY, Chair of the Supervisory Board of the ECB. See, D. NOUY, ‘Too much of a good thing? The need for consolidation in the European banking sector’ (Madrid, 27 September 2017) Speech at the VIII Financial Forum in <https://www.bankingsupervision.europa.eu/press/speeches/date/2017/html/-ssm.sp170927.en.html> (accessed on 4 July 2019).

that supervision essentially is. Accordingly, in applying a sectoral supervisory approach, the outcome might be less efficient as it could be and should be.³²⁰

Too little attention for similarities. The financial sectors have cross-sectoral commonalities as much as they have sectoral specificities – although stakeholders are less willing to admit that (see *infra*). Proof of this is easily found, especially in legislation. Cross-sectoral legislation may not have been yet forthcoming (except for PRIIPs), but a tendency of cross-pollination between sectoral rules is observable. Evidence of this can be found when laying the Insurance Distribution Directive³²¹ (insurance) next to the Markets in Financial Instruments Directive II (MiFID II)³²² (investment).³²³ The parallels are even labeled as the “Mifidization” of insurance.³²⁴ However, there the resemblance stops: the EIOPA and the ESMA have developed divergent implementing standards. Inconsistencies in level 3 output have been regularly identified.³²⁵ COLAERT rightly puts into question whether the differences can always be rationalized on the basis of distinguishing sectoral factors.³²⁶ Even if separate sectoral rules are justified, the different segments of the financial industry should not be approached in an isolated manner. On the contrary, in order for financial institutions to fulfill their role in the economy and the society, unsubstantiated frictions should be avoided.³²⁷

³²⁰ In the same sense but relating to a different context, see, R.R. BLISS, ‘Multiple regulators and insolvency regimes. Obstacles to efficient supervision and resolution’ in D. MAYES and G.E. WOOD, *The Structure of Financial Regulation* (Routledge 2007), 132.

³²¹ Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution [2016] OJ L 26/19 (“IDD”).

³²² Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L173/349 (“MiFID II”).

³²³ For example, compare Art. 1(2) IDD with Art. 24(2) MiFID II. Also see, Commission, ‘Proposal for a Directive of the European Parliament and of the Council on insurance mediation’ COM(2012) 360 final, 2; V. COLAERT, ‘MiFID II in Relation to Other Investor Protection Regulation: Picking Up the Crumbs of a Piecemeal Approach’ in D. BUSCH and G. FERRARINI (eds.), *Regulation of the EU financial markets: MiFID II and MiFIR* (OUP 2017), 592-595, marginal 21.08-21.14.

³²⁴ H. COUSY, ‘Changing Insurance Contract Law: An Age-Old, Slow and Unfinished Story’ in P. MARANO and M. SIRI (eds.), *Insurance Regulation in the European Union. Solvency II and Beyond* (Palgrave 2017), (31) 47-48.

³²⁵ Such as the remuneration of asset management whereby EBA’s guidelines under CRD were at odds with ESMA’s earlier work under AIFMD and UCITS. See, Association française de la Gestion Financière, ‘AFG Response to EC Consultation on Operations of the European Supervisory Authorities’ (2017), 22-23. Also see, European Parliament, ‘Provisional legislative resolution of 16 April 2019 on the European Supervisory Authorities and financial markets’ (2019), n 187, 77, (article 30(4)).

³²⁶ V. COLAERT, ‘European Financial Regulation: Levelling the Cross-Sectoral Playing Field. A Research Agenda’ in V. COLAERT, D. BUSCH and T. INCALZA, *European Financial Regulation: Levelling the cross-sectoral playing field* (Hart 2019, forthcoming), 5-6, draft available via https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3153754.

³²⁷ M. O’SHEA, ‘Comparison of the Regulatory Approach in Insurance and Banking in the Context of Solvency II’ (2013) European Actuarial Consultative Group, 2; I. HENRY, ‘CRD IV and Solvency II: an executive Summary’ (2012) British Bankers’ Association, 1-2.

Missing out on economies of scale. By operating separately, it is not only more likely that inconsistencies sneak into the ESAs' work, but the trade might also be that certain efficiency gains from cooperation get lost. Currently, there is a high chance of duplication of work, a different treatment of similar products and services (cf. regulatory arbitrage) and additional costs.³²⁸ A potential argument to counter this assertion could be the existence of the JC, but practice has proven how difficult it can be to agree (cf. PRIIPs).³²⁹ If supranational supervision were organized more through a cross-sectoral set-up, such as a twin peaks system, the ESAs could learn from each other. Furthermore, their synergies might translate into economies of scale – on the condition that regulation clearly stipulates the nature of the rules (prudential or COB).³³⁰ An efficient structure is also desirable from a pecuniary point of view. Although cross-sectoral supervisory models do not automatically curb the costs attached, it might be possible that structural modernization entails a more efficient allocation of costs. The proverb “simplicity is the ultimate sophistication” deserves more attention.

Asymmetric powers: the connection SSM-EBA. The ESAs of 2011 largely differ from the ESAs of 2019. Starting from more or less identical founding Regulations, the ESAs have received several additional powers.³³¹ In itself, an asymmetry of powers is not problematic. Nonetheless, there are some issues which should be resolved in the following years. Significant are the so-called regulatory ambiguities that occur because of the interrelation between the EBA and the SSM.³³² For example, the EBA has been assigned the task of developing a supervisory handbook³³³, but the ECB itself has already disposed of a ‘supervisory manual’.³³⁴ Moreover,

³²⁸ R.M. LASTRA, ‘The Governance Structure for Financial Regulation and Supervision in Europe’ [2003] *Columbia Journal of European Law* 10(1), (49) 59-60.

³²⁹ Autorité des marchés financiers, ‘Response of the French Autorité des marchés financiers (AMF) to the European Commission’s consultation on the operations of the European Supervisory Authorities’ (2017), 6.

³³⁰ H. COUSY, ‘Changing Insurance Contract Law: An Age-Old, Slow and Unfinished Story’ in P. MARANO and M. SIRI (eds.), *Insurance Regulation in the European Union. Solvency II and Beyond* (Palgrave 2017), (31) 47; The Group of Thirty, ‘The structure of Financial Supervision: Approaches and Challenges in a Global Marketplace’ (2008), 35.

³³¹ Commission Staff, ‘Commission staff working document, accompanying the document ‘Report from the European Commission to the European Parliament and Council’ on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)’ SWD(2014) 261 final, 5; N. MOLONEY, *The Age of ESMA: Governing EU Financial Markets* (Hart 2018), 319-320.

³³² E. FERRAN and V. BABIS, ‘The European Single Supervisory Mechanism’ [2013] *Journal of Corporate Law Studies* 13(2), (255) 277-278.

³³³ From Andre ENRIA’s explanation (the former chairperson of the EBA), I deduce that the idea of a supervisory handbook was to create a single manual that would be used in all of the 28 Member States, including the ones participating in the SSM. However, it appears that the realization of the plan has been less successful. See, A. ENRIA, ‘The Single Market after the Banking Union’ (Brussels, 18 November 2013) Lecture at the AFME and EBF Banking Union in Europe Conference, 6-8.

³³⁴ Art. 1(5) and (14) Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant

both authorities can conduct stress tests.³³⁵ It is advisable to disentangle these overlaps in order to remove confusion.³³⁶ It has been stated that the approaching end of the Brexit saga might incite the remaining non-eurozone Member States to decide to finally adopt the single currency, the consequence of this being that the ECB's and the EBA's position would change³³⁷, with the possibility of the EBA's position becoming weaker.³³⁸

Unproductive cooperation with the ESRB. The ESFS establishes different cooperation nexuses, all of which involve the ESAs.³³⁹ Left undiscussed so far is the mutual cooperation between the ESAs and the ESRB. On the one hand, the ESAs inform the ESRB of embryonic systemic risk; on the other, the ESAs follow up on the ESRB's warnings and recommendations.³⁴⁰ Moreover, the ESRB participates in the JC and in each of the ESAs' Board of Supervisors.³⁴¹ In literature, the level of efficiency of this reciprocal channel for exchanging information has been largely left uncommented; still, it cannot not be ruled out that a cross-sectoral model of supervision could indeed boost the Authorities' cooperation. In departing from a twin peaks model, for instance, it is conceivable that the authority responsible for (micro-)prudential supervision has the most relevant information for the ESRB. After all, systemic risk stems from the financial (in)stability of financial institutions, rather than from the relationship between the financial institution and its client. It may even be imagined that the ESRB and the

to Council Regulation (EU) No 1024/2013 [2013] OJ L287/5; R. HOUBEN, 'The Single Supervisory Mechanism. Banking supervision in the Eurozone since 4 November 2014' in R. HOUBEN and W. VANDENBRUWAENE, *Het nieuwe banktoezicht - The New Banking Supervision* (Intersentia 2016), (21) 29-30; E. MONTANARO, 'The process towards centralisation of the European financial supervisory architecture: the case of the banking union' [2016] PSL Quarterly Review 69, (135) 158.

³³⁵ E. MONTANARO, 'The process towards centralisation of the European financial supervisory architecture: the case of the banking union' [2016] PSL Quarterly Review 69, (135) 158-159.

³³⁶ Commission, 'Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013' COM(2017) 591 final, 15-16; J.M. ROLDÁN and K. LANNOO, 'ECB Banking Supervision and Beyond' (2014) Report of a CEPS task force, 36-40.

³³⁷ N. MOLONEY, 'Brexit and EU financial governance: business as usual or institutional change?' [2017] *European Law Review* 42(1), (112) 125.

³³⁸ For this hypothesis, see, N. MOLONEY, *The Age of ESMA: Governing EU Financial Markets* (Hart 2018), 320-321; E. FERRAN and V. BABIS, 'The European Single Supervisory Mechanism' [2013] *Journal of Corporate Law Studies* 13(2), (255) 278-279.

³³⁹ There is a need for cooperation within the ESAs by the NCAs – which speaks for itself as it is this system that facilitates supervisory convergence. There is also a need for cooperation between the ESAs (e.g. through the JC; examples of this are given throughout the research paper). See, Commission Staff, 'Commission staff working document, accompanying the document 'Report from the European Commission to the European Parliament and Council' on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)' SWD(2014) 261 final, 4 and 13-14.

³⁴⁰ Art. 36 ESAs' Regulations.

³⁴¹ O.J. ERDÉLYI, *Twin Peaks for Europe: State-of-the-Art Financial Supervisory Consolidation. Rethinking the Group Support Regime Under Solvency II* (Springer 2015), 65.

future prudential peak could unite in one umbrella institution for prudential oversight. As a single group, these bodies could then establish one line of communication with the COB authority.

4.2. Obstacle to appropriate representation

National victory of the cross-sectoral model. Above, it has been stated that the NCAs are the “spokes” of the ESAs’ hubs.³⁴² Before, when a sectoral supervisory model was predominating at national level, the tandem of the supranational model with the national models could advance more easily. Over time, cross-sectoral supervisory models have progressively overshadowed the traditional sectoral triumvirate of supervisors.³⁴³ This process is partially attributable to the intertangling of financial sectors, and has received a fresh impetus with the financial crisis.³⁴⁴ The mismatch of models does complicate the proper and competent participation of the NCAs’ representatives in the ESAs.³⁴⁵

Delegating the proper NCA to the ESA. A difficult issue relates to the ESAs’ governance. Within the ESAs’ Boards of Supervisors, each Member State is represented by one NCA.³⁴⁶ Which national supervisor should be delegated to the meetings? An integrated supervisor, being a specialist in everything, shall have to attend every meeting of each ESA and shall have to adapt to the issues scheduled on the agenda. But what in case of a national twin peaks model? As each ESA has a prudential and a consumer protection mandate, the delegation of one or the other “peak” authority implies a risk of pinning down the focus on one of both topics. This risk may materialize if a NCA does not even dispose of a consumer protection mandate, something which

³⁴² N. MOLONEY, ‘The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (1) Rule-Making’ [2011] *European Business Organization Law Review* 12(1), (41) 79.

³⁴³ D. CALVO, J. CRISANTO, S. HOHL and O. GUTIERREZ, ‘Financial supervisory architecture: what has changed after the crisis?’ (2018) *FSI Papers* 8, 36; R. HERRING and J. CARMASSI, ‘The Structure of Cross-Sector Financial Supervision’ [2008] *Financial Markets, Institutions & Instruments* 17(1), (51) 53 and 56.

³⁴⁴ D. CALVO, J. CRISANTO, S. HOHL and O. GUTIERREZ, ‘Financial supervisory architecture: what has changed after the crisis?’ (2018) *FSI Papers* 8, 10, marginal 25; A. GODWIN, T. HOWSE and I. RAMSAY, ‘A jurisdictional comparison of the twin peaks model of financial regulation’ [2017] *Journal of Banking Regulation* 18(2), (103) 103-104; P. VAN CLEYNENBREUGEL, ‘From Shared Competences to Institutional Heteronomy. The Constitutional Architecture of Supranationally Structured Market Supervision’ (PhD thesis Catholic University of Leuven 2013), 215, marginal 221.

³⁴⁵ Criticism has been raised regarding the fact that the evolution of the supervisory regimes in the different Member States has been ignored when the ESFS was created. See, Joint Committee on the draft Financial Services Bill, ‘Draft Financial Services Bill’ (2011) Parliament of Great Britain, 70, marginal 299; N. 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’ [2011] *European Business Organization Law Review* 12(2), (177) 217.

³⁴⁶ Art. 40(4) ESMA Regulation.

can be perceived in more than one NCA.³⁴⁷ By itself, this governance model is likely to deprioritize the ESAs' mandate for consumer protection.³⁴⁸ To some extent, the ESAs' Regulations have anticipated this problem by stipulating that if the subject matter demands different expertise, an alternate may sit on the Board.³⁴⁹ However, by replacing the representative, a smooth decision-making process may be perniciously affected since varying compositions hinder a solid level of trust.³⁵⁰

5. Intermediate assessment

Intermediate assessment. Before discussing the arguments in favour of a sectoral institutional architecture, I find it useful to reflect on the four (overarching) arguments against such structure. In my opinion, the blurring of sectors together with the demand for effective consumer protection, are the most coercing arguments to adopt a cross-sectoral supervisory model, especially a twin peaks model. Separating prudential supervision from COB supervision, instead of drawing (theoretical) lines between the financial sectors, could present a holistic and balanced perspective to approach the financial system. Out of the four discussed challenges which have to be tackled in the near future, I find the fight against money laundering operations, the (r)evolution in fintech and sustainable finance to add the most weight to the case for twin peaks supervision. In my estimation, Brexit does not urge a change of structure, but pressures to tighten supervisory convergence. Finally, discarding the disadvantages sprouting from the “alphabet soup of supervisors” could be a nice bonus of a cross-sectoral supervisory model, but in my opinion, this argument does not constitute one of the crucial pillars shouldering the case for structural transformation. *Prima facie*, the plea for referring the sectoral model to the history books has a lot of merit. In practice, things are naturally more complex than a mere enumeration of four points of cross-sectoral defense. Part C of this second chapter offers several arguments that provide a counterweight. These will be explored in detail, in order to make an honest and truthful evaluation of the (dis)continuation of the sectoral model.

³⁴⁷ BEUC, ‘Review of the European Financial Supervisors: BEUC response to the Commission consultation’ (2017), 4; EBA Banking Stakeholder Group, ‘Consultation on the operations of the European supervisory authorities. General Comments and Replies to Questions’ (2017), 10.

³⁴⁸ BEUC, Better Finance, Finance Watch, AGE Platform Europe, EFIN and COFACE Families Europe, ‘Proposal for the EU financial supervisory reform’ (2017) Open letter, 3-4. Also see, M.N. BAILY, A. KLEIN and J. SCHARDIN, ‘The Impact of the Dodd-Frank Act on Financial Stability and Economic Growth’ [2017] *The Russell Sage Foundation Journal of the Social Sciences* 3(1), (20) 30.

³⁴⁹ Art. 40(4) ESMA Regulation.

³⁵⁰ N. 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 [2011] *European Business Organization Law Review* 12(2), (177) 217.

C. Arguments in favour of the ESAs' sectoral model

The following six subsections contain the arguments that unravel the reasons why the ESAs' sectoral architecture has stood the test of time, and that demonstrate why a structural overhaul may not be as feasible as thought.

1. Path dependence

Path dependence. A first explanation for preserving the sectoral approach stems from the path dependence theory. Following MAHONEY, a path dependent process refers to “historical sequences in which contingent events set into motion institutional patterns or event chains that have deterministic properties”.³⁵¹ An examination of the timeline throughout Chapter I highlighted that the trident of banking, securities and insurance has solidly planted itself in the territory of financial law. *Pro memoria*, originally, the different Member States (*avant la lettre*) autonomously imposed various rules addressing, *inter alia*, the financial (in)stability of banks and/or the information asymmetry relating to investment.³⁵² Then came the European single market, entailing financial liberalization, deregulation and competition, and through these consequences, the integration of financial services.³⁵³ Meanwhile, the first pieces of harmonizing legislation had been enacted, sectorally dismantling national fences.³⁵⁴ LAMFALUSSY and his 3L3 committees only invigorated the sectoral *modus operandi*; DE LAROSIÈRE and his ESAs extended this logic. In other words, citing IKENBERRY, “seemingly small decisions at specific historical moments can take politics down long pathways - pathways that are difficult to alter or reverse”.³⁵⁵ In the sequence of events, the importance of timing should not be underestimated. As PIERSON notes: if an event – *in casu* the integration of financial services – takes place “too

³⁵¹ J. MAHONEY, ‘Path Dependence in Historical Sociology’ [2000] *Theory and Society* 29(4), (507) 507-508. Also see, J.L. HANSEN, ‘A Path-dependent Route towards a Single Financial Regulator: The Experience of Denmark’, in M. ANDENAS and Y. AVGERINOS, *Financial Markets in Europe: Towards a Single Regulator?* (Kluwer 2003), (447) 447-448 and 455.

³⁵² See, Chapter I, page 8-10.

³⁵³ For an application of the path dependence theory on Germany, see, R. DEEG, ‘Institutional Change and the Uses and Limits of Path Dependency: The Case of German Finance’ (2001) Paper for the Max Planck Institute für Gesellschaftsforschung 6, 15-36.

³⁵⁴ R.R. BLISS, ‘Multiple regulators and insolvency regimes. Obstacles to efficient supervision and resolution’ in D. MAYES and G.E. WOOD, *The Structure of Financial Regulation* (Routledge 2007), (132) 139 (“Functional regulation is a natural consequence of historical distinctions between different financial services – traditional banking, insurance, securities brokers/dealers. These financial sectors present different issues for regulators to address”).

³⁵⁵ G.J. IKENBERRY, ‘History’s Heavy Hand: Institutions and the Politics of the State’ (1994) Paper for the conference on “New Perspectives on Institutions” at the University of Maryland, 16-17.

late”, it may not have any effect, whereas had it occurred earlier, the consequences might have been greater.³⁵⁶

Increased returns lock in the path. Along the path, the sectoral approach has reinforced itself. This idea is encapsulated in what ARTHUR describes as “increased return processes” or “positive feedback processes”.³⁵⁷ Great developments towards European integration have been made by means of sectorally applicable rules and thereafter, by means of cooperation amongst national supervisors. In ARTHUR’s perspective, the path might have locked in the sectoral solution, as a reason of which possibly worthy alternatives are being disregarded.³⁵⁸

The efforts may not go to waste. It is highly probable that the increased returns in nurturing sectoral regulation and supervision, are triggered by the costs and time incurred for the purpose of it.³⁵⁹ It took tremendous efforts to create the present framework; cross-sectoral alternatives like integrated or twin peaks supervision – of which the superiority compared to a three-pillar model is not proven (see *infra*) – expose both Europe and Member States with sectoral supervisors, to new costs. Part of the feedback on the ESAs review indeed expressed worries about the price tag attached to the adoption of a twin peaks model.³⁶⁰ Another trigger is the level

³⁵⁶ P. PIERSON, ‘Increasing Returns, Path Dependence, and the Study of Politics’ [2000] *The American Political Science Review* 94(2), (251) 263; K. THELEN, ‘Historical Institutionalism in Comparative Politics’ [1999] *Annual Review of Political Science* 2, (369) 388.

³⁵⁷ P. PIERSON, ‘Increasing Returns, Path Dependence, and the Study of Politics’ [2000] *The American Political Science Review* 94(2), (251) 252; W.B. ARTHUR, ‘On competing technologies and historical small events: the dynamics of choice under increasing returns’ (1983) IIASA Working Paper 90, 3.

³⁵⁸ W.B. ARTHUR, ‘Competing technologies, increasing returns, and lock-in by historical events’ [1989] *The Economic Journal* 99, (116) 117. In the same sense see, G.J. IKENBERRY, ‘History’s Heavy Hand: Institutions and the Politics of the State’ (1994) Paper for the conference on “New Perspectives on Institutions” at the University of Maryland, 20. Also see, N. MOLONEY, *The Age of ESMA: Governing EU Financial Markets* (Hart 2018), 317-318.

³⁵⁹ P. PIERSON, ‘Increasing Returns, Path Dependence, and the Study of Politics’ [2000] *The American Political Science Review* 94(2), (251) 254; W.B. ARTHUR, *Increasing Returns and Path Dependence in the Economy* (University of Michigan 1994), 112. Applied to the topic, see, Banco de Portugal, ‘White Paper on the regulation and supervision of the financial system’ (2016), 25 (“In fact, a drastic institutional transformation would imply using precious time and energy that may be better spent in other priorities”); H. DAVIES, ‘Finance Regulation: why, how and by whom?’ [1997] *Bank of England Quarterly Bulletin*, (107) 110-111 (“The argumentation behind the proposal is considered and thoughtful. But we are not convinced that the substantial upheaval and cost involved would be warranted”).

³⁶⁰ The Division Bank and Insurance of the Austrian Federal Economic Chamber, ‘Public Consultation on the Operations of the European Supervisory Authorities’ (2017), 14; Magyar Nemzeti Bank, ‘Comments of the Magyar Nemzeti Bank on the public consultation launched by the European Commission on the operation of the European Supervisory Authorities’ (2017), 9.

of specialization that has been built up.³⁶¹ Sector-specific knowledge and insights are indeed mentioned amongst the advantages of a sectoral model (see *infra*).³⁶²

One of many variables. Of course, historical influence is only one aspect of Europe's persistence to stick to a sectoral approach: as noted earlier, the choice for *any* model depends not only on its inherent advantages and disadvantages, but also on country specific elements, such as economic and institutional arrangements.³⁶³ To cite MASCIANDARO: "Therefore, the supervisory regime is not deterministic, nor, on the other side, completely accidental".³⁶⁴

2. Political objection

Cross-sectoral model has lacked political support. Europeanization is subject to bottom-up preferences, influences and sometimes, scepticism. In between the lines of the Lamfalussy report and the de Larosière report, it can be read that political endorsement was lacking to organize European financial supervision cross-sectorally.³⁶⁵ With regard to the reasons *why* this was the case, both reports stayed on the surface. Below, some useful theories are explored which can help to politically contextualize the sectoral model.

Strategic decisions. Following BÖRZEL, Member States can adopt three strategies in the endeavour for European integration: they are either pacesetters (pushing European policies) or foot-draggers (blocking European policies)³⁶⁶ or fence-sitters (engaging in a sort of 'waiting

³⁶¹ P. PIERSON, 'Increasing Returns, Path Dependence, and the Study of Politics' [2000] *The American Political Science Review* 94(2), (251) 255 ("Increasing returns provide an answer. Knowledge-intensive sectors are prone to positive feedback. Countries that gain a lead in a particular field, for whatever reason, are likely to consolidate that lead over time. The result is a high degree of specialization"); W.B. ARTHUR, *Increasing Returns and Path Dependence in the Economy* (University of Michigan 1994), 112.

³⁶² K. LANNOO, 'Challenges to the structure of financial supervision in the EU' in M. BALLING, E.H. HOCHREITER and E. HENNESSY, *Adapting to Financial Globalisation* (Routledge 2001), (259) 269.

³⁶³ E. WYMEERSCH, 'The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors' [2007] *European Business Organization Law Review* 8(2), (237) 264.

³⁶⁴ D. MASCIANDARO, 'Divide et impera: Financial supervision unification and central bank fragmentation effect' [2007] *European Journal of Political Economy* 23(2), (285) 288. In another contribution, MASCIANDARO articulates his point of view as follows: "(...) to consider the supervisory structure as dependent variable, determined in turn by the dynamics of other structural variables". See, D. MASCIANDARO, 'Comment: Allocating financial regulatory powers: the twin views' in D. MAYES and G.E. WOOD, *The Structure of Financial Regulation* (Routledge 2007), (213) 218.

³⁶⁵ Lamfalussy report, n 104, 8.

³⁶⁶ For example, in the course towards the Banking Union, the UK wanted to safeguard its position as non-eurozone Member State and threatened to only go along with the project if sufficient guarantees were given for the so-called 'euro-outsiders'. See, L. QUAGLIA, 'European Union Financial Regulation, Banking Union, Capital Markets Union and the UK' (2017) Sheffield Political Economy Research Institute (SPERI) Paper 38, 10; D. HOWARTH and L. QUAGLIA, 'The Political Economy of the Single Supervisory Mechanism: Squaring the 'Inconsistent Quartet' (2015) EUSA Biennial Conference, 21.

game' before aligning with the pacesetters or the foot-draggers).³⁶⁷ Adopting one of the various strategies – which is a dynamic choice that can change over time – is not only dependent on the price tag attached to the proposed plans. A predominant factor is also the incentive for Member States to transfer their own policy upwards.³⁶⁸ In determining which European steps are to be taken next, national governments are led by their preferences, and try to let their mindset and their institutional arrangements prevail.³⁶⁹ The triangle of European superpowers, being the UK, Germany and France, has attempted to affect the Union's regulatory framework from its earliest stages.³⁷⁰ The trio commonly holds conflicting philosophies.

Advocacy coalition. QUAGLIA appeals to SABATIER's framework of an 'advocacy coalition'³⁷¹, by which is meant that policy makers and stakeholders who are actively concerned with a certain issue, will seek to influence the thereto related public policy.³⁷² The supporters of the market-making advocacy coalition, amongst which are the UK and the Netherlands, trust the market and desire "light" regulation based on principles and providing some "breathing space". Conversely, the adherents to the market-shaping advocacy coalition, such as France and Germany, distrust the market, which explains their preference for prescriptive, rule-based regulation that neatly organizes the market and market participants.

Theory put into practice. By combining and applying these theories, the following thoughtful and cautious observations can be made. First of all, it can be argued that, given the freedom of the Member States to autonomously choose a (any) supervisory model, the coexistence of various models³⁷³ unavoidably makes it harder to agree on a fixed model for European supervision.³⁷⁴

³⁶⁷ S. BULMER and S. PADGETT, 'Policy transfer in the European Union: An Institutional Perspective' [2005] *British Journal of Political Science* 35(1), (103) 105; T.A. BÖRZEL, 'Pace-Setting, Foot-Dragging, and Fence-Sitting: Member State Responses to Europeanization' [2002] *Journal of Common Market Studies* 40(2), (193) 197-208.

³⁶⁸ T.A. BÖRZEL, 'Pace-Setting, Foot-Dragging, and Fence-Sitting: Member State Responses to Europeanization' [2002] *Journal of Common Market Studies* 40(2), (193) 196.

³⁶⁹ L. QUAGLIA, 'Completing the single market in financial services: the politics of competing advocacy coalitions' [2010] *Journal of European Public Policy* 17(7), 1009; S. BULMER and S. PADGETT, 'Policy transfer in the European Union: An Institutional Perspective' [2005] *British Journal of Political Science* 35(1), (103) 105-106.

³⁷⁰ G. UNDERHILL, 'The making of the European financial area: global market integration and the EU single market for financial service' in G. UNDERHILL (ed.), *The New World Order in International Finance* (Macmillan 1997), (101) 108-109.

³⁷¹ P.A. SABATIER, 'The advocacy coalition framework: revisions and relevance for Europe' [1998] *Journal of European Public Policy* 5(1), (98) 103.

³⁷² L. QUAGLIA, 'Completing the single market in financial services: the politics of competing advocacy coalitions' [2010] *Journal of European Public Policy* 17(7), (1007) 1008.

³⁷³ D. CALVO, J. CRISANTO, S. HOHL and O. GUTIERREZ, 'Financial supervisory architecture: what has changed after the crisis?' (2018) *FSI Papers* 8, 5 and 33.

³⁷⁴ O.J. ERDÉLYI, *Twin Peaks for Europe: State-of-the-Art Financial Supervisory Consolidation. Rethinking the Group Support Regime Under Solvency II* (Springer 2015), 203.

Furthermore, it has been indicated that a national government's choice for a model is not an abstract exercise, and is influenced by the domestic context (e.g. historical and institutional arrangements).³⁷⁵ Since Europe is a jumble of national financial systems, each of which is unique, it is unlikely that there is an unerring supervisory model that completely matches the European context.³⁷⁶ Unless all Member States would adopt a twin peaks model (*de facto* “bottom-up” harmonization), it does not seem feasible nor advisable to merely “legally transplant”³⁷⁷ a national supervisory structure to the European level.³⁷⁸ MASCIANDARO and QUINTYN state that the conservative approach has the best chance of national political acceptance.³⁷⁹

Secondly, if changes to the European supervisory structure collude with a shift of supervisory powers to the European level (in light of the CMU), it can be expected that Member States will take divergent stances.³⁸⁰ However, with regard to the idea of creating stronger ESAs, it appears that the superpowers' philosophy upholds a system characterized by decentralization.³⁸¹ As for Germany, the country is opposed to attributing new powers to the ESAs – fearing the creation of “a supervisor of the supervisor”. Instead, it recommends the ESAs to make better use of their existing competences.³⁸² This is not surprising: being part of the market-shaping advocacy coalition, it is indeed likely that Germany approves of strong supervision; however, it would rather take charge of this task itself. From the UK, a similar attitude would be expected, on the

³⁷⁵ For instance, the extent to which the boundaries between the financial sectors have blurred and as a consequence of that, the presence (or absence) of financial conglomerates.

³⁷⁶ E. MONTANARO, ‘The process towards centralisation of the European financial supervisory architecture: the case of the banking union’ [2016] PSL Quarterly Review 69, (135) 142; J. STORY and I. WALTER, *Political economy of financial integration in Europe. The battle of the systems* (Manchester University Press 1997), 6 and 23.

³⁷⁷ ‘Legal transplants’ are legal concepts that jurisdictions borrow from each other and implement in their own legal system. It is crucial that a proposed legal transplant fits into the legal culture where it is to be implemented. See, A. WATSON, *Legal transplants: an approach to comparative law* (Scottish Academic Press 1974), 22-23.

³⁷⁸ J.J. NORTON, ‘Global Financial Sector Reform: The Single Financial Regulator Model Based on the United Kingdom FSA Experience – A Critical Reevaluation’ [2005] Policy International Lawyer 39(1), (15) 21-22.

³⁷⁹ D. MASCIANDARO and M. QUINTYN, ‘Regulating the Regulators: The Changing Face of Financial Supervision Architectures before and after the Crisis’ [2012] European Company Law 6(5), (187) 191-192.

³⁸⁰ P. STÄNDER, ‘What will happen with the Capital Markets Union after Brexit?’ (2016) Jacques Delors Institut Policy Paper 181, 11; A. SPENDZHAROVA, ‘Is More ‘Brussels’ the Solution? New European Union Member States’ Preferences about the European Financial Architecture’ [2012] Journal of Common Market Studies 50(2), (315) 318-328; M. HERDEGEN, *Bankenaufsicht im Europäischen Verbund. Banking Supervision within the European Union* (De Gruyter 2010), 148.

³⁸¹ E. MONTANARO, ‘The process towards centralisation of the European financial supervisory architecture: the case of the banking union’ [2016] PSL Quarterly Review 69, (135) 141.

³⁸² F. HUFELD, ‘Review of the European System of Financial Supervision’ (Brussels, 27 February 2018) Statement at the Public Hearing, European Parliament (ECON Committee), https://www.bafin.de/SharedDocs/Veroeffent-lichungen/EN/Reden/re_180227_ESAReview_p_en.html (accessed on 15 July 2019).

basis of its reluctance in the past to shift powers from NCAs to EU level authorities³⁸³ (with a recent attack on the ESMA's powers, see *infra*).³⁸⁴ However, the content of the CMU offers an attractive market-making package for the UK³⁸⁵, as a consequence of which the British find themselves in a hybrid position.³⁸⁶ Of course, Brexit will to a large extent deprive the UK of the CMU's benefits.³⁸⁷ The political setting is about to change as well, with the market-making advocacy coalition losing an important participant (at least for the purpose of further European plans). In any case, it can be presumed that building a twin peaks model on the shoulders of centralized supervision is not as self-evident as *prima facie* presented in literature.³⁸⁸

3. Constitutional and judicial limits

Constitutional limits... In order to make substantive changes to the tripartite ESAs' model, it is paramount to take account of possible constitutional restraints contained in the Treaty of the Functioning of the European Union (TFEU). One restraint that should not be overlooked is Article 127(6) TFEU. This provision has been particularly relevant for establishing the BU and the SSM³⁸⁹, and impacts the pendant question whether to centralize or to decentralize financial supervision. If the EBA would have been chosen over the ECB to be in charge of direct

³⁸³ M. BOŽINA BEROŠ, *Agencies in European Banking: A Critical Perspective* (Palgrave 2018), 31; L. QUAGLIA, 'European Union Financial Regulation, Banking Union, Capital Markets Union and the UK' (2017) Sheffield Political Economy Research Institute (SPERI) Paper 38, 6.

³⁸⁴ The Netherlands join the UK, asserting that the ESAs must make use of the powers at their disposal rather than adding new powers. See, The Netherlands Ministry of Finance, the Netherlands Financial Markets Authority and the Dutch Central Bank, 'Response of the Netherlands – European Commission Green Paper – Building a Capital Markets Union' (2015), 28. However, Pervenche Berès (French Member of the European Parliament) remarks that in order for the ESAs to fully make use of their powers, adjustments are necessary in respect of their governance. See, P. KALETA, 'Q and A with Pervenche Berès' (2018), <https://www.pervencheberes.fr/?p=12449> (accessed on 15 July 2019) ("People are complaining that the ESAs don't use their full power. But they don't have the structure to use their power if there is a self-blocking mechanism like the board of supervisors installed, which is very dear to the Germans").

³⁸⁵ From which I deduce that Europe has attempted to use the CMU as bait to avoid Brexit. Also see, G. DAWSON, 'It's time the City – and the UK – show support for a capital markets union' City AM (London, 18 February 2015), <http://www.cityam.com/209755/it-s-time-city-and-uk-show-support-capital-markets-union> (accessed on 15 July 2019).

³⁸⁶ Overall, the CMU has enjoyed the UK's political backing. See, House of Lords, 'Capital Markets Union: a welcome start' (2015) 11th Report of Session 2014-2015, European Union Committee, 29, marginal 72-75. Also see, L. QUAGLIA and D. HOWARTH, 'The policy narratives of European capital markets union' [2018] *Journal of European Public Policy* 25(7), (990) 991.

³⁸⁷ However, Brexit is also a setback for the CMU. See, A. MULLINEUX, '“Brexit”: ‘The City’ and EU capital markets' [2019] *International Economics and Economic Policy* 16, (17) 24-25; M. FEDERLE, 'The CMU initiative: Is a hard Brexit really an option?' (2018) *Politheor: European Policy Network*, <https://politheor.net/the-cmu-initiative-is-a-hard-brexit-really-an-option/> (accessed on 15 July 2019).

³⁸⁸ In this sense also see, A. CARRIER, 'Member States to continue discussions over controversial ESAs review proposal' (2018), *Blogpost Norton Rose Fulbright*, <https://www.regulationtomorrow.com/eu/member-states-to-continue-discussions-over-controversial-esas-review-proposal/> (accessed on 16 July 2019).

³⁸⁹ See footnote 139.

supervision, a treaty change would have been necessary which would have delayed the process.³⁹⁰ Such detour has been avoided by using the enabling clause in Article 127(6) TFEU which explicitly permits the conferral of prudential banking supervision to the ECB. Still, Article 127(6) TFEU has its limits. It deprives the ECB of assuming any supervisory tasks in respect of insurance companies; as a consequence, the provision cannot effectuate the suggested merger between the ECB and the EIOPA.³⁹¹

In connection with the issue of centralization of powers, attention must also be paid to Article 114 TFEU, which is the legal basis for furthering internal market harmonization through the “approximation of laws”.³⁹² Through this provision, birth was given to the ESAs³⁹³ and substantial powers have been delegated to them. Yet, the more advanced these powers become, the more doubts are casted on whether Article 114 TFEU suffices.³⁹⁴ This uncertainty stems from the *Meroni* doctrine which was formulated by the Court of Justice of the European Union (CJEU).

... and judicial limits. Following *Meroni*, delegation cannot entail a wide margin of discretion.³⁹⁵ Because of *Meroni*, the UK recently questioned the ESMA’s far-reaching powers in the context of short selling. The CJEU’s answer was that “the delegation of powers is lawful as long as it indicates objective criteria and circumscribed conditions for their exercise, and these criteria are

³⁹⁰ I.-M. FALLESEN, ‘The Challenges of the EU Banking Union – will it succeed in dealing with the next financial crisis?’ (2015) Bruges European Economic Policy Briefings 36, 13.

³⁹¹ This is further illustrated by the fact that, unlike EBA and ESMA, the ECB is not represented in the Board of EIOPA. See, EIOPA, ‘List of Members and Observers of the EIOPA Board of Supervisors’ (2019), <https://eiopa.europa.eu/Publications/Administrative/BoS%20of%20EIOPA%20%28Public%29.pdf> (accessed on 1 August 2019).

³⁹² E. FAHEY, ‘Does the Emperor Have Financial Crisis Clothes? Reflections on the Legal Basis of the European Banking Authority’ [2011] *The Modern Law Review* 74(4), (581) 586.

³⁹³ Recital 17 ESAs’ Regulation. Also see, G. TSAGAS, ‘The Regulatory Powers of the European Supervisory Authorities: Constitutional, Political and Functional Considerations’ in M. ANDENAS and G. DEIPENBROCK, *Regulating and Supervising European Financial Markets* (Springer 2016), (103) 112.

³⁹⁴ See in this respect, the opinion of Advocate General Jääskinen in the ESMA Short Selling case: CJEU C-270/12, *United Kingdom vs. European Parliament and Council of the European Union* [2013] ECLI:EU:C:2013:562, Opinion of AG Jääskinen, paras 35-53. Also see, G. TSAGAS, ‘The Regulatory Powers of the European Supervisory Authorities: Constitutional, Political and Functional Considerations’ in M. ANDENAS and G. DEIPENBROCK, *Regulating and Supervising European Financial Markets* (Springer 2016), (103) 113-118 and 122-126; G. THIEFFRY, ‘After the Lamfalussy Report: The First Steps towards a European Securities Commission?’ in M. ANDENAS and Y. AVGERINOS, *Financial Markets in Europe: Towards a Single Regulator?* (Kluwer 2003), (183) 197.

³⁹⁵ CJEU C-9/56, *Meroni v. High Authority* [1958] ECR 133. Also see, G. DEIPENBROCK, ‘The European Securities and Markets Authority and Its Regulatory Mission: A Plea for Steering a Middle Course’ in M. ANDENAS and G. DEIPENBROCK, *Regulating and Supervising European Financial Markets* (Springer 2016), (13) 24; M. BUSUIOC, ‘Rule-Making by the European Financial Supervisory Authorities’ [2013] *European Law Journal* 19(1), 111-125; N. MOLONEY, ‘The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (1) Rule-Making’ [2011] *European Business Organization Law Review* 12(1), (41) 73-76.

subject to judicial review”³⁹⁶, translated by some as “mellowing the *Meroni* doctrine”.³⁹⁷ In light of the UK’s and other Member States’ resistance to a far-reaching centralization of powers, the Court’s deference to Article 114 TFEU is a bitter pill to swallow³⁹⁸. As the decision clears the road for more centralized responses, the controversy will probably far from quiet.³⁹⁹

4. Specialization

The (dis)advantage of sector-specific expertise. If there is one characteristic that can be attributed exclusively to a sectoral supervisory model, it is the sector-specific expertise that supervisors are able to build up.⁴⁰⁰ Because the ESMA, the EBA and the EIOPA are each responsible for a different financial sector, they are capable of familiarizing themselves with sector-specific particularities: they know *what* to supervise.⁴⁰¹ For market participants, having only one supervisory authority as a counterpart is very attractive as well: duplication of control is avoided and the costs of supervision can be reduced considerably. By now, the reader is probably aware of the fact that sectoral specialization is of less importance in a financial system that evolves towards cross-sectoral activities and despecialization of intermediaries. The ESAs are required to have a sufficient level of knowledge of the specificities characterizing the other sectors.⁴⁰² Logically, one would think that the argument of sectoral know-how does not convince

³⁹⁶ CJEU C-270/12, *United Kingdom vs. European Parliament and Council of the European Union* [2014] ECLI:EU:C:2014:18.

³⁹⁷ G. DEIPENBROCK, ‘The European Securities and Markets Authority and Its Regulatory Mission: A Plea for Steering a Middle Course’ in M. ANDENAS and G. DEIPENBROCK, *Regulating and Supervising European Financial Markets* (Springer 2016), (13) 25; C.F. BERGSTRÖM, ‘Shaping the new system for delegation of powers to EU agencies: *United Kingdom v. European Parliament and Council (Short selling)*’ [2015] *Common Market Law Review* 52(1), (219) 219-242; M. SIMONCINI, ‘Legal Boundaries of European Supervisory Authorities in the Financial Markets: Tensions in the Development of True Regulatory Agencies’ [2015] *Yearbook of European Law* 34(1), 319-350; J. PELKMANS and M. SIMONCINI, ‘Mellowing Meroni: How ESMA can help build the single market’ (2014) CEPS Commentary, 1-6.

³⁹⁸ M. BOŽINA BEROŠ and I. BAJAKIĆ, ‘Examining agency governance in the European Union financial sector – a case-study of the European Securities and Markets Authority’ [2017] *Economic Research-Ekonomska Istraživanja* 30(1), (1743) 1752; A. BAKER, ‘European court rejects UK challenge against EU short-selling ban’ *Financial Times* (London, 22 January 2014), <https://www.ft.com/content/68cbcb64-834c-11e3-aa65-00144feab7de> (accessed on 23 July 2019).

³⁹⁹ G. LO SCHIAVO and A. TÜRK, ‘The Institutional Architecture of EU Financial Regulation: The Case of the European Supervisory Authorities in the Aftermath of the European Crisis’ in L.S. TALANI, *Europe in Crisis: A Structural Analysis* (Palgrave 2016), (89) 95-96.

⁴⁰⁰ EIOPA Occupational Pensions Stakeholder Group (OPSG), ‘Public consultation on the operations of the European Supervisory Authorities’ (2017), 20; The Division Bank and Insurance of the Austrian Federal Economic Chamber, ‘Public Consultation on the Operations of the European Supervisory Authorities’ (2017), 12.

⁴⁰¹ F. DEMARIGNY, J. MCMAHON and N. ROBERT, ‘Review of the New European System of Financial Supervision (ESFS). Part 1: The Work of The European Supervisory Authorities (EBA, EIOPA and ESMA) – The ESFS’S Micro-Prudential Pillar’ (2013) Study for the ECON Committee, 111; K. LANNOO, ‘Challenges to the structure of financial supervision in the EU’ in M. BALLING, E.H. HOCHREITER and E. HENNESSY, *Adapting to Financial Globalisation* (Routledge 2001), (259) 269.

⁴⁰² AIMA, ‘AIMA Response to the Public Consultation on the Operations of the European Supervisory Authorities’ (2017), 13.

as much as it did before. Nevertheless, contrary to expectations, the extensive feedback on the ESAs review demonstrates that the ESAs themselves and a large majority of (numerous) respondents appreciate sectoral specialization and are not persuaded that another supervisory structure should substitute the current one.⁴⁰³

ESAs' opinion. The EBA and the EIOPA have commented negatively on the potential reform of the ESAs' current tripartite structure. The EIOPA has warned against rushing changes to the institutional structure and stresses the interlinkage between prudential and conduct matters.⁴⁰⁴ The EBA has enunciated that it sees no point in being merged with the EIOPA for the purpose of constructing a twin peaks model.⁴⁰⁵ The ESMA has not explicitly advised against an institutional reform. From its feedback on the ESAs review of 2017, it can be inferred that the securities watchdog took in a fence-sitter position (see *supra*), seeing which way the wind blows in terms of waiting whether or not it would receive new supervisory tasks.⁴⁰⁶ Recently, it has been decided to indeed attribute additional powers to the ESMA. In light of this present state of affairs, the ESMA will perhaps positively evaluate the adoption of a twin peaks model in the next review. Note, however, that the opinion of the ESAs might not have an effect on the outcome of a reformative process. It is a fact that the decision to move the EBA to Paris has been taken without the EBA having any say in the procedure of choosing the location.⁴⁰⁷

Stakeholders not convinced. Stakeholders⁴⁰⁸ appraise the sectoral know-how's efficiency relative to other models. Generally, the majority of stakeholders are particularly keen on maintaining this asset.⁴⁰⁹ The insurance industry does not make a secret of its dissent from the concept of unified supervision (and also regulation) for banking and insurance matters.⁴¹⁰ This

⁴⁰³ Commission, 'Feedback statement on the public consultation on the operations of the European Supervisory Authorities having taken place from 21 March to 16 May 2017' (2017), 17.

⁴⁰⁴ EIOPA, 'Consultation on the operations of the European Supervisory Authorities' (2017) Letter to the European Commission, 2.

⁴⁰⁵ EBA, 'Opinion of the European Banking Authority on the public consultation on the operation of the European Supervisory Authorities' (2017), 4-5.

⁴⁰⁶ ESMA, 'ESMA response to the public consultation on the operations of the European Supervisory Authorities' (2017) Letter to the European Commission, 3.

⁴⁰⁷ C. CONTIGUGLIA, 'EU agency staff who don't want to leave London set to miss out on benefits' Politico (Brussels, 8 July 2017), <https://www.politico.eu/article/ema-eba-staff-london-benefits/> (accessed on 16 July 2019).

⁴⁰⁸ See footnote 35.

⁴⁰⁹ Insurance Europe, 'Response to the European Commission's Consultation on the Review of the European System of Financial Supervision' (2017), 21; Paris EUROPLACE, 'Response to the European Commission's public consultation on the operations of the European Supervisory Authorities' (2017), 1.

⁴¹⁰ Commission, 'Feedback statement on the public consultation on the operations of the European Supervisory Authorities having taken place from 21 March to 16 May 2017' (2017), 17. Insurance Europe insists on preserving a separate insurance supervisor, asserting that a merger or loss of responsibilities will have a negative

is no revelation: the insurance sector repeatedly underscores the particularities which distinguish it from its counterparts, claiming to have a distinct business model, specific risks and consumer needs⁴¹¹, hence its plea for a separate legal treatment.⁴¹² Following this point of view, prudential supervision and COB supervision should stay under the same roof.⁴¹³ Interested parties from the banking sector have a similar point of view and do not see compelling reasons for creating an objectives-based supervisory model.⁴¹⁴ From those having an interest in the securities sector, there is more sympathy for twin peaks authorities. This can probably be explained by the imperative of adequate consumer (investor) protection.⁴¹⁵ For some of them, the reform of the ESAs should go further than mere amendments to the Authorities' mandates and governance which have recently been adopted.⁴¹⁶ Other parties consider the present model to be working sufficiently well. Overall, the message is to steer clear of the institutional set up, but to enable the ESAs to optimally use their competences (“don't fix what is not broken”⁴¹⁷).⁴¹⁸

effect on the quality of supervision. See, Insurance Europe, ‘ESAs review: splitting responsibilities or losing dedicated insurance supervisor would damage quality of supervision’ Press release (16 May 2017), 1.

⁴¹¹ Insurance Europe, ‘Why insurers differ from banks’ (2014), 8. Also see, EIOPA Insurance and Reinsurance Stakeholder Group (IRSG), ‘Public consultation on the operations of the European Supervisory Authorities’ (2017), 22-24; EIOPA Occupational Pensions Stakeholder Group (OPSG), ‘Public consultation on the operations of the European Supervisory Authorities’ (2017), 19; H. COUSY, ‘Changing Insurance Contract Law: An Age-Old, Slow and Unfinished Story’ in P MARANO and M. SIRI, *Insurance Regulation in the European Union: Solvency II and Beyond*, (Palgrave 2017), (31) 34.

⁴¹² Scholars also have an eye for cross-sectoral similarities that underlie the sectors. For example, see, N. GENETAY and P. MOLYNEUX, *Bancassurance* (Macmillan 1998), 6-7.

⁴¹³ The Division Bank and Insurance of the Austrian Federal Economic Chamber, ‘Public Consultation on the Operations of the European Supervisory Authorities’ (2017), 13.

⁴¹⁴ BNP Paribas, ‘Public consultation on the operations of the European Supervisory Authorities’ (2017), 25; Magyar Nemzeti Bank, ‘Comments of the Magyar Nemzeti Bank on the public consultation launched by the European Commission on the operation of the European Supervisory Authorities’ (2017), 9.

⁴¹⁵ Compare, however, the feedback given by ESMA's stakeholder group in response to the first review of 2014 and to the second review of 2017. In 2014, the group strongly supported the adoption of a twin peaks model; in 2017, it stated that “the SMSG does not reach a consensus as to what is the best model for European financial supervisory architecture at this moment in time”. See, ESMA Securities and Markets Stakeholder Group, ‘SMSG Advice to the European Commission. Response to the Public Consultation on the Operations of the European Supervisory Authorities’ (2017), 10; ESMA Securities and Markets Stakeholder Group, ‘SMSG contribution to the ESFS Consultation. An SMSG review of the ESA's including a self-assessment’ (2013), 9.

⁴¹⁶ BEUC, Better Finance, Finance Watch, AGE Platform Europe, EFIN and COFACE Families Europe, ‘Proposal for the EU financial supervisory reform’ (2017), 1-2.

⁴¹⁷ F. HUFELD, ‘Review of the European System of Financial Supervision’ (Brussels, 27 February 2018) Statement at the Public Hearing, European Parliament (ECON Committee), <https://www.bafin.de/SharedDocs/Veroeffentlichungen/-EN/Reden/re180227ESARewiewpen.html> (accessed on 17 July 2019).

⁴¹⁸ Commission Staff, ‘Commission Staff Working Document Accompanying the Document Report from the European Commission to the European Parliament and Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS)’ SWD(2014) 261 final, 11-13. Also see, BEUC, Better Finance, Finance Watch, AGE Platform Europe and COFACE Families Europe, ‘Reform of the European Supervisory Authorities and financial consumer protection’ (2019) Letter to the Council, 1.

Regulatory capture. To the question why stakeholders cling to sectoral supervisory authorities in a blurred financial industry, one possible answer might be regulatory capture, or in this context, “supervisory capture” .⁴¹⁹ If a supervisory authority is captured by the industry, it will further the specific interests of the latter instead of acting in the interest of the general public.⁴²⁰ Regulatory capture is an existent problem: research has shown that this phenomenon contributed to the financial crisis.⁴²¹ It is indeed conceivable that the ESAs are prone to regulatory capture. In essence, the ESAs are the sum of their participating NCAs. The latter operate on a local basis, being close to the market and its participants. In addition, the ESAs themselves seek input from stakeholders. Therefore, there is a chance that the Authorities become (more) moderate towards the sector they monitor.⁴²² In that way, preserving the *status quo* is beneficial to stakeholders. The Commission has proposed to improve the ESAs’ independence by adjusting their governance structure and installing an Executive Board with full-time members, but the proposal has not been adopted.⁴²³

⁴¹⁹ The founding father of the theory of ‘regulatory capture’ is George Stigler. Note that regulatory capture can take other forms than industry capture. See, G. STIGLER, ‘The Theory of Economic Regulation’ [1971] *The Bell Journal of Economics and Management Science* 2(1), 3 (“Regulation may be actively sought by an industry, or it may be thrust upon it. A central thesis of this paper is that, as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit”). Also see, D. VELTROP and J. DE HAAN, ‘I just cannot get you out of my head: Regulatory capture of financial sector supervisors’ (2014) DNB Working Paper 410, 5-6; L.G. BAXTER, ‘Capture in Financial Regulation: Can We Channel It toward the Common Good’ [2011] *Cornell Journal of Law and Public Policy* 21(1), (175) 187.

⁴²⁰ O.J. ERDÉLYI, *Twin Peaks for Europe: State-of-the-Art Financial Supervisory Consolidation. Rethinking the Group Support Regime Under Solvency II* (Springer 2015), 207-208.

⁴²¹ The Financial Crisis Inquiry Commission, ‘The Financial Crisis Inquiry Report. Final Report of the National Commission on the Causes of the Financial and Economic Crisis in The United States’ (2011), 34. Also see, E. MONNET, S. PAGLIARI and S. VALLÉE, ‘Europe between financial repression and regulatory capture’ (2014) Bruegel Working Paper 8, 4.

⁴²² S. PAGLIARI, ‘How Can We Mitigate Capture in Financial Regulation?’ in S. PAGLIARI (ed.), *Making Good Financial Regulation: Towards a Policy Response to Regulatory Capture* (Grosvenor House Publishing Limited 2012), 1 and 12. For an opposite point of view, see, I. CHIU, ‘Power and Accountability in the EU Financial Regulatory Architecture: Examining Inter-Agency Relations, Agency Independence and Accountability’ in M. ANDENAS and G. DEIPENBROCK, *Regulating and Supervising European Financial Markets* (Springer 2016), (67) 81. Also see, EBA Banking Stakeholder Group, ‘Consultation on the operations of the European supervisory authorities. General Comments and Replies to Questions’ (2017), 22.

⁴²³ The Executive Board would have acquired some tasks of the tasks of the Board of Supervisors. In the end, the changes did not go that far. See, Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending the ESAs’ Regulations’ COM(2017) 536 final, n 187, 11. Also see, ECON Committee, ‘Public hearing in Financial Supervision in the EU’, statement by Jacques de Larosière (Brussels, 27 February 2018), <http://www.europarl.europa.eu/ep-live/en/committees/video?event=20180226-1500-COMMITTEE-ECON> (accessed on 10 August 2019); M. LAMANDINI, ‘A supervisory architecture fit for CMU: Aiming at a moving target?’ (2018) *European Capital Markets Institute Commentary* 55, 5-6; N. MOLONEY, *The Age of ESMA: Governing EU Financial Markets* (Hart 2018), 74-78; EBA Banking Stakeholder Group, ‘Consultation on the operations of the European supervisory authorities. General Comments and Replies to Questions’ (2017), 23.

5. Joint Committee

The JC. Throughout the paper, reference has been made now and then to the *raison d'être* of the JC. *Pro memoria*, the JC is the platform for cooperation between the ESAs. By means of this tool, consistency “within sectors but also between sectors” can be achieved.⁴²⁴ As the first chapter notes, there are four sub-committees to discuss four delineated cross-sectoral topics. Annually, the JC publishes a work programme that indicates where its priorities for the next year lie.⁴²⁵ The role of the JC sounds very promising; stakeholders have indeed frequently applauded the results which have been achieved by the ESAs since the day they have been operating.⁴²⁶ Yet, as is often the case, there is room for improvement.

Some identified issues. Legal doctrine and the feedback on the ESAs review have identified some issues with regard to the JC's operation. Besides the cumbersome governance process that has to be followed when agreeing on (cross-sectoral) proposals⁴²⁷, there are also some substantial problems. The ESAs themselves have voiced that the inconsistencies in the mandates they have been given, constitute a significant drawback to realize an effective level of consumer protection.⁴²⁸ As if this was the last straw that breaks the camel's back, the watchdogs have urged the European legislator “to consider any necessary steps in order to ensure that the ESAs can regulate cross-selling practices in a consistent way across the three sectors, to the benefit of consumers, financial institutions, and supervisory authorities”.⁴²⁹ Meanwhile, sectoral pieces of legislation should be drafted as consistent as possible, in order to avoid unwarranted differences which hinder a holistic approach (see *supra*).⁴³⁰

⁴²⁴ V. ROSS, ‘Towards a genuine single European financial market – the role of regulation and supervision’ (Lisbon, 6 June 2018), Statement at the CIRSIF Annual International Conference, 4. Also see, Joint Committee of the European Supervisory Authorities, ‘2019 Work Programme’ (2018), 1.

⁴²⁵ See the website of the JC: <https://esas-joint-committee.europa.eu/news-and-press>.

⁴²⁶ Commission, ‘Feedback statement on the public consultation on the operations of the European Supervisory Authorities having taken place from 21 March to 16 May 2017’ (2017), 5.

⁴²⁷ EBA, ‘Opinion of the European Banking Authority on the public consultation on the operation of the European Supervisory Authorities’ (2017), 3.

⁴²⁸ ESMA, EBA and EIOPA, ‘The cross-selling of financial products – request to the European Commission to address legislative inconsistencies between the banking, insurance and investment sectors’ (2016) Letter to the Commission, 1-2. Also see, N. MOLONEY, *The Age of ESMA: Governing EU Financial Markets* (Hart 2018), 319.

⁴²⁹ ESMA, EBA and EIOPA, ‘The cross-selling of financial products – request to the European Commission to address legislative inconsistencies between the banking, insurance and investment sectors’ (2016) Letter to the Commission, 3.

⁴³⁰ Joint Committee of the European Supervisory Authorities, ‘Report on automation in financial advice’ (2016), 19-21, marginal 63-69 (concerning the different sectorial definitions of advice). Also see, J.M. ROLDÁN, ‘Integrated Supervision of Financial Conglomerates: Challenges for the Future’ (Amsterdam, 12 May 2005) Speech at the conference “Integrated Supervision of Financial Conglomerates: Challenges for the Future”, 2.

Calling upon the JC. There is one common thread running through the feedback on the ESAs review: the (so far) unexplored potential of the JC.⁴³¹ Improvements are proposed to the JC's governance processes⁴³², and a smoother exchange of best practices between the ESAs, allowing cross-sectoral pollination, is eagerly encouraged.⁴³³ The JC's presence has been borrowed by literature to accentuate the advantage of the sectoral model, namely the combination of disposing of separate agencies that promote non-homogenous approaches, while simultaneously seizing the benefits of joined-up thinking through inter-agency coordination and interaction.⁴³⁴ The feedback seems to steer the same course. This gives the impression that by stressing the presence of the JC, stakeholders want to divert attention away from the sectoral *versus* cross-sectoral debate.⁴³⁵ It is interesting to highlight that a European study, requested by the ECON Committee, has suggested to structure the JC in a twin peaks manner by installing two sub-committees, one for prudential matters and one for consumer protection and financial innovation.⁴³⁶ If on the longer term the JC's share in the story of European supervision would indeed enlarge, the forum's light structure would probably be substituted for a stronger skeleton, to enable the Committee to fulfill its extended mandate.⁴³⁷

⁴³¹ Commission, 'Feedback statement on the public consultation on the operations of the European Supervisory Authorities having taken place from 21 March to 16 May 2017' (2017), 5; The Netherlands Ministry of Finance, the Netherlands Financial Markets Authority and the Dutch Central Bank, 'Response of the Netherlands – Public Consultation on the European Supervisory Authorities' (2017), 25.

⁴³² Commission, 'Feedback statement on the public consultation on the operations of the European Supervisory Authorities having taken place from 21 March to 16 May 2017' (2017), 18.

⁴³³ EBA Banking Stakeholder Group, 'Consultation on the operations of the European supervisory authorities. General Comments and Replies to Questions' (2017), 23; I. CHIU, 'Power and Accountability in the EU Financial Regulatory Architecture: Examining Inter-Agency Relations, Agency Independence and Accountability' in M. ANDENAS and G. DEIPENBROCK, *Regulating and Supervising European Financial Markets* (Springer 2016), (67) 82-85.

⁴³⁴ I. CHIU, 'Power and Accountability in the EU Financial Regulatory Architecture: Examining Inter-Agency Relations, Agency Independence and Accountability' in M. ANDENAS and G. DEIPENBROCK, *Regulating and Supervising European Financial Markets* (Springer 2016), (67) 81. See however, N. MOLONEY, *The Age of ESMA: Governing EU Financial Markets* (Hart 2018), 322-323 ("The image of the ESAs as a collegiate, epistemic community of nascent regulators, learning from each other's experiences and acting as legitimating actors through peer credibility dynamics should not, however, be overplayed, as the ESAs also have distinct incentives to strengthen their powers and protect their respective territories").

⁴³⁵ Commission, 'Feedback statement on the public consultation on the operations of the European Supervisory Authorities having taken place from 21 March to 16 May 2017' (2017), 18.

⁴³⁶ F. DEMARIGNY, J. MCMAHON and N. ROBERT, 'Review of the New European System of Financial Supervision (ESFS). Part 1: The Work of The European Supervisory Authorities (EBA, EIOPA and ESMA) – The ESFS'S Micro-Prudential Pillar' (2013) Study for the ECON Committee, 111.

⁴³⁷ E. WYMEERSCH, 'The European Financial Supervisory Authorities or ESAs' in E. WYMEERSCH, K. HOPT and G. FERRARINI, *Financial Regulation and Supervision: A post-crisis analysis* (OUP 2012), 291, marginal 9.217.

6. Supervisory architecture in the United States (US)

A (too) ambitious blueprint: twin peaks. The ponderous effect of the financial crisis incited profound modifications to the US's supervisory model.⁴³⁸ During the pre-crisis era, the US had a patchwork of sectoral supervisors shaped by a series of responses to historical events and circumstances⁴³⁹, resulting into a system of federal and state layers.⁴⁴⁰ A report dating back from 2004 highlighted the insufficient level of coordination and exchange of information amongst the sectoral financial regulatory agencies.⁴⁴¹ Following the financial crisis, former Treasury Secretary PAULSON did for the US what DE LAROSIÈRE did for Europe. But PAULSON's report of 2008 went further: it postulated an optimal supervisory structure, being an objectives-based, "triple" peaks model.⁴⁴² Following the report, the consolidation of regulatory responsibilities would bring about synergies which lack in a system of separate, individual supervisors. In addition, it would allow for flexible adjustments to new financial realities.⁴⁴³ In another report that soon followed, former US Federal Reserve Board Chairman VOLCKER also considered the potential of a twin peaks model.⁴⁴⁴ The ambitious proposals encountered a lot of criticism, and eventually remained a dead letter.⁴⁴⁵ Less than one and a half year later, a more modest white paper continued the momentum for structural reform⁴⁴⁶, most of which has been

⁴³⁸ E. WILLIAMSON, 'Political Pendulum Swings Toward Stricter Regulation' *The Wall Street Journal* (New York, 24 March 2008), <https://www.wsj.com/articles/SB120631764481458291> (accessed on 25 July 2019).

⁴³⁹ J.W. MARKHAM, 'Merging the SEC and CFTC – A Clash of Cultures' [2009] *University of Cincinnati Law Review* 78, (537) 541-543.

⁴⁴⁰ The Volcker Alliance, 'Reshaping The Financial Regulatory System. Long Delayed, Now Crucial' (2015), 12; R.H. NEIMAN and M. OLSON, 'Dodd-Frank's Missed Opportunity: A Road Map for a More Effective Regulatory Architecture' (2014) *Bipartisan Policy Center*, 49. Also see, E.J. PAN, 'Organizing Regional Systems: the US Example' in N. MOLONEY, E. FERRAN, E. J. PAYNE (eds.), *The Oxford Handbook of Financial Regulation* (OUP 2015), (188) 202-204.

⁴⁴¹ United States Government Accountability Office, 'Financial Regulation: Industry Changes Prompt Need to Reconsider U.S. Regulatory Structure' (2004) *GAO-05-61*, 97-112.

⁴⁴² The report displayed a market stability regulator (the Federal Reserve (the central bank)), a (micro)-prudential financial regulator (a new body, the Prudential Financial Regulatory Agency (PFRA)) and a business conduct regulator (a new body, the Conduct of Business Regulatory Agency (CBRA)). See, H.M. PAULSON, R.K. STEEL and D.G. NASON, 'Blueprint for a Modernized Financial Regulatory Structure' (2008) Report for the Department of the Treasury, 137-180. Also see, E.J. PAN, 'Organizing Regional Systems: the US Example' in N. MOLONEY, E. FERRAN, E. J. PAYNE (eds.), *The Oxford Handbook of Financial Regulation* (OUP 2015), (188) 206-209; K. LANNOO, 'Concrete Steps Towards More Integrated Financial Oversight: the EU's Policy Response to the Crisis' in C. SECCHI and A. VILLAFRANCA, *Liberalism in Crisis?: European Economic Governance in the Age of Turbulence* (Elgar 2009), (55) 71; J.W. MARKHAM, 'Merging the SEC and CFTC – A Clash of Cultures' [2009] *University of Cincinnati Law Review* 78, (537) 548.

⁴⁴³ H.M. PAULSON, R.K. STEEL and D.G. NASON, 'Blueprint for a Modernized Financial Regulatory Structure' (2008) Report for the Department of the Treasury, 14.

⁴⁴⁴ The Group of Thirty (the Volcker report, see n 19), 'The structure of Financial Supervision: Approaches and Challenges in a Global Marketplace' (2008), 14 and 37-38.

⁴⁴⁵ E.J. PAN, 'Organizing Regional Systems: the US Example' in N. MOLONEY, E. FERRAN, E. J. PAYNE (eds.), *The Oxford Handbook of Financial Regulation* (OUP 2015), (188) 209; J.W. MARKHAM, 'Merging the SEC and CFTC – A Clash of Cultures' [2009] *University of Cincinnati Law Review* 78, (537) 549.

⁴⁴⁶ Department of the Treasury, 'Financial Regulatory Reform: A New Foundation: Rebuilding Financial Supervision and Regulation' (2009) White Paper, 2-88.

adopted by the Dodd-Frank Act.⁴⁴⁷ The result was a makeover of the old supervisory model; a radical facelift remains forthcoming.⁴⁴⁸ Although the Dodd-Frank Act did not bring about the desired simplification of the US's supervisory framework⁴⁴⁹, some of the Act's prominent features may give the European legislator food for thought when constructing the future European supervisory framework. A brief discussion follows in the third and last chapter.

Reasons for the sectoral *status quo*. Little light has been shed on the specific motives for putting the twin peaks model on a back burner. The proposed regulatory structure has been described as “a wild pitch, not even close to the strike zone”, and was not considered to be a high priority.⁴⁵⁰ Another critical comment was that the proposal aimed at the competitiveness of the US's financial market more than at restoring consumer trust.⁴⁵¹ The Volcker report itself put forward an argument for not evolving towards a twin peaks organized system. It referred to the fact that the existing arrangements proved to be relatively successful, and it emphasized that for any model to make headway in efficacious supervision, efficient coordination devices and smooth communication are paramount.⁴⁵² It is safe to state that the time (and the political spirit) was not yet ripe for radical reconstruction⁴⁵³, evidence of which is provided by the contentious process through which the Dodd-Frank Act eventually passed.⁴⁵⁴

⁴⁴⁷ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376-2223 (2010) (hereafter, “Dodd-Frank Act (2010), n 447”); Also see, J.R. MASON, J.D. BALCOMBE and W.S. DALRYMPLE, ‘Financial Supervision and Regulation in the US. Dodd-Frank Reform’ (2018) Study for the ECON Committee, 1-52.

⁴⁴⁸ P. HOFlich, *Banks at Risk: Global Best Practices in an Age of Turbulence* (Wiley 2011), 41.

⁴⁴⁹ The Volcker Alliance, ‘Reshaping The Financial Regulatory System. Long Delayed, Now Crucial’ (2015), 12; E.J. PAN, ‘Organizing Regional Systems: the US Example’ in N. MOLONEY, E. FERRAN, E. J. PAYNE (eds.), *The Oxford Handbook of Financial Regulation* (OUP 2015), (188) 212.

⁴⁵⁰ S. LABATON, ‘Parts of U.S. Treasury plan are said to have no hope of survival’ *The New York Times* (New York, 1 April 2008), <https://www.nytimes.com/2008/04/01/business/worldbusiness/01iht-regulate.1.11580013-.html> (accessed on 22 July 2019).

⁴⁵¹ D. IRWIN and C. JOHNSON, ‘Long Fight Ahead for Treasury Blueprint; Consumer Groups, Agencies Criticize Regulatory Overhaul’ *The Washington Post* (Washington, 30 March 2008), accessed via Proquest, [https://search.proquest.com.kuleuven.ezproxy.kuleuven.be/docview/410187717/BFB293863F544233PQ/6?accountid=17215&fbclid=IwAR2WoNDWfNoJQ6YSRRegoGfw78O0GgoLzy4QWgEuRCC_xB1vJ2iwrzK5ITI](https://search.proquest.com/kuleuven.ezproxy.kuleuven.be/docview/410187717/BFB293863F544233PQ/6?accountid=17215&fbclid=IwAR2WoNDWfNoJQ6YSRRegoGfw78O0GgoLzy4QWgEuRCC_xB1vJ2iwrzK5ITI) (accessed on 25 July 2019).

⁴⁵² The Group of Thirty, ‘The structure of Financial Supervision: Approaches and Challenges in a Global Marketplace’ (2008), 49-51.

⁴⁵³ B. KUS, ‘Dodd-Frank: From Economic Crisis to Regulatory Reform’ (2016) Sheffield Political Economy Research Institute (SPERI) Paper 29, 8-10.

⁴⁵⁴ A.J. LEVETIN, ‘The Consumer Financial Protection Bureau: An Introduction’ [2013] *Review Of Banking & Financial Law* 32, (321) 336; B.D. SOUCY, ‘The CFPB: The Solution or the Problem?’ [2013] *Florida State University Law Review* 40(3), (691) 694.

Resurgent debate. The Dodd-Frank Act is seen as one of many pitstops on the road towards a more effective and efficient US supervisory architecture.⁴⁵⁵ Some organizations have not been idle and have worked out extensive roadmaps for further reform.⁴⁵⁶ Unlike the reports drafted in the wake of the financial crisis, these roadmaps embark on a new course, one that does not lead right away to a twin peaks model. At the heart of their plans lie the principles of consolidation, specialization and last but not least, coordination. It is argued that cooperation and communication can make or break any supervisory structure.⁴⁵⁷

7. Intermediate assessment

The arguments in favour of the ESAs' sectoral set-up are paramount to build a well-founded, balanced maquette for European micro-supervision. Again, some arguments provide a more solid base. The theory of path dependence, for instance, helps to understand the presence of the sectoral model, yet it should not stand in the way of justifiable adaptations. Making the link with the level of specialization that has been acquired by the ESAs, there could be room for maintaining this advantage in a twin peaks model as well. The theories regarding political empowerment (or the lack of it) are very interesting and supply the constructive input to make realistic estimates. In spite of the fact that financial supervision will probably continue to be a political "football" which Member States will try to catch hold of, I do hope that governments can overcome their disagreements. Member States should form a team, aiming to score so that both financial institutions and consumers can applaud their actions. To attain this goal, legal certainty should prevail and the ESAs' future should rest on stable pillars. Therefore, constitutional boundaries should either be respected or should be adapted in line with current financial conditions.⁴⁵⁸ What fascinates me most of all elements put forth, is the possibility of giving a more prominent role to the JC. Instead of seeing the ESAs in the foreground and the JC in the background of the ESFS, the positions could be reversed: the JC could come to the fore, being backed up by the ESAs. Finally, an important lesson can be drawn from the parallel institutional debate in the US: the golden ingredients for a successful supervisory recipe are

⁴⁵⁵ M.N. BAILY, A. KLEIN and J. SCHARDIN, 'The Impact of the Dodd-Frank Act on Financial Stability and Economic Growth' [2017] *The Russell Sage Foundation Journal of the Social Sciences* 3(1), (20) 37-39.

⁴⁵⁶ The Volcker Alliance, 'Reshaping the Financial Regulatory System. Long Delayed, Now Crucial' (2015), 40-41.

⁴⁵⁷ The Volcker Alliance, 'Reshaping the Financial Regulatory System. Long Delayed, Now Crucial' (2015), 29 and 35; R.H. NEIMAN and M. OLSON, 'Dodd-Frank's Missed Opportunity: A Road Map for a More Effective Regulatory Architecture' (2014) Bipartisan Policy Center, 13.

⁴⁵⁸ G. THIEFFRY, 'After the Lamfalussy Report: The First Steps towards a European Securities Commission?' in M. ANDENAS and Y. AVGERINOS, *Financial Markets in Europe: Towards a Single Regulator?* (Kluwer 2003), (183) 197.

coordination, cooperation and communication.⁴⁵⁹ A well-thought-out institutional architecture can only add to the success.

D. Conclusion

Conclusion. This chapter has judged the supranational institutional architecture by reviewing two opposite lines of arguments. At the plaintiff's side, it is argued that the sectoral model is outdated and inadequate. At the defendant's side, arguments are put forth to demonstrate why the sectoral model has managed to stand the test of time. There is something to be said for both sides of the case. If one would put the two baskets of arguments on the scales, it would be uncertain to which side the balance would tip. One comes to see that the importance of the ESAs' institutional structure may not be underestimated, nor should it be overestimated. It is debatable what the "best" structure is, and the outcome is intertwined with other question marks. Clearly, the design of the ESAs' anatomy is not and never will be an exercise of exact science.

With reference to Chapter III. Chapter II has provided some very useful insights which the reader should keep at the back of his/her mind when turning to the third and last chapter. Therein, the future of the European supervisory framework is discussed from two different angles: what could the institutional architecture of the ESAs look like? And what should the institutional architecture of the ESAs look like?

⁴⁵⁹ In the same sense, see, Financial Services Action Plan, n 101, 12.

CHAPTER III: RESHAPING EUROPE’S MICRO-SUPERVISORY MODEL

Introduction. LANNOO proclaims that “the cause of financial supervision is not well served by half-baked solutions”.⁴⁶⁰ This leaves the question of what a “full-baked” solution looks like. Following LANNOO, I am convinced that the success formula lies in a combination of sectoral and cross-sectoral supervision.⁴⁶¹ On the basis of the information assembled in Chapter II, it appears that my vision on the future of the organization of European micro-supervision deviates from the vision of the European legislator. This chapter is reserved for an outline of both perspectives. The first section (A) describes Europe’s perspective: what *could* the institutional architecture of the European Supervisory Authorities look like? It is argued that shorter term, a cross-sectoral supervisory model (twin peaks) is not feasible; longer term, a twin peaks structure might be forthcoming. The second section (B) responds to the question “what should the institutional architecture of the European Supervisory Authorities look like?”. This section reflects my personal point of view on the European micro-supervisory formula. In my view, the supranational supervisory model should indeed evolve towards a cross-sectoral design without fully abandoning the current sectoral approach.

Preliminary: no substantive changes to the ESRB and the ECB. For both sections, the following preliminary remarks regarding the ESRB and the ECB are valid. The ESRB will continue to occupy a central position in the ESFS. Preceding the ESAs review, the Commission also reviewed the European macro-prudential framework by way of a public consultation.⁴⁶² Taking account of the feedback, adjustments have been proposed and subsequently adopted. Targeted changes have been made to the ESRB’s operation, increasing its position as macro-prudential authority in the ESFS in order to shield the financial system against instability. As for the ECB, the question has been posed whether the SSM has fulfilled the expectations.⁴⁶³ A report of the Commission – again, subsequent to a review⁴⁶⁴ – has positively evaluated the progress made so far. Therefore, the Commission did not see any need to modify the SSM Regulation.⁴⁶⁵

⁴⁶⁰ K. LANNOO, ‘Financial supervision is not well served by half-baked solutions’ (2008) CEPS Commentary, 1-2.

⁴⁶¹ K. LANNOO, ‘Challenges to the structure of financial supervision in the EU’ in M. BALLING, E.H. HOCHREITER and E. HENNESSY, *Adapting to Financial Globalisation* (Routledge 2001), (259) 271.

⁴⁶² Art. 20 ESRB Regulation; Commission, ‘Consultation Document. Review of the EU Macro-Prudential Policy Framework’ (2016), 3-34.

⁴⁶³ I. ANGELONI, ‘The Single Supervisory Mechanism: were expectations fulfilled?’ (Frankfurt, 22 November 2018) Speech at the Fifth Conference on the Banking Union, <https://www.bankingsupervision.europa.eu/press/-speeches/date/2018/html/ssm.sp181122.en.html> (accessed on 22 July 2019).

⁴⁶⁴ Art. 32 SSM Regulation.

⁴⁶⁵ Commission, ‘Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013’ COM(2017) 591 final, 3.

A. What could the European micro-supervisory model look like? Europe's perspective

Incremental reform. Save for the ESAs' institutional architecture, a lot has been moving at the supranational level. An extensive study of EU documents⁴⁶⁶ allows to interpret the European legislator's perspective on the future of financial micro-supervision within the Union. As usual⁴⁶⁷, the modifications appear to be of an incremental character, through which the traditional sectoral approach could eventually disappear. On the basis of the materials, I deduce two stages of change. In a first stage, a sort of 'quartet' model comes forth.⁴⁶⁸ The ECB and the three ESAs stay while some of the ESAs' responsibilities are reshuffled amongst the Authorities themselves. In a second stage, there are two options: either a twin peaks model could be established, or alternatively, a practical alliance between the European supervisors could come forth. A more detailed description of the two stages follows hereunder.

1. Short term: sectoral specialists

Enlarging the ESAs' mandates. Now and then, the second chapter has indicated how the watchdogs' mandates are changing under the CMU's umbrella. To recapitulate, the ESAs invigorate their status as authorities. With regard to the EBA, it is as if Europe is preparing itself for the day when the EU27 single market and the eurozone converge. As a consequence, the ECB would become *the* micro-prudential banking supervisor of the Union. In turn, this would neutralize the EBA's function as the intermediary between the eurozone insiders and outsiders. However, by giving the EBA a robust and wide AML mandate, which signals that the Authority's part is not played out yet, it appears that a stop has been put to the above scenario. Although the ESMA's and the EIOPA's role in AML matters diminishes, sectoral expertise remains assured via the establishment of a permanent committee that consists of all three ESAs⁴⁶⁹. Still, it is the EBA pulling the strings since the committee's tasks are restricted to preparing and scrutinizing the EBA's decisions.⁴⁷⁰ As for the ESMA, the Authority's share in consumer protection is weighted in its overall package of tasks. Furthermore, the ESMA's direct supervisory powers

⁴⁶⁶ To which reference has been made in several footnotes.

⁴⁶⁷ In another, yet interconnected context, see M. TONVERONACHI, 'The ECB and the Single European Financial Market: a Proposal to Repair Half of a Flawed Design' (2014) Levy Economics Institute of Bard College Public Policy Brief 137, 5 (Given the EU's typically gradualist approach to reform (...)); R. DEEG, 'Institutional Change and the Uses and Limits of Path Dependency: The Case of German Finance' (2001) Paper for the Max Planck Institute für Gesellschaftsforschung 6, 7 ("The second is that the switch to a new path is always (or nearly so) an evolutionary process").

⁴⁶⁸ See footnote 18.

⁴⁶⁹ The permanent committee replaces the specific AML sub-committee that currently resides under the JC. See, Chapter II, page 20.

⁴⁷⁰ European Parliament, 'Provisional legislative resolution of 16 April 2019 on the European Supervisory Authorities and financial markets' (2019), n 187, 13-14, marginal 24a.

grow, namely in respect of data reporting services providers and benchmarks.⁴⁷¹ Finally, in accordance with the reservations made by the insurance sector in response to the ESAs review, nothing notably changes in respect of the EIOPA's mandate - at least not for the time being (cf. the contemplation of a Single Market for Personal Pension Products⁴⁷²).

The Authorities' empowerment is accompanied by the required human and financial resources.⁴⁷³ It is also interesting to notice that by explicitly highlighting the condition of proportionality in the exercise of the ESAs' mandate, the legislator seems to have anticipated any criticism coming from the *Meroni* proponents.⁴⁷⁴

Presence of NCAs. While supervisory responsibilities seem to gradually shift upwards to the ESAs, the NCAs do not disappear from sight. With the path dependence theory in mind, it could be argued that the NCAs' expertise and local presence are valuable assets which contribute to the desired level of efficient and effective supervision. Moreover, in expectation of EU single rulebooks, there will normally be less room for diverging national interpretations of supranational rules. The NCAs will (continue to) function as the eligible assistants of the ESAs, looking upon the fluent implementation of and adherence to the rules by the financial institutions they supervise. The SSM mechanism has delivered proof that the combination of centralization and decentralization works. Any further centralization of powers will probably lead to a cooperation between local NCAs and Union-wide Authorities.⁴⁷⁵

JC. With regard to the JC, the legislator has clearly taken due account of the feedback on the ESAs review. The JC already was a forum for cooperation and for achieving cross-sectoral consistency, but now the ESAs' Regulations will explicitly state that the JC shall consider sectoral specificities.⁴⁷⁶ Hopefully, this alteration will effectively engender more coherence in level 3 output.

⁴⁷¹ Ibid., 16-18, marginal 42-48. If the Commission's initial proposal had been adopted, more powers would have been shifted to the securities watchdog, e.g. centralized approval of prospectuses and the supervisory and enforcement activities related thereto. See, Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending the ESAs' Regulations' COM(2017) 536 final, n 187, 7-8.

⁴⁷² See Chapter I, page 23.

⁴⁷³ European Parliament, 'Provisional legislative resolution of 16 April 2019 on the European Supervisory Authorities and financial markets' (2019), n 187, 20, marginal 64a.

⁴⁷⁴ Ibid., 5, marginal 5a.

⁴⁷⁵ D. SCHOENMAKER and N. VÉRON, 'A 'twin peaks' vision for Europe' (2017) Bruegel Policy Contribution 30, 8-9.

⁴⁷⁶ Compare, art. 54(2) ESAs' Regulations with, European Parliament, 'Provisional legislative resolution of 16 April 2019 on the European Supervisory Authorities and financial markets' (2019), n 187, 230, marginal 44.

Sectoral status preserved. The aforementioned modifications do not alter the ESAs' institutional set-up. The Authorities' arms still stretch out to different sectors, with each Authority having one arm for prudential matters and one arm for COB matters. However, the fact that the COB arms of the EBA and the ESMA have become more muscular, may indicate that the legislator will try to put the Union on a path leading towards a more optimal supervisory structure.

2. Long term: either twin peaks or practical alliance

The latent prospect of twin peaks. Notwithstanding the fact that the proposal of a European twin peaks structure has foundered a few times on obstinacy stemming from various corners, Europe has never lost interest in the idea. On the long term, DE LAROSIÈRE's suggestion of twin peaks authorities could be realized. In order to explain this possible evolution, the reader should call the picture of the ESAs to mind as it has been described up to this point. At present, this picture looks as follows: in Paris, there are the EBA and the ESMA, both of which have received significantly important COB powers. In Frankfurt am Main, there are the ECB and the EIOPA, where prudential supervision is (more) prominent. In respect of the ECB, this is logical.⁴⁷⁷ In respect of the EIOPA, one could argue that, in view of the feedback on the ESAs review, the prudential aspect seems to be the overriding factor in the insurance sector. This observation is underpinned by the horizontal nature of consumer protection. If one puts two and two together, one could perceive a business conduct Authority in Paris, and a micro-prudential Authority in Frankfurt.

Possible pitfalls. On paper, a European twin peaks model could be launched in no time. However, the fine print should not be forgotten. Chapter II has highlighted some pitfalls that warrant some profound reflection. First of all, a merger between the ECB and the EIOPA presupposes an alteration of Article 127(6) TFEU. Given the vast opposition of the insurance sector to consolidated supervision, it is doubtful whether a constitutional amendment is feasible. If this aspect would intermingle with the ever-unsettled debate about how much and which powers should fall in the hands of supranational supervisors, an agreement on the TFEU risks to be slowed down even more, not in the least because centralization also entails constitutional implications. Another impediment would probably be the price tag attached to the realization of these plans, not only literally (the costs attached) but also figuratively (the risk of losing what has been built up so far). The ultimate goal is of course to attain a similar or (preferably) higher

⁴⁷⁷ See page 21-22 and 39.

level of efficient and effective supervision. Finally, it is unlikely that institutional reform will be the primary concern of the upcoming European legislature given that there are bigger fish to fry at this moment, not only inside the financial arena (a.o. the CMU, Brexit and fintech) but also outside of it (e.g. climate change, migration, ...).

Alternative: practical alliance. In order to evade some of the above-mentioned pitfalls, Europe could consider the following alternative: instead of truly consolidating supervision into a twin peaks model, the legislator could see the merit of bringing the ESMA and the EBA under one Parisian roof, and the ECB and the EIOPA under one Frankfurter roof. Operating under the same roof could allow for so-called economies of scale, such as shared infrastructure and shared administrative support.⁴⁷⁸ It could also accommodate a smooth exchange of information and tighten the network between the Authorities. Cooperation could be facilitated, as could inter-ESA consultation as a consequence of which level 3 work could be more coherent. Costs would likely be lower.⁴⁷⁹ At the same time, sectoral specialization would be preserved. The internal organizational structure could be concretely designed in order to simultaneously secure sectoral specialization and enable cross-sectoral pollination. For an optimal monitoring of financial conglomerates, it could be beneficial for the ECB and the EIOPA to join forces, and learn about each other's sectoral specificities. For the EBA and the ESMA – which, in this alternative scenario, maintain their sectoral mandates – an alliance could be equally advantageous as these authorities could learn from each other's expertise on prudential (the EBA) and COB (the ESMA) aspects (see *supra*). This subsidiary option could, over time, lead to an actual merger. In such gradual manner, a twin peaks model could become a more realistic prospect.

3. Guidance of the US Dodd-Frank Act

Guidance of the US Dodd-Frank Act. Though the Dodd-Frank Act, and the White Paper that underpins it, did not entail an institutional revolution, these documents greatly implicated the US' supervisory framework. Two particular features that may provide useful insights to the European legislator, are worth lingering over.

Attention for consumer protection: the Bureau of Consumer Financial Protection. A first feature is the Act's engagement on the improvement of consumer protection. To this end, birth was given

⁴⁷⁸ C. BRIAULT., 'The Rationale for a Single National Financial Services Regulator' (1999) FSA Occasional Paper 2, 20-21.

⁴⁷⁹ K. LANNOO, 'Challenges to the structure of financial supervision in the EU' in M. BALLING, E.H. HOCHREITER and E. HENNESSY, *Adapting to Financial Globalisation* (Routledge 2001), (259) 268; C. BRIAULT, 'The Rationale for a Single National Financial Services Regulator' (1999) FSA Occasional Paper 2, 19.

to the Bureau of Consumer Financial Protection (CFPB)⁴⁸⁰ – which some interpret as endorsing the twin peaks philosophy⁴⁸¹. Before that, consumer protection was everywhere *and* nowhere⁴⁸² which made the proposition of a federal agency with a significant regulatory and supervisory toolbox a hard political nut to crack.⁴⁸³ The conception of the CFPB also encountered resistance from the financial industry.⁴⁸⁴ Amongst the criticisms voiced against the CFPB, some are parallel to those that came forth in the feedback on the ESAs review. One concern revolved around the separation of consumer protection and prudential aspects which was regarded as an erroneous decision.⁴⁸⁵ Another concern was that the CFPB acquired too much power, resulting in a regulatory and supervisory overkill.⁴⁸⁶ This was exacerbated by the fact that proper accountability mechanisms were absent.⁴⁸⁷ Despite the opposition, the CFPB has been installed, yet it is fair to say that the Bureau's road has been and continues to be bumpy.⁴⁸⁸

As consumer protection remains a critical issue in Europe, several lessons can be drawn from the CFPB's history. If the ESMA is supposed to become the consumer protection guru of the ESFS, it will be vital to solidly anchor its mandate in the TFEU together with the necessary checks and balances. Moreover, a break-up of prudential supervision and COB supervision should not amount to a rigorous isolation of both. Lastly, it is safe to state that the future institutional organization of European supervision shall have to be founded on solid grounds, taking account

⁴⁸⁰ Dodd-Frank Act (2010), n 447, sections 1001-1100H; Consumer Financial Protection Bureau, 'Building the CFPB: a progress report' (2011), 1-32.

⁴⁸¹ E.J. PAN, 'Organizing Regional Systems: the US Example' in N. MOLONEY, E. FERRAN and J. PAYNE (eds.), *The Oxford Handbook of Financial Regulation* (OUP 2015), (189) 211.

⁴⁸² The Volcker Alliance, 'Reshaping The Financial Regulatory System. Long Delayed, Now Crucial' (2015), 40-41; R. FISCHER and E. RODRIGUEZ, 'The Consumer Financial Protection Bureau: Measuring the Progress of a New Agency' (2013) Bipartisan Policy Center, 16-17.

⁴⁸³ B. KUS, 'Dodd-Frank: From Economic Crisis to Regulatory Reform' (2016) Sheffield Political Economy Research Institute (SPERI) Paper 29, 7-12; B.D. SOUCY, 'The CFPB: The Solution or the Problem?' [2013] Florida State University Law Review 40(3), (691) 694-696.

⁴⁸⁴ B. KUS, 'Dodd-Frank: From Economic Crisis to Regulatory Reform' (2016) Sheffield Political Economy Research Institute Paper 29, 11; A. J. LEVETIN 'The Consumer Financial Protection Bureau: An Introduction' [2013] Review Of Banking & Financial Law 32, (321) 336-339.

⁴⁸⁵ A.J. LEVETIN, 'The Consumer Financial Protection Bureau: An Introduction' [2013] Review Of Banking & Financial Law 32, (321) 337.

⁴⁸⁶ W. SIMPSON, 'Above Reproach: How The Consumer Financial Protection Bureau Escapes Constitutional Checks & Balances' [2016] Review of Banking & Financial Law 36(1), (343) 357; A.J. LEVETIN, 'The Consumer Financial Protection Bureau: An Introduction' [2013] Review Of Banking & Financial Law 32, (321) 336.

⁴⁸⁷ M.N. BAILY, A. KLEIN and J. SCHARDIN, 'The Impact of the Dodd-Frank Act on Financial Stability and Economic Growth' [2017] The Russell Sage Foundation Journal of the Social Sciences 3(1), (20) 30; W. SIMPSON, 'Above Reproach: How The Consumer Financial Protection Bureau Escapes Constitutional Checks & Balances' [2016] Review of Banking & Financial Law 36(1), (343) 357-360.

⁴⁸⁸ H. DAVIES, 'Was the financial crisis wasted?' The Guardian (London, 30 August 2018), <https://www.theguardian.com/business/2018/aug/30/was-the-financial-crisis-wasted> (accessed on 7 August 2019); W. SIMPSON, 'Above Reproach: How The Consumer Financial Protection Bureau Escapes Constitutional Checks & Balances' [2016] Review of Banking & Financial Law 36(1), (343) 357-363.

of stakeholders' concerns, in order to evade continuous attacks that might hamper an efficient and effective operation.

Facilitating inter-agency coordination. The Financial Stability Oversight Council. A second feature in the Dodd-Frank Act was the establishment of the Financial Stability Oversight Council (FSOC).⁴⁸⁹ Two aspects of the FSOC attract attention. In the first place, the FSOC has been called into existence to keep watch over financial stability which makes the body the counterpart of the ESRB.⁴⁹⁰ The most interesting aspect, however, is that the FSOC constitutes a permanent “supercouncil” of federal and state financial regulators which receive assistance in the coordination of possible overlaps or gaps in their responsibilities. In other words, the FSOC is the “facilitator of agency communication and potential cooperation”.⁴⁹¹ Yet, the FSOC does not find itself in a superior position vis-à-vis its members; some see this as a missed opportunity to address the fragmented financial system in a more profound manner.⁴⁹²

Subsequently to the ESAs review, the European legislator did not propose any substantial changes regarding the ESAs' institutional structure. However, it would have been wise to reinforce the JC's role, modelling it after the FSOC. This would have been in line with the financial industry's wish to confer a more prominent role to the JC.

In fact, placing the JC as the focal point of the ESFS is precisely my own conceptualization of the future of supranational micro-supervision. I propose the creation of a new body that I would name the ‘European Coordinator for Financial Supervision’. An extensive description of this body follows hereunder.

⁴⁸⁹ Dodd-Frank Act (2010), n 447, sections 111-123.

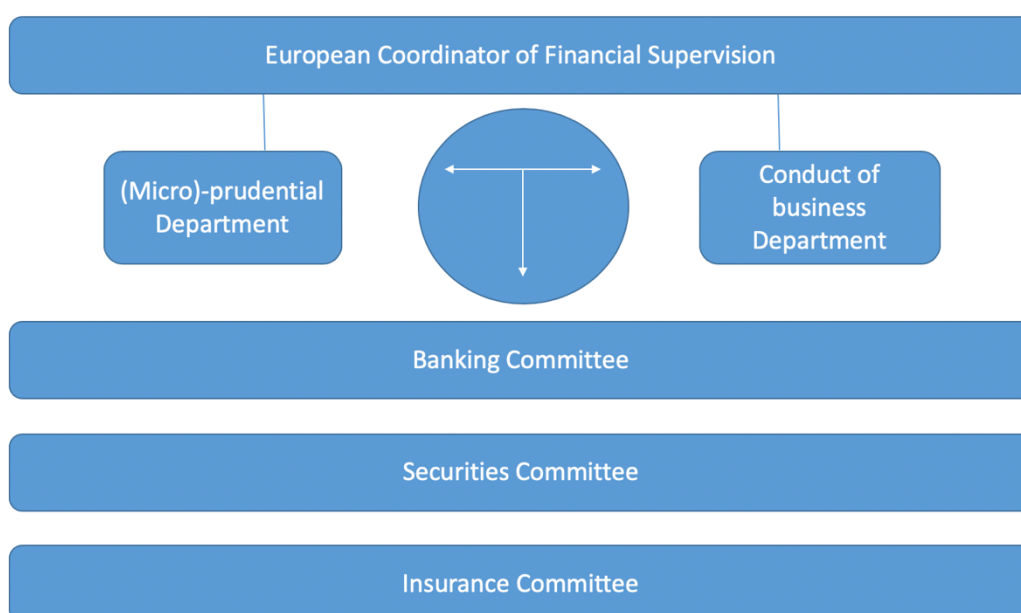
⁴⁹⁰ Like the ESRB receives operational and organizational support from the ECB, the FSOC is supported by the US's central bank, the Federal Reserve (FED). For the FSOC, see, J.M. STUPAK, ‘Financial Stability Oversight Council (FSOC): Structure and Activities’ (2018) Congressional Research Service Report, 1; D. CALVO, J. CRISANTO, S. HOHL and O. GUTIERREZ, ‘Financial supervisory architecture: what has changed after the crisis?’ (2018) FSI Papers 8, 31. For the ECB, see, artt. 2-7 Council Regulation (EU) 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board, OJ L331/162; C. PAPATHANASSIOU and G. ZAGOURAS, ‘A European Framework for Macro-Prudential Oversight’ in E. WYMEERSCH, K. HOPT and G. FERRARINI, *Financial Regulation and Supervision: A post-crisis analysis* (OUP 2012), 165-171, marginal 6.08-6.20.

⁴⁹¹ J.M. STUPAK, ‘Financial Stability Oversight Council (FSOC): Structure and Activities’ (2018) Congressional Research Service Report, 8; R.H. NEIMAN and M. OLSON, ‘Dodd-Frank's Missed Opportunity: A Road Map for a More Effective Regulatory Architecture’ (2014) Bipartisan Policy Center, 15.

⁴⁹² R.H. NEIMAN and M. OLSON, ‘Dodd-Frank's Missed Opportunity: A Road Map for a More Effective Regulatory Architecture’ (2014) Bipartisan Policy Center, 17.

B. What should the European micro-supervisory model look like? Personal perspective

Integration, twin peaks, and sectoral specialization. In the aftermath of the financial crisis, PAULSON pleaded for “a system that can adapt as financial institutions, financial products, and markets continue to evolve”.⁴⁹³ In my opinion, the underdescribed model should serve as a basis for such dynamic system in Europe. A distinctive feature of the model is that it combines the three traditional supervisory models. It mixes integration, twin peaks and sectoral specialization, and cherry-picks the advantages that each of these models contain. The underlying *ratio* is that the single financial market requires more than a one-size-fits-all model. By way of the following scheme, I illustrate my own point of view. Because of the focus on micro-supervision, the scheme does not include the ESRB’s macro-prudential pillar (see *supra*).



The JC becomes the European Coordinator of Financial Supervision. The more I read about the role of the JC within the ESFS, the more I believed that its capacity has been left unexploited so far. As a platform for cross-sectoral cooperation of three sectorally oriented Authorities, the JC is pre-eminently the body towards which the European legislator’s focus should shift. To signal the presence of a central European body for Union-wide supervision, I suggest to transform the JC into the European Coordinator of Financial Supervision (ECFS). The ECFS would replace the EBA, the ESMA and the EIOPA. However, I do not intend the ECFS to function as a single, integrated supervisor that is traditionally in charge of all three sectors. Such prospect does not seem feasible to me, nor do I find it appealing. By integrating the ESAs into

⁴⁹³ H.M. PAULSON, *On the brink: inside the race to stop the collapse of the global financial system* (Business Plus 2010), 441.

the ECFS, I seek to exploit economies of scale (see *supra*). Instead of three Authorities needing the auxiliary instruments, facilities and equipment, there would be one Authority that provides the complete infrastructure. In this way, the available resources would be used in a more efficient manner. For the NCAs and financial institutions, matters would be simplified as they would have one single contact point to turn to (“one-stop shopping”).⁴⁹⁴ The ECFS could be compared with a lead regulator that coordinates the regulatory actions of the distinguishable agencies operating under its wings.⁴⁹⁵

The ECFS as a conduit. The symbol in the middle of the scheme represents the ECFS’s primary function, which is to act as a conduit through which the work is divided, information is exchanged and cooperation is assured. When level 3 work is required, the conduit would assign the task to the most appropriate internal division. The task would then be carried out either by the micro-prudential department or the COB department or – if the topic in question requires tailor-made treatment – one of the three sectoral committees that reside in the ECFS. Thus, the conduit would clearly indicate the nature of the subject matter.⁴⁹⁶ If the issue at stake would ask for the involvement of more than one division (for instance, if detailed input from a sectoral committee is sought for the purpose of constituting a final “end product” of generally applicable guidelines), the conduit would facilitate such cooperation. Equally, it would guarantee proper information channels through which the essential and correct information would arrive at the right division. The conduit would also be able to resolve the possibly tense relationship between the prudential department and the COB department – a much mentioned shortcoming of the traditional twin peaks model.⁴⁹⁷ In order to fulfill all of its assigned functions, the ECFS would have to dispose of dedicated and highly competent staff. As a large(r), integrated authority, it is likely that the ECFS would manage to attract such a professional workforce.⁴⁹⁸

Installing twin peaks departments... I am convinced that today’s blurred financial system cannot be adequately monitored by sectorally organized authorities. An objectives-based system,

⁴⁹⁴ R.M. LASTRA, *International Financial and Monetary Law* (OUP 2015), 133, marginal 3.88; K. LANNOO, ‘Challenges to the structure of financial supervision in the EU’ in M. BALLING, E.H. HOCHREITER and E. HENNESSY, *Adapting to Financial Globalisation* (Routledge 2001), (259) 268.

⁴⁹⁵ In a lead regulator model, there exists a general concern of having to select one agency to take the lead. *In casu*, this problem is avoided as the ECFS would supersede the present trio of ESAs. On a lead regulator model, see, E.J. PAN, ‘Organizing Regional Systems: the US Example’ in N. MOLONEY, E. FERRAN and J. PAYNE (eds.), *The Oxford Handbook of Financial Regulation* (OUP 2015), (189) 201-202.

⁴⁹⁶ See page 48, footnote 330.

⁴⁹⁷ E.J. PAN, ‘Organizing Regional Systems: the US Example’ in N. MOLONEY, E. FERRAN and J. PAYNE (eds.), *The Oxford Handbook of Financial Regulation* (OUP 2015), (189) 201.

⁴⁹⁸ M. ČIHÁK and R. PODPIERA, ‘Is One Watchdog Better Than Three? International Experience with Integrated Financial Sector Supervision’ (2006) IMF Working Paper 57, 9-10.

consisting of two departments, one for micro-prudential aspects and one for COB aspects, should be the cornerstone of the ECFS. According to me, the departments should consist of three internal bodies: a consultative, an executive and a supervisory body. The consultative body would be manned by the NCAs, guaranteeing the participation of local expert supervisory authorities. With their expertise and experience, the consultative body would be able to give well founded advice to the executive body. The latter should be obliged to take the former's opinion into consideration when taking a final position. It would be the executive body that eventually cuts the knots. This should improve the inefficient governance process that is currently in place.⁴⁹⁹ The executive body would be permanently staffed by specialists from the sectoral committees (see *infra*) and other experienced personnel such as former heads of the NCAs. With the proper accountability mechanisms in place, the much feared outcome of a “supervisor of supervisors” could be avoided.⁵⁰⁰ Finally, the supervisory body would assume direct supervisory powers with regard to financial activities and market participants for which national supervision is considered insufficient (see *infra*).

... while maintaining sectoral committees. The financial system has become too complex for a mere sectoral approach. At the same time, I am persuaded of the benefits of sectoral know-how. Therefore, I am in favour of installing (maintaining) sectoral committees that would be able to continuously finetune their sectoral-specific knowledge and insights. If necessary, the ECFS's conduit could call upon their proficiency. Some of the sectoral committees' members would have a permanent seat in the executive body.

The place of the ECB (SSM). The scheme does not display the SSM. While I can understand the original motives for involving the ECB in micro-prudential banking oversight, I regret the way in which the SSM has been implemented. I find it unfortunate that the SSM highlights the boundary between eurozone insiders and outsiders, and I dislike the ECB's artificial split-up between monetary policy and supervision. In my opinion, it would be better that the ECB's micro-supervisory component would be transferred to the ECFS.⁵⁰¹ What I do like about the SSM, is the underlying partnership between the NCAs and a supranational authority. Therefore,

⁴⁹⁹ See page 63.

⁵⁰⁰ M. LAMANDINI, ‘A supervisory architecture fit for CMU: Aiming at a moving target?’ (2018) European Capital Markets Institute Commentary 55, 6.

⁵⁰¹ The ECB should, however, maintain its macro-prudential tools. Mentioning of this aspect has been made in footnote 140. Some commentators have plead for the retrieval of banking supervision from the ECB and its transfer to the EBA. See, A.-K. BARAN and B. VAN ROOSEBEKE, ‘Review of the European Supervisory Authorities: 12 Recommendations’ (2014) CEP Input 04, 21.

I would copy-paste this concept to the ECFS, as a consequence of which it would apply on a Union-wide basis instead of being limited to eurozone members.

Partnerships. It is my belief that the ECFS should foster supervisory convergence, acting as the guardian of the level playing field between Member States. As I see it, the NCAs should continue to assume responsibility for direct supervision to the largest extent possible. Where local supervision is no longer realistic, supervisory responsibilities could be shared between the two levels.⁵⁰² Drawing inspiration from the SSM and its apparent success (see *supra*), the center of gravity would still lie with the NCAs but there would be a higher level of supranational intervention. Concretely applied to the ECFS, it would be the supervisory body within each department which would establish cooperation mechanisms with the NCAs of all Member States.

AML authority. In principle, AML matters should be dealt with by the ECFS's COB department. The latter should cooperate closely with the micro-prudential department, in order to safeguard the financial institutions' safety.⁵⁰³ However, since money laundering practices also occur outside the financial sectors⁵⁰⁴, it seems to me that there would be merit in the establishment of a specific AML body which would have authority that stretches beyond the financial sectors. This body could set up partnerships with the responsible NCAs for the enforcement of the rules that are set at European level.

Less pitfalls. The above model would succeed in avoiding many of the aforementioned pitfalls. First of all, the ECFS takes due account of the path dependence theory. As it represents a mix of old and new institutional aspects, the model does entail a compromise that might unlock Europe's sectoral tunnel vision. The efforts made so far would not be lost. Secondly, by combining integration, twin peaks and sectoral specialization, the ECFS's structure meets the variety of national structures which might make it easier to find political enthusiasm. In my estimation, the proposition would also gain acceptance from the financial industry, given that it meets the concerns that were voiced in response to the ESAs review. The remaining stumbling blocks are the TFEU and the location of the ECFS's seat. A provision would have to be inserted that would enable the ECFS to carry out direct supervisory tasks with the assistance of the NCAs. If the

⁵⁰² K. LANNOO, 'Challenges to the structure of financial supervision in the EU' in M. BALLING, E.H. HOCHREITER and E. HENNESSY, *Adapting to Financial Globalisation* (Routledge 2001), (259) 286.

⁵⁰³ Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the Economic and Social committee and the Committee of the Regions. Strengthening the Union framework for prudential and anti-money laundering supervision for financial institutions' COM(2018) 645 final, 3.

⁵⁰⁴ See page 40, footnote 269.

principle of cooperation and the division of tasks is well recorded, with due respect for the subsidiarity and proportionality principle, the political will might be found more easily. Article 127(6) TFEU would not need to be modified since the ECB would lose its micro-supervisory mandate to the ECFS. As to the ECFS's seat, I reckon that the Authority would have to be located in a financially stable Member State.

ECFS's role on level 2. Finally, as the ECFS would remain an important advisor at level 2 of the Lamfalussy procedure⁵⁰⁵, it would be able to flexibly provide sectoral and/or cross-sectoral input for the development of level 2 output.

C. Conclusion

Conclusion. In this last chapter, the future of the ESAs' institutional set-up has been outlined by departing from two questions. "What could the future of the ESAs' institutional architecture look like?", has been answered as follows: in the short term, it seems that the ESAs maintain their sectoral mandates, yet they gradually turn into prudential or COB specialists. Exemplary is the EBA as AML supervisor. In the long term, a twin peaks model could be constructed: considering that the EBA has moved to Paris, there may be room for one Authority for COB in the French capital, and one Authority for (micro-)prudential supervision in Frankfurt am Main. In case this prospect could not be realized – which is not an unreasonable thought given the many pitfalls – Europe could opt for an interesting alternative, *i.e.* an alliance between the ESAs for the purpose of exhausting potential synergies. The answer to the question of what the future of the ESAs' institutional architecture should look like, is different. Here, the focus shifts to the JC, transforming it into the European Coordinator for Financial Supervision (ECFS). This new body would be equipped with an internal structure that reflects a combination of the three core supervisory structures: integration, twin peaks and sectoral specialization. It incorporates the best of three worlds, and seems to evade many pitfalls. Therefore, the ECFS should *and* could provide the "full-baked" solution which the European single market, its twenty-eight Member States, the financial industry and legal doctrine are seeking.

⁵⁰⁵ See footnote 104.

CONCLUSION

Conclusion. This paper has provided instructive insights into the past, the present and the future of the institutional architecture of the European Supervisory Authorities.

Like Rome, the European micro-supervisory framework was not built in a day. Chapter I demonstrates that its construction can be described as putting up sectoral walls on a growingly cross-sectoral surface. This paradoxical evolution has been propelled by the harmonization tsunami of the single market. Sandwiched between the national and the international level – where the sectoral division between the banking, the securities and the insurance sector traditionally prevailed – European waves of harmonized sectoral rules washed ashore in the Member States. As the 1985 White Paper proclaimed, these waves were caught by national supervisors, most of them sectorally organized at that point. The side effect of this stream of European integration was that it also flooded the barriers that stood in between the different sectors. Many Member States have reacted to this by substituting their sectoral supervisory models for an integrated model (a single supervisor for all three sectors) or an objectives-based twin peaks model (one supervisor for prudential supervision, one for COB supervision). By contrast, this trend has not been followed when the Lamfalussy 3L3 committees were installed, nor did it influence the design of the ESAs. In line with regulation, European micro-supervision still departs from a sectoral perspective. Nothing indicates that this will soon change: the projects of the BU and the CMU give away that the European legislator chews on another, yet interrelated aspect, *i.e.* the centralization of supervisory powers.

The present standstill of the ESAs' institutional structure is not without problems. Chapter II enlists the arguments which plead against the ESAs' sectoral structure: the integration of the financial sectors, the lack of consumer protection, the challenges and opportunities of innovation and modernization, and the complexity of the present system. Being aware of the fact that none of the supervisory models can avoid the emergence of another crisis, this package of arguments does persuasively vindicate a cross-sectoral overhaul of the ESAs' structure, with preference for a twin peaks model. As usual, however, the other side of the coin should not be lost out of sight: the chapter continues the debate with a list of arguments in favour of the ESAs' sectoral structure. First, the path dependence theory makes clear why the sectoral approach has stood the test of time, and why it has not been done away with yet. The second argument, of a political nature, reminds of the fact that Europe is the sum of its twenty-eight members which all have a unique, nationally shaped supervisory structure. To politically agree on *the* institutional architecture of the ESAs is not self-evident, not in the least because the architectural debate cuts across the

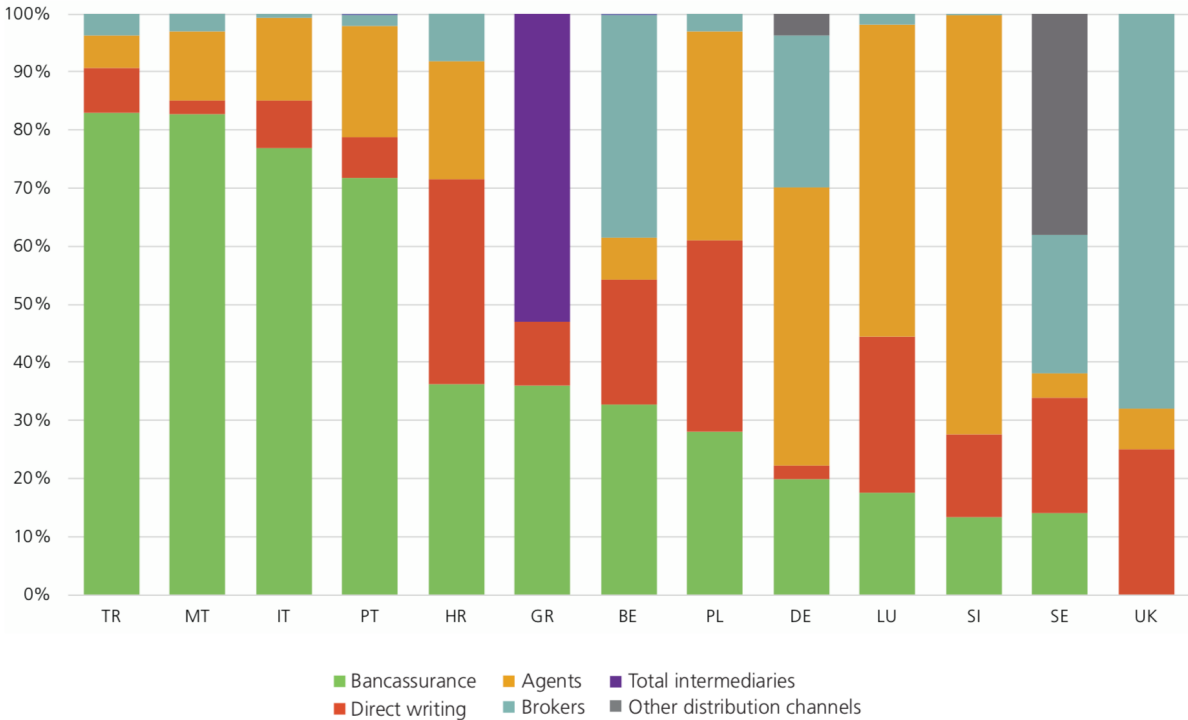
debate concerning the (de)centralization of supervisory powers. The third argument draws attention to the boundaries of the TFEU and the way in which these have been judicially interpreted. The fourth argument expresses the financial industry's support for sectorally organized ESAs and their sectoral expertise. The fifth argument points in the direction of the JC, urging to exhaust its potential to the largest extent possible by making better use of what is in place. The sixth and last argument has its origin in the US, where institutional reform has been just as contentious. One lesson learnt from overseas is that the focus on how supervisory authorities should be structured, is less important than the focus on how supervisory authorities work together. On the basis of the arguments *contra* and *pro*, Chapter II concludes that the institutional architecture of the ESAs is an exercise of art, not of exact science.

In Chapter III, an attempt is made to do the exercise of art, by answering the main, twofold research question. On the one hand, what *could* the future of the ESAs' institutional architecture look like? On the basis of the information gathered in Chapter II, it is argued that the legislator does not immediately intend to alter the ESAs' sectoral structure. The latest amendments that have been made to the ESAs' Regulations in view of the CMU, suggest that the ESAs are meant to become specialists in specific subject matter. Nevertheless, the prospect of twin peaks is not entirely off the table. Considering that the EBA now shares Paris with the ESMA and that the ECB and the EIOPA are Frankfurter inhabitants, there could be room for a dual merger, or alternatively, for a dual synergetic alliance. On the other hand, the ESAs' future structure is looked upon from my own point of view, describing what it *should* look like. As for my proposal, the ESAs should amalgamate into the European Coordinator for Financial Supervision (ECFS). This new entity cherry-picks some of the advantageous features of the three traditional supervisory models: (i) integration for the purpose of benefiting from possible economies of scale, (ii) twin peaks for the purpose of optimally addressing cross-sectoral developments, and (iii) sectoral specialization for the purpose of maintaining a high level of sector-specific expertise. At the top of the ECFS, a conduit would be in place to coordinate internal operations and to facilitate and stimulate cooperation and communication.

I fiercely hope that whenever the time is ripe for a new European committee of wise men to engage in the debate, the proposed model comes to their attention.

APPENDICES

A. Appendix I: Life distribution channels by country (% of GWP) – 2016



Source: Insurance Europe, ‘European Insurance’ (2018), 40
https://www.insuranceeurope.eu/sites/default/files/attachments/European%20insurance%20-%20Key%20facts%20-%20October%202018.pdf?fbclid=IwAR2_dMpHiGOR_ltQUmP3GyE-MFBTzaC9LEwn34rSqYQobWYo

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Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 amending Directives 2003/71/EC and 2009/138/EC and Regulations (EC) No 1060/2009, (EU) No 1094/2010 and (EU) No 1095/2010 in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) [2014] L 153/1.

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