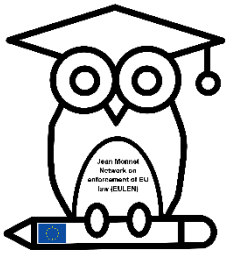

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A 'house of cards' construction for the expanding mandate of supervision of financial markets in the EU

Miroslava Scholten*

Abstract

The supervision of financial markets in the EU has been undergoing considerable changes with a remarkable speed in the recent years. One of the most recent legal changes involves attributing more powers to ESMA. These include powers to perform direct enforcement, to set up strategic policy priorities for national supervisors and to be the 'guardian' of relevant legislation, which have been powers that used to be typically given to the EU institutions by the treaties. This paper looks at this continuously evolving legal architecture of supervision of financial markets. This discussion paper suggests that the recent legislative developments supported by the recent landmark case-law aim to enhance the effectiveness of the supervision and enforcement in the financial markets in the EU. Yet, effectiveness of policies is better off if promoted *thanks to* the rule of law, the latter yet needs to be strengthened, especially at the level of the primary law, i.e. treaties. This paper stresses the need for the treaty reform concerning the 'constitutionalisation' of EU agencies, of supervisory and enforcement powers of the EU (in the financial markets), and of the evolved institutional balance to ensure resilience to possible financial and ongoing political (the rule of law) crises. The ongoing expansion runs a risk of instability of a 'house of cards' construction.

Keywords:

Enforcement, supervision of markets, EU agencies, ESMA, Meroni, ESMA-shortselling, FBF case, controls, rule of law, effectiveness, delegation.

* Associate Professor of EU Law Enforcement, Faculty of Law, Economics and Governance, Utrecht University, Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE); m.scholten@uu.nl.
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I. Introduction

The supervision of financial markets in the EU has been undergoing considerable changes in the recent years to promote financial stability and safety (see, among others, a historical overview and changes after the financial crisis in Scholten and Ottow 2014, Scholten and van Rijsbergen 2016). The major changes and hence bulk of research and publications have happened especially in the aftermath of the 2008 financial crisis and the subsequent legislative reforms at the EU level. The EU has started to know its own 'watchdogs' in banking supervision and financial markets – Single Supervisory Mechanism (SSM) led by the European Central Bank (ECB) since 2013 and the creation of the three European supervisory agencies, often labelled together as the 'ESAs', in 2010. These have been the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA), with ESMA having a fully-fledged direct supervisory and enforcement powers package vis-à-vis some participants of the financial markets, starting with credit rating agencies (CRAs) and trade repositories (TRs). The legal changes did not stop there. The founding regulations of the ESAs, among others, have been amended at the end of 2019 as well as a number of legal challenges have been brought before the Court of Justice, which have nuanced the at times ambiguous legislative provisions. Hence, the founding act of ESMA talks nowadays about the task of establishing strategic supervisory priorities (articles 29 and 29a of the amended founding act, i.e. Regulation 2019/2175). The Court of Justice allows judicial review of soft law via the preliminary procedure (Balgarska Narodna Banka Case C-501/18 and FBF-judgement Case C-911/19) and develops the arguably misleadingly called '*non*-delegation' Meroni-based doctrine into a 'delegation' doctrine of discretionary powers.

This paper discusses these rapidly developing changes in light of the longstanding debate about effectiveness of policies and the rule of law expectations in the EU to enhance awareness of the growing gap when it comes to the fundamental 'effectiveness *and* the rule of law' balancing act. It argues that the recent changes aim to enhance the effectiveness of the supervision and cooperation of financial markets, at least from the legal institutional perspective. However, the promotion of effectiveness has not been done with the support of the relevant level of promotion of the rule of law. The legitimisation of the ongoing proliferation of agencies, of enforcement powers of the EU and the evolved institutional balance have not been reflected in the primary legal sources, i.e. the treaties, and have not been sufficiently justified by relevant secondary legislation, official documents and case-law. This is not the most optimal way to promote effectiveness and may in time jeopardise it. The need for such an 'agencies' treaty base' has never been so high if to consider the ongoing proliferation of EU agencies' supervisory and enforcement powers. This discussion paper concludes by inviting further debate on this pertinent question by outlining directions for legal and political science scholarship and EU officials to promote the relevant balance in the field of supervision of financial markets and beyond this policy field as similar proliferation of supervision and enforcement has been noticed across policy sectors.

This paper comes in five parts. I first introduce my thoughts about the relationship between effectiveness and the rule of law, arguing for a more optimal way of achieving the effectiveness also thanks to the rule of law, rather than from a 'effectiveness vs the rule of law' balance perspective (section 2). I pinpoint the developed legal architecture in the field of supervision of financial markets to demonstrate that the rule of law has not been respected in the ongoing proliferating of ESMA's supervisory powers (section 3). Sections 4 and 5 offer discussion and conclusions. Enforcement implies monitoring compliance with regulation – rules, soft law, etc - (supervision stage in other words), investigation of possible violations and sanctioning for non-compliance.

II. Effective and under the rule of law policy-making at the EU

One of the major dilemmas is what role the 'state' should play in setting up norms and regulate and hence supervise the behaviour of private actors, this has been a highly debatable question for financial markets already for 100 years if not longer. This is because "there is a view that private ordering in financial markets is the best means of achieving price stability and equilibrium, and that adequate protection against financial crisis does not necessarily require regulation" (Partnoy 2015, 84). The effectiveness of private ordering has showed however its limits if the effects of financial crises affect the public, its safety and stability. Financial regulation (policies and tools) have been created with a view of three main objectives:

support financial stability; promote market efficiency, transparency, and integrity; and ensure consumer protection (Moloney et al. 2015, 6). This policy area has some specific: highly dynamic, intense intermediation, increasingly 'borderless' also online, innovation- and risk-rich, diverged of interests between issuers and buyers, speculative as regards prices and values of products and services, with the necessity of trust and large amounts of information. Given these, public regulation, including public supervision and enforcement, have sought to be essential. In the EU, the question has been similar. What role should the EU play, given also the lack of, for instance, clear treaty provisions on supervision and enforcement powers of the EU and the possibility to establish EU agencies with relevant powers in light of the EU's 'executive federalism view on the Union governance (Schütze 2010)?

So, what kind of policy needs to be established to promote financial stability and safety? What type of public regulation should be there, at what level and with which actors? These questions have been at the core of the debate, especially in the aftermath of the most recent financial crisis. Some interesting research exists arguing for most optimal types of regulation of enforcement – private and/or public (see e.g. Shavell 2003). The choices made on these issues have to be made however in light of the key values of the EU. Making effective public policy needs to respect the rule of law expectations.

What is the exact relationship between effectiveness and the rule of law? When one talks about striking a balance between the two, it seems to presuppose a negative correlation between the two – effectiveness vs. the rule of law – which in turn would require to balance these. To what extent is this so? It is important to define both and align with each other to determine the interrelationship between the two as well as extract the elements for further analysis of the evolution of the relevant legal framework in the EU. Is it effectiveness vs the rule of law or effectiveness through the rule of law that we should have? Which one do we witness in the regulation of financial markets in the EU in particular? And what does this imply for the ongoing development in the supervision of financial markets in the EU?

On the interrelationship between effectiveness and the rule of law

Effective policy is in light of the dictionary explanations of these word imply a set of ideas or a plan of actions that have been established (by politicians) and which produce the intended result (Oxford and Collins online dictionaries). This set of ideas needs to have an aim and intended results and methods to achieve it, including possible designation of actors assigned to implement and execute this set of actions. This is essential also to assess the effectiveness as one would need to know the ex ante established aim and method to check ex post results against. The extent to which any policy will be legislatively prescriptive in relevant acts may depend on a number of factors, including the degree of decided public intervention in regulation, supervision and enforcement of the policies. Here, the rule of law elements come to fore.

The essence of the rule of law can be characterized as the binding of the exercise of executive power to fixed rules, which allow a degree of certainty in predicting how and when that power will be exercised. In other words, the exercise of power becomes dependent on rules, instead of on the preferences and whims of those who exercise the power (Sklansky 2012). In the EU context, the treaties are the acts of delegation of power from the national level and the people to supranational institutions. The treaties set up the boundaries of what the EU legislature is allowed to do – aims and areas for legislative action, possible options and types for such actions, etc. Hence, respecting the rule of law requires acting when allowed and giving justifications for any EU public regulation and enforcement – in accordance with which treaty aims and legislative basis and which type of the acts to select and policy choices to be made – this seem to bring this 'negative connotation' on the interrelationship between the concepts of effectiveness and the rule of law. Effective policy making seems to be possible then only within the restrictive limits of the rule of law expectations, i.e. in line with the guidance of the existing primary and then secondary rules. If this may restrain the choice of possible arguably effective options leading to the necessity of 'creative interpretation' of relevant basic and primary norms and principles and sophisticated justifications, the rule of law seems not an element contributing to the effectiveness as such.

On the other side of the 'spectrum', it is logical to suppose that one is unlikely to produce an effective policy if relevant parties do not accept it, do not see it as legitimate if the policy is not made in accordance

with the existing – substantive and procedural - rules, i.e., the rule of law expectations ('input legitimacy' dimension, see e.g. Scholten 2015). From this perspective, the rule of law elements – treaty contours for EU legitimacy action – can be seen as establishing a fundament, certainly and predictability, which can contribute to achieving the intended results if relevant parties trust the system, established norms and actors. The interrelationship between effectiveness and the rule of law would be here then not in a negative correlation, but rather support each other. This supporting interrelationship seems ideal if it allows achieving a presumably higher degree of effectiveness through or thanks to the rule of law, too.

In the following section, I look at the evolution of regulation of financial markets in the EU, especially the growth of the strongest agency in the field, ESMA. This is to determine to what extent the effectiveness of financial markets supervision has been promoted also respecting the rule of law or if effectiveness and the rule of law are more in a negative correlation in this case and if so, why. To discuss the effectiveness, I look if there is a plan of actions in this respect. I discuss a set of legislative actions taken and hence show the evolution of legislative and institutional architecture of supervision of financial markets with the growth of rules and supervisory agencies. To discuss the rule of law, I focus on the legal debate surrounding the delegation of powers to EU agencies and especially the main arguments on the limits of the delegation to agencies and of EU's enforcement powers. The analysis shows that the promotion of effectiveness in this case has gone so far without sufficient respect of the rule of law, which, as just discussed, may be not optimal to the effective supervision. My key sources for analysis have been relevant legislative acts, official documents and landmark case-law.

III. Evolution of supervision of the financial markets in the EU

Given the historical development of EU legislation in this field, the effectiveness is thought to be promoted by enhancing harmonization of rules and centralization of supervision and enforcement, following among others the Lamfalussy process and de Larosière report (see more in, e.g. Scholten and Ottow 2014). The historical development has gone through the roughly distinguished three stages: 1. promoting the internal market in the financial sphere via minimum harmonization, using predominately directives as legal instruments; 2. enhancing consistent implementation and enforcement of EU laws and rules via the first attempt of centralization of supervision via EU networks; 3. enhancing harmonization of rules via using also regulations as legal instruments, soft law and centralization of supervision and enforcement via creating EU enforcement authorities (EEAs).

Has this been effective? The development of financial markets supervisions has gone through a plan of action, which have been elaborated and developed by experts (Lamfalussy and de Larosière report). The most recent report from the Commission 'On the operation of the European Supervisory Authorities (ESAs)' COM(2022) 228 final, of May 2022, seems quite positive on the functioning of the ESAs. It states that the responses from the public consultation before this report for further centralisation and harmonisation have been not that supportive and the Commission is hence not planning to propose new legislative changes. Please, note though that ESMA has just expanded its direct supervisory power and there have been reactions from the public consultation on the need to centralise supervision of environmental, social and governance (ESG) rating agencies, ESG data providers, sustainability-related service providers, and pan-European market infrastructures such as EU CCPs (pp. 5, 11-13, 18). Based on this information and in light of the earlier mentioned definition of effective policies, one can conclude that the set plan of actions seems to achieve the intended result, hence has been effective.

To analyse the elements of effectiveness, three developments are worth noticing here: instrumental, institutional and functional elements, to put it succinctly. First, it is a growth of legal instruments to govern and harmonise/converge rules and supervisory practices (instrumental). The effectiveness is deemed to be achieved thanks to the shift from using only directives to also using regulations and a sophisticated design of level 1- 4 normative framework established by the Lamfalussy process. As I describe it elsewhere, " The first two levels, i.e., the passing of necessary legislation (Level 1) and creating two new comitology committees to assist the Commission in implementing the details of that legislation (Level 2), were the responses on the regulation side. The other two levels, i.e., enhancing cooperation between relevant national authorities (Level 3) and strengthening the role of the Commission in the implementation of common rules (Level 4), aimed to ensure consistent implementation and to enhance the enforcement of

EU laws and rules" (Scholten and Ottow 2014). This includes also the development of supportive and soft law (van Rijsbergen 2022) that the supervisory agencies are allowed to issue to govern the financial markets, national counterparts and private parties. Second, there is an institutional change from a networked governance system of national authorities to institutional centralisation with powerful EU agencies to enhance effectiveness through institutional centralisation. ESMA has become the most powerful of EU agencies with the powers to develop the common rules via legally-binding technical standards and soft law, register some financial market participants, like credit rating agencies, monitor such registered actors compliance and investigate and sanction for violations (see ESMA's official webpage on the fines imposed).

This brings me to the final, functional element to discuss. In addition to direct supervisory powers, ESMA has recently been assigned the power to establish strategic supervisory priorities policy-making. Article 29a Regulation (EU) 2019/2175 reads as follows:

"Following a discussion in the Board of Supervisors and taking into account contributions received from competent authorities, existing work by the Union Institutions, and analysis, warnings and recommendations published by the ESRB, the Authority shall, at least every three years, by 31 March, identify up to two priorities of Union-wide relevance which shall reflect future developments and trends. Competent authorities shall take those priorities into account when drawing up their work programmes and shall notify the Authority accordingly. The Authority shall discuss the relevant activities by the competent authorities in the following year and draw conclusions. The Authority shall discuss possible follow-up which may include guidelines, recommendations to competent authorities, and peer reviews, in the respective area.<…>"

This is an important power to direct also financial and human resources at the national level and in the private sector. Moreover, ESMA's role in cooperation and oversight of national authorities has grown from the already existing emergency powers and 'breach of Union law' powers from the start to include facilitating coordination and delegation of tasks among national authorities (Article 8) and settling of disagreements between them (Article 19). Such tasks and powers seem to have been predominately given to EU institutions by the treaties (the Commission and the Council). This raises the 'rule of law' question.

The rule of law discussion underpinning the ongoing legislative changes comes down to the discussion of the so-called non-delegation doctrine and its key question of what kind of powers can be lawfully delegated and to whom. It has been a matter of a longstanding (academic) debate that the input legitimacy of EU agencies remains questionable upon the sole argument that the Treaties have not offered an explicit legal basis for agencies' creation and operation, leaving also subsequent questions as to what powers can be delegated and what controls should be there, open for debate (Scholten 2014, Scholten and van Rijsbergen 2014, Chamon 2016).
This discussion seems to be advanced now with the fact that the powers that agencies receive are enhancing to include the powers to issue legally-binding decisions of rule-making, supervisory and enforcement nature. The 'oil' into this already 'burning' discussion on agencies' legitimacy comes in this policy field further from the fact that the EU's role in enforcement of its law has not been established either. For decades, it has been considered to be left to the national authorities in light of articles 4-5 TEU and 197 TFEU and the principle of national procedural autonomy. Doesn't this development go too far when EU agencies with direct supervisory and enforcement power start to appear and when such agencies' power start to evolve even further against the limits of the major case-law in the absence of the primary rules?

It seems that it does go too far, especially given the most recent changes. Such landmark judgements as Meroni, ENISA and ESMA-shortselling seem to allow slowly but surely legislating beyond the boundaries of the treaties to enhance effectiveness of achieving the treaties' goals. The limits of these judgements – prohibition of delegation of discretionary powers and delegation supported by controls (Meroni Case 9-56), delegation to agencies created for temporary duration (ENISA Case C-217/04), delegation of clearly delineated powers amicable to judicial review (ESMA-shortselling Case C-270/12) – seem to be further stretched via subsequent legislative acts for the reasons of effectiveness but the fact remains that this is a 'house of cards' built upon an instable fundament of no clear primary legal basis for the fundament. Thus, it seems highly problematic to delegate, further extend direct supervisory powers and soft law-making

powers, even though the judicial review of the latter seems to have been possible indirectly (Marjosola et al. 2022), and add policy discretionary powers to ESMA (the new article 29a of the amended founding act) and the guardian's role 'a la the Commission' (among others, article 8) from the rule of law perspective.

This evolution goes simply one step too far each time with another legislative reform when the fundament – delegation to EU agencies, where controls over them are still in the making (Scholten and Brenninkmeijer 2020, Marjosola et al. 2022) and the EU's role in enforcement – have not been that clear. Interestingly in the sense too, that the Commission's report of 2022 on the operation of ESAs has been focusing predominately on effectiveness. There seems to have been only one reference to the principles of subsidiarity and proportionality mentioned (p. 12), very briefly, when discussing the questionable necessity to enhance direct supervision further. The reality seems to have become to ignore the question of to what extent EU agencies, including ESMA, and the ongoing proliferation of EU's (agencies) supervisory and enforcement powers are legitimate. In light of proposed assumption in section 2 on a negative correlation of effectiveness and the rule of law, the conclusion here is that effectiveness of supervision policies of financial markets is being promoted without clear support of the treaties, hence the effectiveness is less optimal than it would have been the case if effectiveness would be promoted also thanks to the necessary, specific treaties' provisions reflecting the outcome of negotiations and normative picture on what role the EU should be in this respect.

IV. Towards promoting effectiveness through the rule of law

Effective policies are not the ones that aim at achieving the intended results at any cost; in fact, the latter may cause their ineffectiveness due to (potential) social, political and/or stakeholders' refusal to follow an illegitimately established goal, actor or norm and subsequent relocation of business and other activities. Effectiveness should be built and be enhanced by the fact that policies have been made according to the key values of governance, where the rule of law plays a major (if not the major) role, respected by those who are in power, too. Policies made in accordance with the agreed norms are trustworthy, what then contributes to their acceptance and effectiveness. Relevant decision-making actors have to adhere to the existing norms, starting from the primary sources (the treaties). In light of the words of the classics, "If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself" (The Federalist No 51).

The ongoing developments in the field of financial markets' supervision seem to be the most controversial in this sense. The institutional architecture has evolved to include the most powerful EU agency, ESMA, with arguably continuously expanding supervisory and enforcement powers. This is against the background of the still lacking treaty base to create agencies and hence the absence of clarity on the operation of EU agencies as such and on the supervisory and enforcement powers of and relevant institutional roles within the Union to play.

How 'to oblige the government to control itself' in this light? The treaty reform is essential on three issues: agencification; scope of Union's supervision and enforcement powers; and the arguably evolving Commission's guardian role, interrelationship between the Commission and the Council via agencies and hence an evolving institutional balance.

First, as this has been argued already by a number of prominent scholars (see, e.g. Chamon 2016, Curtin 2009, to name but a few), the institutional provisions need to be adjusted to include a proper legal base for the creation of EU agencies and constitutionalise their existence and conditions of their operation (aims, powers, controls); think of, for instance, expanding Article 13 of the Treaty on the European Union for this purpose. This is to legitimize such actors as policy implementation tools, also for the purposes of Art. 114 TFEU, and to clarify the scope of their functions, which has become ambiguous in the case-law; would clearly delineated powers with discretion (CJEU's arguably evolving language) be allowed to be delegated and if so under which controls? (see Scholten and Brenninkmejier 2020 on the discussion of the need to develop a relevant system of control for the growing shared legal order) Is the review of an agency's board

of appeal an agency-administrative review or a pre-judicial check with relevant implications for the safeguards to be in place? Etc. The need for such an 'agencies' treaty base' has never been so high if to put it next to the second issue – ongoing proliferation of EU (agencies') supervisory and enforcement powers, which brings me to the second issue mentioned above.

The treaty system of policy-making and its implementation has been traditionally built upon the division of competences between the EU and national jurisdictions. The principles of conferral, subsidiarity, proportionality, national procedural autonomy, effectiveness and equivalence and provisions on administrative cooperation and infringement procedures have been there to guard the division and successful implementation and enforcement at the national level. Yet, against this background and the prevailing idea of 'executive federalism' of the EU's governance structure (Schultz 2009), we witness the proliferation of EU agencies with direct supervisory and enforcement powers, especially in the area of financial markets but also elsewhere (Scholten and Luchtman 2017). This does not reflect the treaty-established categorisation of the division of competences (art. 2 TFEU talking about legislating as the key activity in this light). This is important as there is a difference in exercising legislating and rule-making powers in comparison to supervisory and enforcement powers when it comes to the implications that the exercise of such powers brings for delegating such tasks, powers, (procedural) safeguards and controls necessary (see, the landmark publications in this sense: Hofmann, Turk and Rowe 2011, Eliantonio 2014, Jans, Prechal and Widdershoven 2015, Wissink 2020, Karagianni 2022). An adjusted treaty set up is hence essential to ensure also effective supervision and enforcement and proper alignment with national systems of controls, safeguards, actors and relevant processes (see, e.g. van Rijsbergen and Scholten 2016 showing how different national rules may lead to forum shopping by ESMA if it inspects at the national level).

Moreover, according to the landmark research (Baldwin 1990), enforcement is better off once being designed at the legislative or rule-making stage. According to Scholten and Scholten (2017), it is logical to expect the shift of enforcement powers to the same level or jurisdiction where the rules have been made if the alternative means face challenges in enforcement. It seems that the time is ripe to discuss and assign the Union (institutions and agencies) specific supervisory and enforcement powers to ensure effectiveness and the rule of law. The existing set up, however, seems to stand in stark contract with the 'general set up' of the treaties on keeping legislating and implementation apart at the EU and national level respectively and assigning only the Commission the role of the 'guardian' and 'enforcer' against the member states, and again calls for a 'constitutional rethinking'. Articles 2, 197, 288, 290, 291 and 352 TFEU at least should be adjusted to reflect on the different types of power of the EU institutions and agencies and their effects for relevant jurisdictions, (controlling) actors, norms and procedures. This in turn brings me to the third issue mentioned above, i.e. the need of constitutional rethinking of the institutional balance in light of the changing roles of the EU institutions and agencies.

As the CJEU defined it in Chernobyl (Case 70/88), an institutional balance is a "system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community" (para. 21). The institutional balance is not a clear and cut concept (Jacqué 2004), which does not derive from the treaties but connected to Article 13 by the Court in the mentioned judgement. This makes the clear boundaries between institutions difficult to draw, which in turn "may hinder spotting encroachment of one institution on the powers of another institution if EU institutions can exercise powers of a 'mixed nature'" (Scholten 2014, p. 55), especially if one considers also the interaction with EU agencies. Still, it is an important feature in a rule of law system ensuring clarity, legitimacy and trust in the system. The Treaties have assigned the Commission to be the 'guardian of the treaties', including ensuring application of the Treaties and oversee the application of Union law under the control of the CJEU (Art. 17 TEU, 258-260 TFEU). According to the most recent research findings, the Commission seems to be changing its role and refrains from its 'guardian' role vis-à-vis national administrations to ensure its rule-making function in a 'more friendly' setting with the member states (Kelemen and Pavone 2022). In this light, the proliferation of EU's enforcement power as such and via its agencies seems as a collateral development. Yet, with ESMA receiving powers of direct supervision vis-à-vis national authorities and private actors, emergency powers against non-complying member states, setting strategic supervisory priorities and overseeing compliance with financial regulation and lead in cooperation of national authorities, this agency seems to take up quite some important tasks, which would normally fall under the remit of the Commission

and perhaps also of the Council (policy-making and coordination functions according to Article 16 TEU). It is true that EU agencies' management board resemble 'mini-Councils' (Scholten 2014), yet, they have not been 'treaty-based mini-Councils' to take up the ever-evolving functions they seem to have been receiving. And if this is so, it means that the Commission-Council interrelationship seem to be changing and get another twist within the agencies' management boards. This development and unclarity require a constitutional reflection via the treaties. All in all, the existence of EU agencies as such and with the mentioned types of powers impacts thus the existing treaty-institutional design and hence requires adjustments, including at least the institutional articles as Article 13 TEU and its follow-up articles on individual institutions, 288 TFEU and potentially new provisions on agencies (first point discussed in this section).

V. Conclusions

The ultimate goals of financial markets regulation and supervision are to ensure financial stability and safety; the EU actions have been arguably so far necessary and successful in this sense (Commission report 2022). Yet, trust plays a key role in the society and on financial markets and impacts the effectiveness of public policies there. The effectiveness is thus dependent on trust in the public authorities, too. The rule of law plays a key role in ensuring trust in the public regulation, which has to develop in accordance with the rules and procedures set up by relevant norms. The rapid development and further evolution of institutional architecture of financial markets in the EU shows at this moment a pursuit for effectiveness without necessary respect of the rule of law, the latter yet being able to promote effectiveness optimally. This is a general trend in the evolving EU polity where the treaty adjustments to 'constitutionalise' EU agencies, supervision and enforcement powers of the EU (in financial sector) and the evolved institutional balance are essential to ensure the stability of the 'fundament' and ultimately promote legitimacy and effectiveness of the Union's actions before its citizens. The existing, growing 'house of cards' construction is vulnerable to allegations of its questionable respect of the rule of law, which affects effectiveness of the policies if national and private actors may not be accepting it leading to, among others, having ineffective mechanisms, divergent practices, weak cooperation, disputes and judicial actions. This is then less resilience against possible future financial crisis and is not helpful in the ongoing 'rule of law' crisis in Europe.

VI. Bibliography

1. Baldwin, R. (1990). 'Why Rules Don't Work' Modern Law Review 53.
2. Chamon, M. (2016) 'EU Agencies: Legal and Political Limits to the Transformation of the EU Administration'. Oxford University Press.
3. Collins online dictionary, https://www.collinsdictionary.com/dictionary/english/policy/related#:~:text=shape%20policy-,A%20policy%20is%20a%20set%20of%20ideas%20or%20plans%20that,politics%20%2C%20economics%20%2C%20or%20business.&text=social%20policy-,A%20policy%20is%20a%20set%20of%20ideas%20or%20plans%20that,politics%20%2C%20economics%20%2C%20or%20business, last check 18 August 2022.
4. Commission's report 'On the operation of the European Supervisory Authorities (ESAs)' COM(2022) 228 final, May 2022.
5. Curtin, D. (2009) 'Executive Power of the European Union: Laws, Practices and the Living Constitution'. Oxford: Oxford University Press.
6. Eliantonio, M. (2014) 'Judicial Review in an Integrated Administration: the Case of Composite Procedures' Review of European Administrative Law 7(2).
7. ESMA's Annual report 2021, https://www.esma.europa.eu/sites/default/files/library/esma22-439-962_2021_annual_report.pdf (last check 18 August 2022).
8. ESMA's enforcement actions 2014-2022, https://www.esma.europa.eu/supervision/enforcement/enforcement-actions (last check 10 August 2022)
9. ESMA's official web-page of the EU 'banking and finance' for an overview of regulated topics, https://ec.europa.eu/info/business-economy-euro/banking-and-finance_en (last check 10 August 2022)

10. Hofmann, H., Turk, A., and Rowe, G. (eds.). (2011) 'Administrative Law and Policy of the European Union' Oxford University Press.
11. Jacqué, J-P. (2004) 'The principle of institutional balance', Common Market Law Review, 41 (2).
12. Kelemen, D. and Pavone, T. (2021) 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union', SSRN working paper: https://ssrn.com/abstract=3994918 (last check 18 August 2022).
13. Jans, J., Prechal, S. and Widdershoven, R. (2015) 'Europeanisation of Public Law' Europa Law Publishing.
14. Karagianni, A. (2022) 'The Protection of Fundamental Rights in Composite Banking Supervision Procedures' Europa Law Publishing.
15. Lamfalussy report, Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, Brussels, 15 February 2001.
16. Marjosola, H., van Rijsbergen, M., Scholten, M. (2022) 'How to exhort and to persuade with(out legal) force: Challenging soft law after FBF' *Forthcoming* in Common Market Law Review 59(5).
17. Moloney, N., Ferran, E. and Payne, J. (eds). (2015) 'The Oxford Handbook of Financial Regulation, Oxford: Oxford University Press.
18. Partnoy, F. (2015) 'Financial Systems, Crises, and Regulation', in N. Moloney, E. Ferran, and J. Payne (eds), The Oxford Handbook of Financial Regulation, pp. 68–94.
19. Oxford online dictionary, https://www.oxfordlearnersdictionaries.com/definition/english/policy#:~:text=%2F%CB%88p%C9%92l%C9%99si%2F,present%20government%27s%20policy%20on%20education (last check 18 August 2022).
20. Report of the High-level Group on Financial Supervision in the EU chaired by Jacques de Larosière, 25 February 2009.
21. Scholten, M. (2014) 'The Political Accountability of EU and US Independent Regulatory Agencies' Brill, Nijhoff Studies in European Union Law.
22. Scholten, M. (2015) 'Democratic Input Legitimacy of IRAs: Proposing an Assessment Framework', Utrecht Law Review, 11(2).
23. Scholten, M. and Brenninkmeijer, A. (eds) (2020) 'Controlling EU Agencies: The Rule of Law in a Multi-jurisdictional Legal Order' Edward Elgar Publishing.
24. Scholten, M., Ottow, A. (2014) 'Institutional Design of Enforcement in the EU: the Case of Financial Markets' Utrecht Law Review 10(5).
25. Scholten, M. and Scholten, D. (2016) 'From Regulation to Enforcement in the EU Policy Cycle: A New Type of Functional Spillover?'. Journal of Common Market Studies, 55 (4).
26. Scholten, M. and van Rijsbergen, M. (2014) The ESMA-short selling case: Erecting a new delegation doctrine in the EU upon the Meroni-Romano remnants, Legal Issues of Economic Integration, 41 (4).
27. Schütze, R. (2010) 'From Rome to Lisbon: "Executive Federalism" in the (New) European Union. Common Market Law Review 47 (5).
28. Shavell, S. (2003) 'Economic Analysis of the General Structure of the Law'. Harvard Law and Economics Discussion Paper No. 408.
29. Sklansky, D. (2012). 'Crime, Immigration, and Ad Hoc Instrumentalism' New Criminal Law Review, 15(2).
30. The Federalist No. 51, https://billofrightsinstitute.org/primary-sources/federalist-no-51 (last check 18 August 2022).
31. Van Rijsbergen, M. (2021) 'Legitimacy and Effectiveness of ESMA's Soft Law', Edward Elgar Publishing.
32. van Rijsbergen, M. and Scholten, M. (2016) 'ESMA Inspecting: The Implications for Judicial Control under Shared Enforcement' European Journal of Risk Regulation, 7(3).
33. Wissink, L. (2021) 'Effective Judicial Protection in Banking Supervision An analysis of judicial protection in composite administrative procedures in the Single Supervisory Mechanism' Europa Law Publishing.

Case-law

Case 10/56 *Meroni* [1956] ECR 1958 – 00133.

Case 70/88 *European Parliament v Council of the European Communities* [1990] ECLI:EU:C:1990:217.

Case C-217/04 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union (ENISA)* [2006] ECLI:EU:C:2006:279.

Case C-270/12 *ESMA Short-Selling* [2014] ECLI:EU:C:2014:18.

Case C-501/18 *BT v Balgarska Narodna Banka* [2021] ECLI:EU:C:2020:729

Case C-911/19 *Fédération bancaire française (FBF) v. Autorité de contrôle prudentiel et de résolution (ACPR)* [2021] ECLI:EU:C:2021:599.