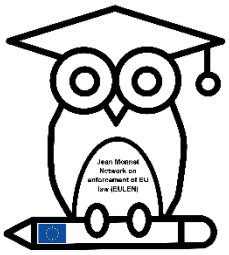

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Peer influence on enforcement practices in regulating EU financial markets

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The EU has become an important forum for innovation in market regulation, through novel regulatory and enforcement procedures and institutions,[1] ranging across comitology, deliberation,[2] transnational soft law,[3] the open method of coordination, councils of regulators and networked agencies. In regulating the internal market, a key driver of regulatory innovation has been the process of 'agencification,' both at national and EU level.[4] At both levels, regulatory agencies have been tasked with functions as diverse as monitoring and information-gathering, market studies, provision of technical advice and recommendations, as well as the exercise of rule-making, standard-setting and enforcement powers.[5] At national level, EU law has mandated regulatory agencies in many spheres to be formally independent from national political actors and industry.[6] National agencies have been networked not only to coordinate enforcement activities and engender mutual learning, but also as a precursor to the creation of EU-level agencies.[7]

In the last decade, a sleuth of new European agencies have been created and their mandate goes beyond coordination and cooperation so that they themselves have been tasked with specific regulatory and market oversight functions.[8] According to the European Commission, EU agencies have the purpose of

[1] Mariolina Eliantonio and Federica Cacciatore, When the EU takes the field. Innovative forms of regulatory enforcement in the fisheries sector, journal of European integration.
[2] Joerges and Neyer 1997.
[3] Christiansen and Piattoni, 2000.
[4] Chitti
[5] M. van Rijsbergen, On the Enforceability of EU Agencies' Soft Law at the National Level: The Case of the European Securities and Markets Authority, in Utrecht L. Rev., Vol. 10, Issue 5, 2014, pp. 116-131.
[6] M Thatcher and A Stone Sweet, 'Theory and Practice of Delegation to Non-Majoritarian Institutions' (2002) 25 West European Politics 1.
[7] Koen Verhoest, Agencification in Europe, in the Palgrave Handbook of Public Administration and Management in Europe, 2018, Edoardo Ongaro and Sandra van Thiel, 327-346; Miroslava Scholten and Marloes van Rijsbergen, The limits of Agencification in the European Union, German Law Journal 15(7), 2019.
[8] See generally The Agency Phenomenon in the European Union: Emergence, Institutionalisation and Everyday Decision-Making, edited by M. Busuioc, M. Groenleer and J. Trondal (Manchester: Manchester University Press, 2012; M Chamon, EU Agencies, Legal and Political Limits to the Transformation of the EU Administration (Oxford University Press, 2016'.

making 'the executive more effective at the European level in highly specialized technical areas requiring advanced expertise and continuity, credibility and visibility of public action'.[9] EU agencies do not follow a specific and consolidated operational model, not least because of different legal and political objectives and constraints in different sectors,[10] resulting in variable composition, mandate, and powers.[11] Generally speaking, EU agencies are said to be used as an 'instrument of administrative integration' in a 'context of sectoral administrative networks'.[12] As such, they often emerge through a process of formalization of previously informal networks of national regulators and are then granted some administrative powers 'instrumental to the exercise of decision-making powers conferred on national and European authorities'.[13] EU agencies are said to have a double purpose: (i) institutionalising cooperation among the Member States' administrations including with the Commission, and (ii) 'light and controlled reinforcement of EU administration' enabling common administrative action while preserving EU and national prerogatives.[14]

Once established, some EU agencies have gradually acquired stronger intervention powers, resulting in a suggested "verticalization" enforcement of EU law[15] and bootstrapping it to national enforcement mechanisms.[16] Eliantonio and Cacciatore argue that EU agencies have gained an active role within the law implementation and enforcement phases. For instance, such agencies have been granted specific powers and tasks in the enforcement of EU legislation, previously within the competence of Member States.[17] Compared to an earlier clearer division between implementation and enforcement of EU law, now in several fields both European and national actors can participate in both, even if the patterns of cooperation and active involvement depend on the policy sector and phase of integration.[18] Importantly, for both legal and political constraints, such verticalization does not constitute the mere replication or transfer of existing (national) regulatory and enforcement powers at the EU level. This is one of the reasons that newly established EU agencies have become venues for innovation in regulation and enforcement.

The above trends are particularly notable in banking and finance.[19] Following the 2008 financial and sovereign debt crises, the EU embarked on strengthening the supervision of financial markets, institutions, and products given the weaknesses revealed at the national level, amplified by strong crossborder interdependencies and spillovers. Supervision of financial actors and conduct has been the responsibility of national competent authorities, which were informally networked in the Committee of European Securities Regulators (CESR). Moreover, EU financial regulation operated by the minimum harmonization principle, meaning that national governments and competent authorities had room to manoeuvre in seeking competitive advantage for domestic financial institutions, resulting in heterogeneous supervisory standards and practices. The move towards a stronger banking and capital markets union involved creation of the European Supervisory Agencies (ESAs): the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA), and the European Securities Markets Authority (ESMA), with separate regulatory mandates coordinated through a Joint Committee.[20]

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[9] The Operating Framework for the European Regulatory Agencies, COM(2002) 718 final, 5.
[10] P. Craig, Institutions, Power, and Institutional Balance, in Craig and de Burca, The Evolution of EU Law, 3rd ed, 2021, 67.
[11] P Craig, EU Administrative Law (3rd edn, Oxford University Press, 2018) ch 6, Jacopo Alberti, New Actors on the Stage: The Emerging role of EU Agencies in Exercising Power, in EU law enforcement evolution, 2022, 27
[12]
[13] Edoardo Chiti, EU Agencies in de Burca and Craig, Evolution of EU law, 132-133
[14] Chiti, 133-134.
[15] Mind the trend! Enforcement of EU law has been moving to 'Brussels', Miroslava Scholten Journal of European Public Policy, Volume 24, 2017 - Issue 9.
[16] Mariolina Eliantonio and Federica Cacciatore, When the EU takes the field. Innovative forms of regulatory enforcement in the fisheries sector, journal of European integration, 5-6; Scholten, M., and M. Luchtman, eds. 2017. *Law Enforcement by EU Authorities. Implications for Political and Judicial Accountability*. Cheltenham: Edward Elgar.
[17] Eliantonio and Cacciatore, When the EU takes the field, 4
[18] Eliantonio and Cacciatore, When the EU takes the field, 4
[19] CITE
[20] See Pedro Gustavo Teixeira, The Legal History of the European Banking Union, 2020, Hart.

The ESAs generally follow the networked agency model, with a decision-making Board made up of national authority representatives, while also being granted new regulatory powers such as directly intervening in the internal market.[21] All the three ESAs have been tasked to develop and enforce a centralized supervisory rule book in their respective regulatory fields and issue binding decisions to ensure greater regulatory consistency.

As such, all three ESAs (EBA, ESMA and EIOPA) were designed to strengthen the pre-existing informal networks of national competent authorities (NCAs), so as to enhance cooperation and coordination, engender regulatory convergence, but also to stimulate European interest-formation which can be injected into regulatory decision-making. Grant of formal powers in technical fields of regulation has also led to novel formal oversight mechanisms for the exercise of such powers, such as the Boards of Appeal.[22]

The only difference, if we follow their respective founding regulations, is the specific area in which the ESA is focused on. Hence, ESMA was granted direct intervention powers with respect to rating agencies and financial products. It has to ensure that the taking of investment and other risks are appropriately regulated and supervised.[23] EBA has the task of appropriately regulating and supervising the taking of credit and other risks, plus preventing the use of the financial system for money laundering and terrorist financing.[24] And EIOPA focuses on insurance and occupational pensions supervision in the EU. It aims to foster financial stability and confidence in the insurance and pensions markets. Otherwise, all three are geared towards ensuring strong, effective, and consistent regulation and supervision, and bringing about a more harmonized and consistent application of the rules.

Given that the direct intervention powers of all three ESAs are limited, their key competence is the oversight and coordination of NCAs in their exercise of regulatory powers enforcing EU and related national law.[25] Notwithstanding a suggested trend toward verticalization and hierarchy,[26] the bulk of supervisory tasks is still in the hands of NCAs. While substantial secondary EU legislation has been enacted to harmonise aspects of national regulation, this legislation is often in the form of directives allowing some leeway to NCAs and financial institutions.[27] Moreover, since the daily conduct of financial supervision is in the hands of NCAs, its effects and efficacy are determined by their formal and informal supervisory techniques and practices, including by the relationships they establish with financial institutions and financial market stakeholders.[28] As noted by Cacciatore, EU financial governance is further differentiated and fragmented due to 'the intersection with other legislative frameworks (the SSM), various levels for the same tasks (direct supervision at the national/EU levels) across the branches, and the different criteria by which regulatees are clustered under varying competences'.[29]

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[21] Moloney, Niamh (2014) European Banking Union: Assessing its Risks and Resilience. Common Market Law Review, 51 (6). pp. 1609-1670. European Banking Union: A Legal and institutional analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism, Alexander Kern, European Law Review, ISSN 0307-5400, Nº 2, 2015, pp. 154-187.

[22] Michal Krajewski, Relative Authority of Judicial and Extra-judicial Review : EU Courts, Boards of Appeal, Ombudsman, 2021, Hart.

[23] Moloney, The Age of ESMA.

[24] Art. 10 to 16.

[25] Federica Cacciatore, (2019). Patterns of Networked Enforcement in the European System of Financial Supervision: What is the New Role for the National Competent Authorities? European Journal of Risk Regulation, 10(3), 502-521. doi:10.1017/err.2019.25

[26] D Levi-Faur, "Regulatory networks and regulatory agencification: towards a Single European Regulatory Space" (2011) 18(6) Journal of European Public Policy 810, p 811 (enumerating ESMA's direct enforcement powers).

[27] Moloney, The Age of ESMA

[28] Financial Supervision in the Interstices Between Private and Public Law, Yane Svetiev and Annetje Ottow From the journal European Review of Contract Law, 10(4) 2014 496-544.

[29] Cacciatore, Networked Enforcement, 508.

A key tool for ESAs to promote convergence of the supervisory framework is the conduct of peer reviews.[30] Art. 8 of all three ESAs' Founding Regulations lists as a key organisational task the conduct of "peer review analyses of competent authorities, including issuing guidelines and recommendations and issuing best practices, … to strengthen consistency in supervisory outcomes'. Notably, peer review is not an established regulatory oversight mechanism at the national level, and all three Regulations provide no definition of peer review. Art. 30, identical to all ESAs, thoroughly details the objectives and means of peer review without defining what constitutes a 'peer' or what type of 'review' is required.

Peer review in EU governance can be traced back to the OMC instituted in policy areas without EU competence, such as labour and employment, or research. OMC peer reviews were a mechanism of informal exchange, learning and inspiration among national policy-makers without necessarily aiming for convergence in rules or regulatory practices.[31] More recently, however, legal frameworks for networked regulation and administration at EU level have involved decision-making or enforcement of EU or national actors being reviewed by regulatory peers. Even if they do not always use the term "peer review", these EU regulatory frameworks require peer oversight and input before taking specific regulatory actions and decisions at national or EU level.[32]

By contrast, Art. 30 of the ESA Regulations lists objectives for peer review and leaves it to the individual ESAs to develop methods that 'allow for objective assessment and comparison between the authorities reviewed'. Peer reviews are to provide the basis for all ESAs for the issuing of specific guidelines and recommendations, which the reviewed NCAs 'shall endeavour to follow', as well as identifying 'best practices' that other NCAs may decide to adopt. ESAs must also consider 'the outcome of the peer review when developing draft regulatory technical or implementing technical standards'.

All three ESAs are a repository of regulatory expertise with no political representation whose decision-making is supposed to be technical.[33] They have been granted leeway to shape peer reviews, as the basis for recommendations, guidelines, and best practices that NCAs should endeavour to follow in exercising their supervisory powers. Given the under-specification of peer review, weakness of political representation, as well as its potential to affect national regulation and enforcement, there is the concern that peer reviews could facilitate the process of legislation by stealth. Namely, under the guise of disseminating technical or non-binding guidance on enforcement, does the club of regulatory peers make normative choices about the regulation of European markets?[34] This has been a recurring concern about the drift of regulatory power within EU regulatory networks, recently legally crystallised in considering the practical effect of soft instruments of EU financial governance promulgated by EU agencies in the *FBF* case.[35] AG Bobek observed that (non-binding) guidelines promulgated by EBA had been implemented into national law directly by a decision of the French NCA turning them into an instrument binding on regulated undertakings. AG Bobek argued that the requirement for NCAs to 'make every effort to comply with the guidelines' demonstrates that the instrument has not been 'adopted with the intention simply to be disregarded by their addressees, particularly if making such effort is a duty placed upon them.'[36] As such, ESA guidelines and recommendations are

> formally addressed to the Member State, [but] their provisions are in due course meant to govern the conduct of individuals, with the latter having no choice but to apply them. [NCAs] are not the real addressees of those obligations; their task is simply to opt in or to opt out.

[30] ESMA/EBA/EIOPA have all been provided powers to conduct peer review: ESMA article 30; EBA Article 30, Regulation (EU) No 1093/2010; EIOPA Article 30, Regulation (EU) No 1094/2010

[31] CITE OMC Papers (in the OMC peer reviews were used to assess whether a practice is "effective; contributes to EU objectives [and] could be effectively transferred to other countries. In addition, states could hold a peer review "to gather expert advice from other countries to inform the process of preparation of a major policy reform").

[32] Svetiev, Experimentalist Competition Law and the Regulation of Markets (examples from electronic communications and energy).

[33] Busuioc, M., European Agencies: Law and Practices of Accountability (Oxford 2013),

[34] Moloney, The Age of ESMA, Generally, ESMA has been viewed positively from a legitimacy point of view.

[35] For an overview and possible discussion see Giulia Gentile, To Be or Not To Be.

[36] AG Bobek opinion, FBF Case, 11.

> However, once that decision is made, the initially non-binding nature becomes very much binding, as the 'nominal addressee' [the NCA] becomes an effective 'enforcer'. Thus, there is very little choice, or rather none at all, on the part of the real addressees of the guidelines, namely the financial institutions, on whether to comply with them.[37]

Given that peer reviews are used as the basis for developing recommendations, guidelines, and best practices addressed to NCAs, the absence of limiting principles on their conduct may deepen the legitimacy concerns for their use as a mechanism of (transnational) legislation by stealth.[38]

The use of peer review commenced under the auspices of the predecessors of the three ESAs. It came under threat as part of the centralising initiatives leading up to the ESAs and subsequently. The Larosiere Report characterised, for instance, CESR's peer review as being at an "embryonic stage" and ineffective in challenging the decisions of national supervisors. It expressed the view that a reinforced peer review mechanism should be able to challenge the decisions of the home regulator and enforce a decision where a home regulator "has not met the necessary supervisory standards", while also acting as a binding mediation mechanism for cross-border supervisory problems. In its 2017 review of the performance of the ESAs, the Commission criticised ESA governance, which, relying as it does on representation from NCAs, did not adequately mediate EU and national interests and produced an inaction bias. It found that peer reviews lacked teeth and should be replaced by "independent" reviews by panels of EU agency (rather than NCA) officials with stronger powers to ensure compliance with outcomes. By contrast, the Commission's most recent 2022 ESA review provided a positive assessment of peer reviews as a supervisory tool, suggesting that the European supervisors should use it more actively on an ad hoc basis, including as an ex-post oversight tool in events with major supervisory implications.

The focus of this paper is to explore the use of peer review throughout the three ESAs and the implications of the use of this mechanism for the enforcement of EU and national financial markets law. As discussed above, as a matter of legislative text at least, Art. 30 of all three ESAs founding regulations is currently identical, although this was not the case in earlier versions of the respective founding regulations. But, as we also noted, the legislation allows for flexibility to each of the ESAs to organise and conduct peer review in a format considered to be appropriate for achieving the stipulated objectives. Thus, our aim is to examine whether the internal practices developed by each of the ESAs pinpoint certain differences in scope, method, and purpose. We also wish to explore whether such differences in method and practice lead to any observed differential effects on the degree of convergence or harmonisation, as well as on the concerns about verticalized enforcement and legislation by stealth through EU administrative networks.

I. ESMA

ESMA's predecessor, as discussed, was CESR, which body experimented with peer review from its founding. Originally, CESR peer reviews were meant to stimulate mutual discussion and learning among NCAs, though as there were pressures to build an internal market in finance, peer reviews started to be used to verify the national implementation of EU rules and CESR standards.

ESMA originally simply adopted the CESR methodology, but then, over time, the methodology for conducting peer reviews, as well as how they define the purpose of peer reviews, has changed considerably. For present purposes, we will outline the most recent methodology of ESMA peer reviews (issued in 2022). The current methodology envisages two types of peer reviews: discretionary and mandatory. The former refers to peer reviews undertaken by ESMA based on several factors, such as the novelty and importance of the matter, which are generally pre-planned according to a review programme. The methodology also allows for emergency peer reviews in cases of urgent and unforeseen events, such as the fast track peer review conducted in 2020 in the aftermath of the Wirecard collapse in Germany. By contrast, mandatory peer reviews are peer reviews mandated by legislation (including EMIR) and entrusted to ESMA to perform, e.g., CCP legislation.

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[37] AG Bobek opinion, FBF Case, 11.
[38] Moloney, Age of ESMA.

Regarding review formats, the current methodology maintains one format focused on verifying implementation of EU rules, as well as whether the implementation of soft law satisfies the "comply or explain" obligation. However, the main focus of the second format outlined in the methodology is for the review panel to understand how NCAs perform their job of 'actual supervision.' In conducting a peer review, the panel must assess whether NCAs have achieved a 'high level of supervisory outcomes and on promoting investor protection, orderly markets, or financial stability' through convergence 'rather than full harmonisation' of practices. Thus, while earlier review methodologies seemed to envisage that harmonised rules and standards should be accompanied by a harmonised enforcement toolkit, the most recent iterations instruct the review panels to consider the 'differences between jurisdictions and markets.' In other words, they explicitly disclaim a 'one size fits all' approach to enforcement and invite consideration of legitimate reasons for difference across NCA enforcement practices.

The aim to understand both the practices and outcomes of 'actual supervision' is reflected in the modalities of peer reviews. Apart from the definition of review mandates, which takes place within ESMA and in regular consultation with the NCAs who are its members, the methodology emphasises the importance of need to provide detailed information and 'complete, coherent, and high-quality responses.' In providing NCA self-assessments, the methodology emphasises the importance of narrative, reiterating that the NCA self-assessment is not a 'box-ticking exercise.' To achieve an in-depth understanding of the submissions and individual and collective analysis of enforcement practices, more recent peer reviews increasingly rely on on-site visits, including interviews with relevant NCA officials. In addition, at least since 2018, the methodology has also emphasised the importance of the consultation of relevant stakeholders as part of the review process. Finally, while early peer review methodologies resulted in synthesis tables as a snapshot of the levels of implementation, together with mappings of supervisory and enforcement tools to identify best practices, the more recent methodologies emphasise the importance of an ongoing dialogue between the review panel and the NCAs to work together towards improved quality of supervision.

An instantiation of this granular approach to supervision can be observed in the 2017 report on *Guidelines on Enforcement of Financial Information* (GLEFI).[39] These guidelines provide principles for 'effective and consistent enforcement' of financial reporting and require '[NCAs] to be empowered to examine financial information' under the TD.[40]

The peer review evaluated NCAs compliance with GLEFI to identify good practices and areas for improvement. The reviewed assessed (1) the degree of convergence and effectiveness in enforcing the guidelines, (2) the application of law and supervisory practices, and, importantly, (3) the extent to which the practices achieve the objectives of the guidelines. The review focused on guidelines 2 (whether NCAs have sufficient human and financial resources and appropriate professional experience), 5 (NCAs' use of a risk-based approach and sampling), and 6 (whether NCA examination procedures for financial information are effective). These were selected because of an expectation that they would reflect the lowest levels of convergence among NCAs (as subsequently confirmed by the report).[41]

The report put a lot of emphasis on qualitatively describing and analysing NCAs' enforcement practices and differentiating between them. Such a qualitative approach also disclosed an assertive role by the AG in identifying deficiencies, as well as actions NCAs and ESMA should take to ameliorate them. A few examples illustrate the above findings. First, the report noted that NCAs require a balanced issuers-to-staff ratio for effective oversight. While noting that member responses

[39] ESMA, Peer Review on Guidelines on Enforcement of Financial Information, July 2017, ESMA42-111-4138.
[40] ESMA, ESMA Guidelines on Enforcement of Financial Information, October 2014, ESMA/2014/1293. CESR established the European Enforcers Coordination Sessions (EECS), where NCAs exchange views and discuss experiences.
[41] ESMA, Peer Review on Guidelines on Enforcement of Financial Information, July 2017, ESMA42-111-4138, 10.

suggested that some NCAs lacked sufficient human resources, the report accepted that ESMA cannot prescribe 'a precise limit on the ratio of issuers to [staff] that NCAs should observe.'

Second, when selecting issuers for inspection, Gl 5 provided a 'mixed model' whereby risk-based selection was combined with sampling and/or rotation of companies. Earlier reports discussed the average number of companies NCAs selected for inspection, including a general overview of selection methods. Instead, this report focused closely on actual NCA practices. The depth of the report illustrates how on-site visits triggered dialogue and contestation about what constitutes good practice and the importance of local context. For instance, the AG noted that the UK selection model excluded smaller issuers, arguing that the UK authority should modify its model and cover all issuers subject to the TD regardless of size. The UK NCA disagreed with the AG on the interpretation of Gl 5, suggesting that it allows NCAs flexibility to select larger and smaller equity and bond issuers, tailored to local market characteristics and investor profile.[42] Similarly, the AG noticed that, notwithstanding a consensus among NCAs on core risk factors to consider under Gl 5, there was no consensus about 'additional' factors, expressing the view that factors that are 'objectively relevant' should be included in all jurisdictions.

Third, on the effectiveness of enforcement procedures, Gl 6 did not prescribe inspection procedures to be used and evidence to be examined, providing instead a non-exhaustive list of examples for NCAs to consider. Recognising the 'relative freedom' afforded to NCAs, in assessing convergence, the AG sought to identify practices routinely followed by NCAs and opportunities for further ESMA work by drawing on the on-site visits. The reviewers acknowledged that examination procedures could not be fully harmonised, given that they depend on national context, the type of examination, the issues raised, the powers at the disposal of NCAs, as well as time constraints and available resources.

Ultimately, the AG concluded that Gl 6 had not reduced diversity in practice across NCAs. It explicitly noted that a 'one-size-fits-all' approach should not be adopted, whiling highlighting some enforcement procedures that may be insufficient or inappropriate. For example, while disclosure checklists used by some NCAs were characterised as helpful in assessing the *completeness* of financial statements, the AG suggested that NCAs should adopt a critical look at disclosures to ensure that they are informative, provide sufficient and valuable information, and challenge them when certain information or assumptions are not reasonable.

II. EBA

EBA's methodology envisages only one type of peer review: discretionary one. By contrast to ESMA, EBA peer reviews are always pre-programmed under a mandate and there is no possibility of conducting an 'urgent' or fast-tracked peer review to respond to urgent and unforeseen circumstances.

EBA's peer review methodology focuses much more on the question of 'compliance', e.g., how far the relevant NCA has complied with a particular piece of EU legislation broadly speaking, thus including soft-law such as standards and guidelines. The methodology does not convey the sense that it is important to understand with some degree of granularity the internal workings of NCAs and their enforcement practices. Rather than the requirement of 'high-quality responses' based on narrative text in NCAs' self-assessments for ESMA peer reviews, for EBA the self-assessments typically involve ticking yes, no, or not applicable, with limited space to provide a free text response, which underscores the verification approach to peer review, rather than the objective of gaining an in-depth understanding of practice, even if the reviewers are reminded to go beyond the law on the books (legislation) to assess associated practices. Further, EBA peer reviews do not use on-site visits as a tool to enhance the peer reviewers' understanding of NCA practices. Finally, EBA peer reviewers have the possibility to reach out to stakeholders, with the methodology pithily stating that EBA 'may' seek information from external parties. However – unlike ESMA – the consultation of stakeholders is not structured and guided

[42] ESMA, Peer Review on Guidelines on Enforcement of Financial Information, July 2017, ESMA42-111-4138, 133.

by principles which ensure broad-based consultation, as well as some publication of the results of such consultation.

As such, we may argue that EBA peer reviews are more akin to static verification mechanisms, but even here we may observe the injection of some dynamic elements of dialogue and recursivity. For example, the review panel can request further information from the NCA when trying to better understand the 'effectiveness' of its 'supervisory provisions or practices.'[43]

EBA's narrower definition of the object and scope of peer reviews is also reflected in the final panel reports. By way of example, we examine the recent peer review report on the *Guidelines on the Application of the Definition of Default* (DoD). In the aftermath of the global financial crisis, a harmonised definition of default of a financial institution was established across the EU as a key element for reducing the scope for regulatory arbitrage. Subsequently, EBA developed guidelines for harmonising the definition of default (Guidelines EBA/GL/2016/07). For this exercise, the panel reviewed five NCAs and the European Central Bank. In particular, the exercise focused on the effectiveness of the procedure for submitting the application of default, the effectiveness of the assessment of compliance with the definition of default, whether the methodologies applied by the NCAs ensure effective and consistent adoption of the definition across institutions in their systems and processes, or whether the frequency and intensity of NCAs' assessments are adequate.

The report assessed the effectiveness of supervision as 'good'. However, the report principally sets out a description of compliance with the relevant legislation or guidelines and procedures, with very limited discussion or review of actual practice. By way of example, several of the review criteria focused on the questions of relevant documentation and regulatory clarity about the procedure as it applies to banks: establishing a well-documented procedure rooted in regulatory standards ensures transparency and provides clear guidelines for banks to follow when submitting applications related to the implementation of the new DoD, implementing clear and structured approaches to facilitate compliance by offering a phased methodology and clear milestones for IRBA institutions to adopt new DoD requirements. There was no engagement with stakeholders about whether the rules and practices deployed by respective NCAs were effective or otherwise, and about the performance and enforcement activities by NCAs more generally. While it provides limited discussion of how the relevant procedures operate as well as problems encountered in operationalising them, the report does not approach compliance from a monolithic lens. Likewise, it accepts that the compliance of products depends on which institutions are under the spotlight. For instance, the ECB has complex procedures and sophisticated routines because it deals with the biggest cases. In contrast, Lithuania's NCA has far less stringent procedures because of the small size of the market and the type of organizations they deal with.

III. EIOPA

EIOPA's current peer review methodology, like EBA and unlike ESMA, only envisages discretionary, pre-planned peer review exercises based on a review programme, without the possibility for fast-tracked or 'urgent' peer reviews. It would appear that the EIOPA methodology seeks to straddle an approach in-between that of ESMA and EBA. However, on balance, we would argue that, both in methodology and application, it is closer to ESMA's methodology. Most importantly, compared to the EBA peer reviews' focus on compliance, the EIOPA methodology specifically emphasises the question of 'effectiveness'. Peer review aims to uncover and observe *how*, rather than just *whether*, the NCAs under EIOPA's supervision apply the relevant rules. Unlike ESMA peer reviews, however, the evidence provided by NCAs as part of the self-assessment appears to be limited to written documentation, with

[43] Although a more detailed analysis is needed, there is one EBA peer review report - 'Authorisation under PS' – where there is reference to changing guidelines in light of experience. The relevant quote goes as follows: The report also recommends that, as part of any future review of the Guidelines, the EBA provides more guidance on how the proportionality principle should be applied in assessing the suitability of shareholders having a qualifying holding in an applicant's capital.

an emphasis on answers that are 'concise'. The methodology does allow the review committee to ask the NCAs for further information and clarification.

Like the ESMA methodology deployment of on-site visits, EIOPA's current methodology has a dedicated section about 'fieldwork.' The purpose of fieldwork is 'to exchange supervisory experiences and to further assess supervisory practices' by the NCAs. This could involve, according to the methodology, asking for review of written procedures, doing teleconferences, on- and off-site visits, and exchanging notes or additional information between the peer review committee and the NCAs. The precise scope and conduct of the fieldwork will vary depending on a series of factors, including in particular, non-contribution, insufficiency of responses to the self-assessment questionnaire or information requested, or inconsistency or lack of clarity of responses provided in the self-assessment questionnaire [WHAT IS THE OUTCOME IN SUCH A CASE?]. To ensure the successful completion of fieldwork, the methodology obliges NCAs to ensure that staff with relevant expertise for the topics covered by the fieldwork is available throughout the exercise.

To understand the effects of EIOPA peer reviews on enforcement practices, we examine the report of the recent *Peer Review on Supervision of Prudent Person Principle (PPP) under Solvency II*. The review focused mainly on the supervision of investments in non-traditional or more complex assets, including derivatives (principally in the case of their use for efficient portfolio management), and of assets backing unit-linked and index-linked (UIL) contracts where policyholders bear the risk.

NCAs participating in this peer review were asked whether any recommendation had been issued to the market (e.g. circulars, letters, opinions, recommendations) or whether any internal guidance has been developed (e.g. supervisory handbook) on the use of risk indicators for investments. In terms of fieldwork, the report explained that for this review fieldwork took the form of written procedures and conference calls.

The report provides a general overview of the activities of all NCAs with brief recommendations of further actions for some NCAs. By way of example, the report observes that '[s]everal NCAs (16 out of 24 participating to the peer review) have either issued additional legal acts on PPP to supplement the provisions in the Solvency II Directive (9 NCAs) or set out supervisory expectations to their market (12 NCAs).' The actions that NCAs might have to take are also defined at a high and general level. For instance, concerning the question of a supervisory handbook, the report recommended the Finnish NCA to 'develop and maintain an internal handbook to support supervisory staff in an effective and consistent supervision of undertakings' compliance with the PPP.' In the area of tools, the report recommends the Dutch NCA define and develop different risk indicators on PPP for UIL, pinpointing that the NCA could look at EIOPA's SRP handbook for guidance. As such, the report is not particularly useful for understanding the effectiveness of national regulation and enforcement in this specific area. This is, to a large extent because, it provides limited detail for the practices of reviewed NCAs.

IV. Provisional conclusion

One possible conclusion: ESMA's peer review appears most intrusive going beyond verification of implementation to focus on actual supervisory practice. As such it has the most potential to influence enforcement practices at national level by identifying and stimulating the adoption of identical best practices. And yet it seems that once peers start to focus on understanding local practice as it is shaped by local conditions, reviews become more accepting and tolerant of legitimate difference, so this type of convergence through identical practices is not observed. To the extent that EBA and EIOPA do not focus on practice, the scope for convergent or harmonised enforcement remains more elusive.