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How to ensure legitimacy when (re)designing enforcement on the EU level: the 'Enforcement Competence Test Roadmap'

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Abstract

The EU level has been increasingly involved in the enforcement of EU law through the regulation of national enforcement, the establishment of enforcement networks, and the establishment of separate EU enforcement authorities. These developments have taken place, however, despite the lack of explicit enforcement competences under the EU treaties. This consequently raises several questions. To what extent can the development of increased enforcement on the EU level be reconciled with the lack of an express enforcement competence, and how can the legitimacy of the enforcement structures on the EU level be ensured? This paper presents a step-by-step roadmap based on the core EU legal principles that can be utilised by the EU legislator and others to determine the legitimate establishment and use of EU enforcement competences when (re)designing and assessing EU enforcement structures. The proposed roadmap is subsequently applied to one of the most criticized EU agencies in terms of legitimacy, namely, the European Markets and Securities Authority, to demonstrate its practical application This roadmap aims at helping further research and legal practice to (re)designing legitimate enforcement of EU law. While the roadmap can be seen as a helpful tool, this paper shows that this is a pragmatic solution which leaves discretion to the EU institutions on the question which has no clear legal normative answer, i.e. what should be the EU's enforcement power?

Keywords:

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Enforcement, legitimacy, conferral, subsidiarity, proportionality, non-delegation doctrine, national procedural autonomy

I. Introduction

Apart from a few exceptional provisions in the EU treaties,[3] there are no explicit nor general enforcement competences granted to the EU in the treaties as such. Traditionally, it is the Member States that have been left with the role of implementing and enforcing EU law,[4] while the European Commission acts as the 'enforcer' or 'guardian' against the Member States' performance in this area.[5] Despite of these constitutional arrangements, there has been an increasing shift during the past decades from enforcement on the national level to the EU level.[6] This shift includes the regulation and prescription of requirements to national enforcement,[7] the creation of enforcement networks,[8] to the establishment of EU authorities with direct enforcement powers.[9] From an EU integration theory perspective, this can be regarded as a natural development. For instance, according to Scholten and Scholten, 'functional policy cycle spillover' will cause enforcement to move up a level of regulation, if the default enforcement structure, such as enforcement on national level, proves to be unsuccessful or faces challenges.[10] With the continuous emergence of transnational challenges related to climate, (economic) security, migration and energy,[11] it is likely that the national level will be continued to be deemed inefficient to ensure the effectiveness of EU law in more policy areas to come. In other words: there does not seem to be an end in sight for the proliferation of enforcement on EU level in the immediate future.

At the same time, any shift of enforcement level presupposes that it is legitimate. Meanwhile, the legitimacy of the increased role of the EU level in enforcement has been frequently questioned in lack of express competences under the treaties.[12] In order to solve parts of the competence concerns, it has been suggested that it is time to assign the EU, including its agencies, specific supervisory and enforcement powers through treaty amendments, to both ensure effectiveness, but also to ensure that relevant rule of law elements are observed.[13] However, with the current political reality, it is reasonable to assume that treaty amendments are unlikely to take place any time soon. This consequently raises a number of questions. Namely, to what extent can the development of increased enforcement on the EU level be reconciled with the lack of an express enforcement competence, and how can the legitimacy of the enforcement structures on the EU level be ensured?

This paper aims to provide solutions under the current treaty framework and demonstrate that despite there being no explicit and general EU enforcement competence, enforcement on the EU level can still be legitimate if the enforcement is designed in compliance with the EU guiding principles for EU action, as defined under

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[3] E.g. Article 85 TFEU on Eurojust and Article 86 TFEU on the European Public Prosecutor's Office (EPPO). Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU), arts 84, 86.

[4] Consolidated version of the Treaty on European Union [2012] OJ C 326/13 (TEU), arts 4-5; TFEU (n 1) art 197.

[5] TEU (n 3) art 17; TFEU (n 1) art. 258-260; Miroslava Scholten, 'A "house of cards" construction for the expanding mandate of supervision of financial markets in the EU' (2022) Jean Monnet Network of EU Law Enforcement, Working Paper Series No. 35/22, 7.

[6] Miroslava Scholten, 'Mind the trend! Enforcement of EU law has been moving to "Brussels"' (2017) 24(9) Journal of European Public Policy 1348.

[7] E.g., Articles 51-58 in the General Data Protection Regulation (Regulation (EU) 2016/679), or see relevant case law of the CJEU, e.g., Case C-68/88 *Greek Maize.*

[8] E.g., the European Competition Network (Directive 2019/1) and the Consumer Protection Cooperation Network (Regulation 2017/2394).

[9] Currently, there are nine EU enforcement authorities with direct power to monitor, investigate and sanction incompliance with EU law, for more on these agencies see: Miroslava Scholten and Michiel Luchtman (eds), *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Edwar Elgar 2017).

[10] Miroslava Scholten and Daniel Scholten, 'From Regulation to Enforcement in the EU Policy Cycle: A New Type of Functional Spillover' (2017) 55(4) Journal of Common Market Studies 925.

[11] See e.g. Jame s Caporaso, 'Europe's Triple Crisis and the Uneven Role of Institutions: The Euro, Refugees and Brexit' (2018) 56(6) Journal of Common Market Studies 1345; and Jan Zielonka, *Is the EU Doomed?* (Polity).

[12] See e.g. Federica Cacciatore and Miroslava Scholten, Introduction to the Symposium on Institutional Innovations in the Enforcement of EU Law and Policies' (2019) 10(3) European Journal of Risk Regulation 435; Miroslava Scholten, 'The proliferation of EU enforcement authorities: a new development in law enforcement in the EU' in Miroslava Scholten and Michiel Luchtman (eds), *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Edwar Elgar 2017); Merijn Chamon, 'The Empowerment of Agencies under the Meroni Doctrine and Article 114 TFEU: Comment on United Kingdom v. Parliament and Council (Short-selling) and the Proposed Single Resolution Mechanism' (2014) 39(3) European Law Review 380.

[13] Scholten (n 4) 7.

Article 5 TEU.[14] The paper will investigate the guiding principles' role in determining the EU enforcement competence, and suggests that the principles constitutes the 'legal theory' behind the enforcement design processes on the EU level. Based on these findings, an 'enforcement competence test roadmap' will be developed with relevant questions and elements that can be utilised to establish, test, and ensure the legitimacy when (re)designing enforcement on the EU level. The competence roadmap will subsequently be applied 'in action' to demonstrate its functioning, but also simultaneously test the legitimacy of one of the most powerful, but also highly criticised agencies in terms of legitimacy; namely, the European Securities and Markets Authority (ESMA).[15] In developing and justifying the competence test roadmap, a method combined of doctrinal legal research and literature study will be adopted to explain the role and assessment of the principles in the field of enforcement.[16] When applying the competence test roadmap to the legal design of ESMA, relevant key legislative documents will be consulted.

Although the need to consider relevant EU general principles when designing rules at EU level is well-established, the roadmap nonetheless constitutes an addition by synthesizing and structuring the role of the principles into a clear, step-by-step guide that can be followed when specifically (re)designing enforcement on the EU level. The competence test roadmap can be used by the EU institutions and EU enforcement scholars when designing and assessing enforcement structures and their ability to effectively achieve policy goals in a *legitimate* way.

The next section will introduce the competence test roadmap and explain why and how the guiding general principles can be used to determine the EU enforcement competence. The following section will apply the constructed roadmap to the legal design of ESMA, before some reflections are offered in the last section on concluding remarks.

[14] TEU (n 3) art 5.

[15] See e.g. Dariusz Adamski, 'The ESMA doctrine: a constitutional revolution and the economics of delegations' (2014) 39(6) European Law Review 812; Miroslava Scholten and Marloes van Rijsbergen, 'The ESMA-Short Selling Case: Erecting a New Delegation Doctrine in the EU upon the Meroni-Romano Remnants' (2014) 41(4) Legal Issues of Economic Integration 389, 390; Marloes van Rijsbergen and Marta Simoncini, 'Controlling ESMA's enforcement powers' in Miroslava Scholten and Alex Brenninkmeijer (eds), *Controlling EU Agencies: The Rule of Law in a Multi-Jurisdictional Legal Order* (Edward Elgar 2020).

[16] For more on doctrinal legal research, see Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 Law Quarterly Review 632; and Sanne Taekema, 'Relative Autonomy: A Characterisation of the Discipline of Law' in Bart van Klink and Sanne Taekema (eds), *Law and Method Interdisciplinary Research into Law* (Tübingen Mohr Siebeck 2011).

II. Chapter 1: The enforcement competence test roadmap

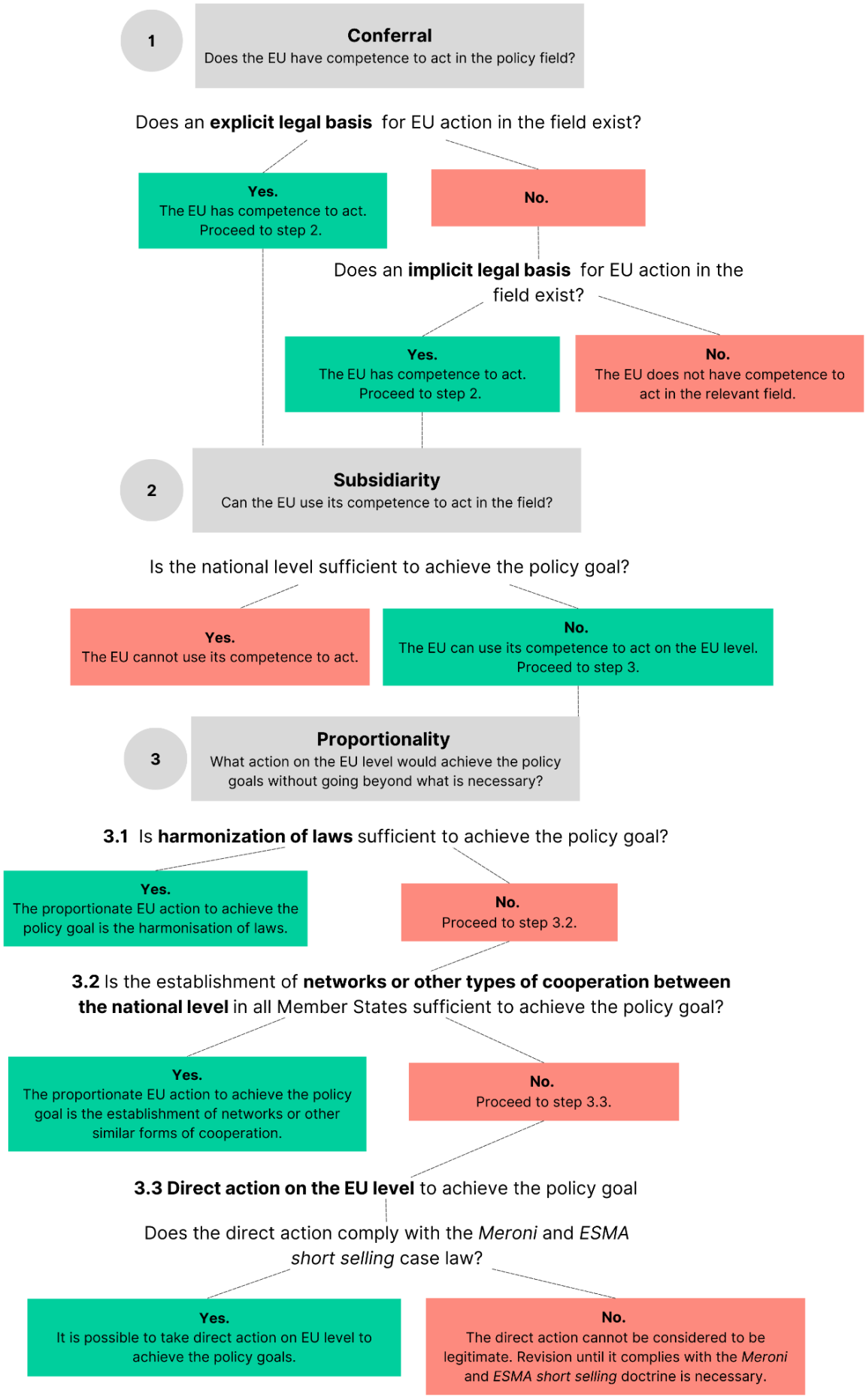
The enforcement competence roadmap is a coherent scheme that is based on the three main principles as defined under Article 5 TEU, guiding and legitimizing all action on the EU level: conferral; subsidiarity; and proportionality.[17] The illustration of the 'enforcement competence test roadmap' has been included in the following page of this paper.

The first step of the roadmap is conferral, represented in the form of the legal basis. Conferral determines the existence of an EU competence to adopt certain measures,[18] but also determines the delimitations of competences between the EU and the Member States.[19] Meanwhile, the principles of subsidiarity and proportionality concern the *use* of competences,[20] and essentially form the corollary principles to conferral in the sense that they determine to what extent the EU can exercise its competence.[21] These two principles therefore constitute the following steps. Subsidiarity is the second step, and determines whether the EU shall exercise its (non-exclusive) competences in a particular case.[22] In other words, *when* shared competences should be used on the EU level.[23] The third step is proportionality. Here, the legitimacy of action on the EU level is presupposed based on the previous step, and only the intensity and scope of the EU action in question is scrutinized.[24] Essentially, the proportionality step deals with *how* competences should be used on the EU level.[25]

This section will introduce the enforcement competence roadmap and its legal justifications, in addition to elaborating on the elements to consider when conducting the relevant assessments under each step of the roadmap.

[17] Consolidated version of the Treaty on European Union [2012] OJ C 326/13 (TEU), art 5.
[18] ibid, art 5(2); Carlo Panara, 'Subsidiarity v. Autonomy in the EU' (2022) 28(2) European Public Law 269, 292.
[19] TEU (n 16) art 5(1); Lucia Serena Rossi, 'Does the Lisbon Treaty Provide a Clearer separation of Competences between EU and Member States' in Andrea Biondi (ed), *EU Law after Lisbon* (Oxford University Press 2012) 94-95.
[20] TEU (n 16) art 5(1).
[21] Rossi (n 18) 93-94.
[22] TEU (n 16) art5(3); Panara (n 14) 292.
[23] Rossi (n 18) 95.
[24] TEU (n 16) art5(3); Panara (n 14) 286.
[25] Rossi (n 18) 95.

Figure 1: the ‘enforcement competence test roadmap’.


1
Conferral
Does the EU have competence to act in the policy field?
Does an explicit legal basis for EU action in the field exist?
Yes.
The EU has competence to act.
Proceed to step 2.
No.
Does an implicit legal basis for EU action in the field exist?
Yes.
The EU has competence to act.
Proceed to step 2.
No.
The EU does not have competence to act in the relevant field.
2
Subsidiarity
Can the EU use its competence to act in the field?
Is the national level sufficient to achieve the policy goal?
Yes.
The EU cannot use its competence to act.
No.
The EU can use its competence to act on the EU level.
Proceed to step 3.
3
Proportionality
What action on the EU level would achieve the policy goals without going beyond what is necessary?
3.1 Is harmonization of laws sufficient to achieve the policy goal?
Yes.
The proportionate EU action to achieve the policy goal is the harmonisation of laws.
No.
Proceed to step 3.2.
3.2 Is the establishment of networks or other types of cooperation between the national level in all Member States sufficient to achieve the policy goal?
Yes.
The proportionate EU action to achieve the policy goal is the establishment of networks or other similar forms of cooperation.
No.
Proceed to step 3.3.
3.3 Direct action on the EU level to achieve the policy goal
Does the direct action comply with the Meroni and ESMA short selling case law?
Yes.
It is possible to take direct action on EU level to achieve the policy goals.
No.
The direct action cannot be considered to be legitimate. Revision until it complies with the Meroni and ESMA short selling doctrine is necessary.

i. Step 1: Conferral

In accordance with Article 5(2) TEU, 'under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein'.[26] The principle of conferral therefore constitutes a logical first step in the principles roadmap for establishing the legitimacy of enforcement designs on the EU level.

A frequently expressed concern in the EU enforcement literature regarding the proliferation of EU agencies is their compatibility with the principle of conferral: can the EU establish such agencies without having express and explicit competences in the area of enforcement?[27] It may be argued that the EU might under certain circumstances have *implicit* competences to regulate enforcement and even establish EU enforcement agencies.[28] However, and as will be explained later in this section, to establish such an implicit competence, the EU guiding principles need to be strictly adhered to. Thereby, the explanation of the first step of conferral simultaneously explains the underlying reasons for the structure of the enforcement competence test, and why it can be used to establish the legitimacy of EU enforcement (re)designs.

In practice, most of the existing EU authorities have been established based on provisions that do not explicitly regulate enforcement. Before the Treaty of Lisbon, most authorities were established on the basis of the flexibility clause of Article 352 TFEU, or the internal market approximation provision of Article 114 TFEU.[29] After the introduction of the Treaty of Lisbon, the institutional practice shifted by relying on other more specific provisions instead.[30] For instance, the European Aviation Safety Agency was established on the basis of Article 100(2) TFEU, providing that 'appropriate provisions for sea and air transport' may be laid down.[31] Another example is the European Environmental Agency, which was established on the basis of Article 192 TFEU on actions to achieve the environmental objectives of the Union.[32] In the literature on EU agencies, there is a general acceptance for EU having some form of (implicit) competence in the field of enforcement, albeit there is lack of an explicit competence for it.[33] Where this enforcement competence is specifically legally grounded, however, remains more unclear.[34]

The debate concerning whether the EU can have implicit competences existing outside the express and explicit legal bases under the treaties is, however, not a new debate. In both legal doctrine and literature, this topic has already received considerable attention in the area of EU procedural and remedial competences.[35] Similar to

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[26] TEU (n 16) art 5(2).

[27] See e.g. Elio Maciariello, 'EU Agencies and the Issue of Delegation: Conferral, Implied Powers and the State of Exception' (2019) 4(3) European Papers 732; Marta Simonici, 'EU Agencies in the Internal Market: A Constitutional Challenge for EU Law' in Marting Belov (ed), Global Constitutionalism and its Challenges to Wesrphalian Constitutional Law (Bloomsbury 2018); Merijn Chamon, *EU Agencies: Legal and Political Limits ot the Transformation of the EU Administration* (Oxford University Press 2016).

[28] In the context of this paper 'explicit enforcement competence' refers to specific competences in the field of enforcement, for instance a treaty provision allowing for the establishment of a specific agency (e.g. Art. 86 TFEU). More general, and open-ended competences (e.g. Arts. 114 and 352 TFEU) are in the context of this paper referred to as 'implicit enforcement competences' if they are relied on in context of EU enforcement.

[29] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU) arts 114, 352. The European Chemicals Agency and the European Medicines Agency were established based on Article 114 TFEU, see Case C- 217/04, *UK v EP and Council* [2006] ECLI:EU:C:2006:279, para 44 and Case C- 270/12, *UK v EP and Council (Short selling)* [2014] ECLI:EU:C:2014:18. For instance the EU intellectual property was established on the basis of Article 352 TFEU. Chamon (n 26) 138.

[30] Chamon (n 26) 143.

[31] European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and repealing Regulation (EC) No 216/2008 of the European Parliament and of the Council (COM(2015) 613 final); TFEU (n 28) art 100(2).

[32] European Commission, Proposal for a Regulation of the European parliament and of the Council on the establishment of the European Environment Agency and the European Environment Information Observation Network (COM(2007) 66 final); TFEU (n 28) art 92.

[33] E.g. Martin Nettesheim, 'Kompetenzen' in Armin Bogdandy and Jürgen Bast (eds), *Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge* (Springer 2009).

[34] Chamon (n 26) 137.

[35] In the context of this paper, EU procedural and remedial competences refers to competences in judicial proceedings and remedies specifically, and not to enforcement more broadly. See e.g. Daniel Halberstam, 'Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach (2021) 23 Cambridge

how there is a lack of a general EU enforcement competence in the treaties, neither does an express EU competence in the field of judicial procedure and remedies exist.[36] As confirmed by the CJEU in *Rewe*, the procedural and remedial competences rest by default with the Member States in line with the principle of national procedural autonomy.[37] However, national procedural autonomy is simultaneously limited by the principles of equivalence and effectiveness.[38]

It has been suggested that if national procedural law does not comply with the principle of effectiveness, the need to ensure the '*effet utile*' of EU substantive law can in turn give rise to an EU procedural and remedial competence.[39] Halberstam argues that there must be some degree of implied EU remedial and procedural competences stemming from EU substantive competences, 'or else, the trinity of legal normativity [substance, procedure, remedy]– and hence the normative of substantive law itself – would be incomplete'.[40] Similarly, Galetta describes national procedural autonomy as a 'union' of two elements: (1) the absence of explicit EU procedural competence and (2) the limit imposed on national procedural autonomy from the need to ensure the 'effet utile' of EU law.[41] According to Galetta, the second element 'outlines the competence that has been, so far, indicated as an implicit competence of procedural matters'.[42] Galetta clarifies, however, that such an implicit competence only plays a role in its attenuated form identified by the '*effet util*e', and not as an implied power of procedural and remedial matters flowing directly from EU substantive competences as such.[43] According to Kakouris and Bobek, claims of primacy and direct effect alone can prove sufficient to put claims of national procedural autonomy aside. They argue in a similar way that procedure and remedy are ancillary to substance, and therefore a remedial and procedural competence can flow from substance competence when the effectiveness of EU law necessities this.[44] These conclusions in the literature originate from the case law of the CJEU. The CJEU has confirmed under the doctrine of implied powers that the scope of EU law is to be understood in functional terms, where demands of procedure and remedies may flow from the enumeration of substantive competences.[45] Moreover, when the CJEU in more recent case law has assessed the limit of the principle of effectiveness on national procedural autonomy, the focus has been on how well national procedural law is able to pursue goals set by EU substantive law.[46]

At the same time, any establishment of procedural competences must be argued well in light of the EU guiding principles. Halberstam underlines that the limits of equivalence and effectiveness do not grant 'a free-standing

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Yearbook of European Legal Studies 128; Diana-Urania Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?* (Springer 2010); Fabrizi Cafaggi and Paola Iamiceli, 'The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions' (2017) 3 European Review of Private Law 575; Rossi (n 18).

[36] Apart from some exceptional provisions allowing the EU to harmonize criminal remedial measures, such as TFEU (n 28) art 83.

[37] National procedural autonomy was established in the first Rewe case and was later reaffirmed in the second Rewe case: Case 33/76 Rewe/Landwirtschaftskammer für das Saarland [1976] ECLI:EU:C:1976:167, para 5; Case 158/80 Rewe v Hauptzollamt Kiel [1981] ECLI:EU:C:1981:163.

[38] The principle of equivalence requires no discrimination of EU law claims in national procedural law, while the principle of effectiveness entails that the national rules must not make it virtually impossible or excessively difficult to exercise EU rights. See Case 33/76 Rewe (n 29) para 5.

[39] Halberstam (n 34); Galetta (n 34); Cafaggi and Iamiceli (n 34); Rossi (n 18).

[40] Halberstam (n 34) 141.

[41] Galetta (n 34) 13.

[42] ibid.

[43] ibid, 9.

[44] C N Kakouris, 'Do the Member States Possess Judicial Procedural "Autonomy"?' (1997) 34 Common Market Law Review 1389; Case C-451/16 *MB v Secretary of State for Work and Pensions* [2018] ECLI:EU:C:2018:492, Opinion of AG Bobek; Halberstam (n 34) 141.

[45] See e.g. Case C-176/03 *Commission v Council* [2005] ECLI:EU:C:2005:542, paras 47-48; Case C-440/05 *Commission v Council* [2007] ECLI:EU:C:2007:625, para 66. Halberstam (n 34) 141.

[46] E.g. Joined Cases C-430/93 and C-431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECLI:EU:C:1995:441.Although the focus in *van Schijndel* is on the *ex officio* application of EU law and consistent interpretation, the case demonstrates how national procedural autonomy can be limited to ensure the effectiveness of EU substantive law. The reasoning has also been upheld din the cases of *Kraaijeveld* and *Eco Swiss*: Case C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland* [1996] ECLI:EU:C:1996:404; Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECLI:EU:C:1999:269.

legislative competence over national judicial procedure at the EU level'.[47] Instead, he views the implied power as a type of shared competence, which presupposes the need for the EU level to justify the need to take action, as required by the EU guiding principles.[48] Halberstam stresses that procedural and remedial demands from the EU level must be seen as an *additional* step of harmonization, going beyond harmonisation of substantive law itself. He therefore considers it to be a separate form of regulation, an exercise that is different and beyond substantive regulation.[49] Since it is an implied power that is not explicitly grounded in the treaties, he argues that it is therefore necessary to conduct a review of its 'legislative grounding' and its 'constitutional propriety'.[50] More specifically, it triggers a review of compliance with the general principles of EU law, such as subsidiarity and proportionality.[51] Furthermore, the review of compliance with the principles of an implied competence requires a stricter review compared to the principles review of an expressly conferred power for substantive measures.[52] According to Halberstam, this '*provides a normative foundation for EU law interventions into those national judicial procedures*'.[53] In other words, the EU guiding principles can potentially be used to establish and justify an implicit EU enforcement competence.

Specific EU constitutional law theories can further explain and support the possibility of developing implicit EU enforcement competences on the basis on the need to ensure effectiveness of EU law. There is an abundance of EU constitutional theories attempting to explain the relationship between the EU and national legal orders.[54] One theory that can be relied on to justify creating implicit competences where the effectiveness of EU law requires so, is the concept of the 'verbund', as presented by Calliess and Schnettger.[55] Central to the proposed concept of 'verbund' is the question of 'how to normatively achieve legal unity and ensure effective problem solving in a pluralistic European legal space'.[56] Functioning and stability of this legal unity is considered as the main objective.[57] Furthermore, it is suggested that the EU guiding principles, which have as their purpose to guide the procedural aspect of conflict resolution between institutions belonging either to EU or the Member States, is used in determining what is the most effective solution in term of national or EU level.[58] The EU constitutional law theory of the 'Verbund' thereby further supports the possibility of limiting national procedural autonomy and the creating an implicit competence of enforcement powers for the EU, where EU substantive law requires it for its effectiveness to be maintained, i.e. 'to solve the conflict'. Moreover, the constitutional law theory supports the need to rely on the EU guiding principles to conduct the assessment of what constitutes 'the effective problem solution'.

This demonstrates that both the existing literature on establishing implicit competences in the field of judicial procedure and remedies, in addition to theories on EU constitutional law, support that implicit competences

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[47] Halberstam (n 34) 132.
[48] ibid, 141-142.
[49] Halberstam (n 34) 141.
[50] Halberstam (n 34) 142.
[51] ibid, 143.
[52] ibid.
[53] Emphasis added. ibid,
[54] For other theories on the relationship between the EU legal order and the national legal order, and what it ought to be, see **constitutional pluralism**: Miguel Poisares Maduro, 'Three Claims of Constitutional Pluralism' in Avbelj Matej and Komarek Jan (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012); Miguel Poisares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Neil Walker (ed), *Sovereignty in Transition* (Bloomsbury Publishing 2006); **multilevel constitutionalism**: Ingolf Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' (2009) 15(3) Colombia Journal of European Law 349; theories describing the relationship as a **form of hierarchy**: Leonardo Pierdominici, 'The Theory of EU Constitutional Pluralism: A Crisis in a Crisis?' (2017) 9(2) Perspectives on Federalism 119; Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 Cambridge Yearbook of European Studies 59; Gareth Davies, 'Constitutional disagreement in Europe and the search for pluralism' in Avbelj Matej and Komarek Jan (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012); theories related to **dispute resolution**: Peter Lindseth, 'The Metabolic Constitution and the limits of EU legal pluralism' in Gareth Davies and Matej Avbelj, *Research Handbook on Legal Pluralism in EU Law* (Edwar Elgar 2018).
[55] Christian Calliess and Anita Schnettger, 'The Protection of Constitutional Identity in a Europe of Multilevel Constitutionalism' in Christian Callies and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2020).
[56] ibid, 350.
[57] ibid, 354.
[58] Calliess and Schnettger (n 54) 368.

may arise from the need to ensure the effectiveness of EU law. A transfer of similar arguments to the field of EU enforcement may be possible as well, supporting that implicit EU enforcement competencies may arise from the need of ensuring effectiveness of EU law, thereby legitimising relying on legal bases such as Article 114, 352 TFEU or even other, more specific substantive legal bases in the area of enforcement. These legal theoretical arguments do equally complement the existing EU enforcement literature which explains the increasing shift of enforcement from national level to EU level as a response to the ineffectiveness of the national level to protect the effectiveness of EU law.[59]

In addition to demonstrating that there are possibilities to establish implicit enforcement competences based on the need to ensure the effectiveness EU substantive law, this section has also demonstrated that the EU guiding principles play a key role in the establishment and use of such competences. This thereby explains how the EU guiding principles can be structured into a roadmap to determine whether the EU indeed can take (legitimate) action in the field of enforcement — both in situations where there are specific, express legal basis for such actions, and when there are not.

ii. Step 2: Subsidiarity

Although the EU may have competence to act in a certain field, this is not sufficient on its own for legitimatising legislative intervention.[60] In accordance with Article 5(3) TFEU, 'the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale and effects of the proposed action, be better achieved at Union level'.[61] Subsidiarity therefore constitutes the second step of the principles roadmap, and is used to determine whether action on the EU level is necessary in the first place.

Regarding the requirements for the compliance with the principle of subsidiarity, the CJEU has confined itself to a 'light' judicial review, where only a 'manifest error' of the assessment of subsidiarity by the EU legislature can lead to an annulment of a legislative act.[62] The reason for this stems from the general political discretion enjoyed by the EU legislature in the exercise of the EU's competences. As formulated by AG Kokott, 'scrutiny of these measures are exercised primarily at the political level'.[63] Because of this, the CJEU therefore only reviews whether the legislature has kept within its limits of discretion, or whether a manifest error has been committed.[64] The CJEU has clarified that there is no duty to explicitly refer to the principle of subsidiarity in the draft legislative act.[65] As long as subsidiarity has been considered by the EU institutions, this is rendered sufficient to comply with the principle of subsidiarity during the legislative process.[66] In fact, a mere reference to the principle is sufficient, as long as there is evidence that subsidiarity has been taken into account during

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[59] See e.g. Mariavittoria Catanzaraiti and Alexander H Türk, 'EU agencies and the rise of mixed administrations in the EU multi-jurisdictional setting: Facing the challenges of the rule of law' in Miroslava Scholten and Alex Brenninkmeijer (eds), *Controlling EU Agencies: The Rule of Law in a Multi-Jurisdictional Legal Order* (Edward Elgar 2020); Miroslava Scholten and Annetje Ottow, 'Institutional Design of Enforcement in the EU: The Case of Financial Markets' (2014) 10(5) Utrecht Law Review 80, 90.

[60] Case C-59/08 *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECLI:EU:C:2009:596, Opinion of AG Poiares Maduro, para 28; Panara (n 14) 278.

[61] TEU (n 16), art 5(3).

[62] See e.g. Case C-233/94 *Germany v Parliament and Council* [1997] ECLI:EU:C:1997:231, paras 25-29; Case C-377/98 *Kingdom of the Netherlands v European Parliament and Council of the European Union* [2001] ECLI:EU:C:2001:523, para 82.

[63] Case C-358/14 *Republic of Poland v European Parliament and Council of the European Union* [2015] ECLI:EU:C:2015:848, Opinion of AG Kokott, paras 146-147.

[64] E.g. Case C-508/13 *Republic of Estonia v European Parliament and Council of the European Union* [2015] ECLI:EU:C:2015:403, para 54; Case C-58/08 *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECLI:EU:C:2010:321, para 78.

[65] See e.g. Case C-233/94 *Germany v Parliament and Council* [1997] ECLI:EU:C:1997:231, paras 25-29; case C-377/98 *Kingdom of the Netherlands v European Parliament and Council of the European Union* [2001] para 82; Case C-547/14 *Philip Morris Brands SARL and Others v Secretary of State for Health* [2016] ECLI:EU:C:2016:325, para 226-227.

[66] Case C-233/94 *Germany v Parliament and Council* [1997] ECLI:EU:C:1997:231, paras 25-29; case C-377/98 *Kingdom of the Netherlands v European Parliament and Council of the European Union* [2001] para 82.

the legislative process.[67] Furthermore, the CJEU has also confirmed that there is no duty for the EU institutions to state the reasons for every provision of an act.[68]

In essence, there are no strict requirements for the EU legislature to justify how subsidiarity has been considered during the legislative process. Nonetheless, it is important to highlight that the requirement to comply with the principle still exists, despite the lack of requirements to do so explicitly or elaboratively. Therefore, it is still relevant to discuss the elements the subsidiarity assessment encompasses, especially in light of the application of the competence test roadmap.

As can already be deduced from Article 5(3) TEU, there are two main elements to compliance with the principle of subsidiarity: (1) there has to be a verification that the Member State level is insufficient to achieve the relevant objectives; and (2) there is a need to confirm that the relevant scale and effects warrants and requires action to be taken at the EU level.[69] These two main steps to assessing subsidiarity have also been confirmed by the CJEU and multiple Advocate Generals.[70]

As regards to how to assess these two steps of subsidiarity, the CJEU has provided limited guidance. Advocate General (AG) Kokott, however, has elaborated on what concrete elements can be evaluated under each limb of the subsidiarity test.[71] The first step is referred to as the 'negative component of the test', where the EU institutions must establish that they are acting only and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.[72] AG Kokott highlights that the first step is an evaluation of the ability of the Member States to sufficiently achieve the proposed objectives, and *not* a comparative efficiency test, comparing the abilities of the EU level and the Member States' level.[73] Essentially, the first step of subsidiarity constitutes what in the classic procedural and remedial field would have been an assessment of the principle of national procedural autonomy and its limits, the principles of effectiveness and equivalence.

AG Kokott proposes to evaluate three main elements in the first step, namely:

I. The ***technical and financial capabilities of the Member States***. If some Member States are not capable to take all necessary action, it indicates that the negative component is not satisfied.[74] AG Kokott does not elaborate what exact technical and financial capabilities to base the evaluation upon. The regulatory delivery method from the existing enforcement literature might prove useful in this regard, by suggesting some elements that might be relevant to consider under this point.[75] The model proposes prerequisites for regulatory agencies to be able to operate efficiently,[76] in addition to describing concrete elements that affect the effective operation of the regulatory agency in *practice*.[77]

II. Whether ***national, regional or local features are central to the issue.*** If so, Kokott suggests that intervention should be addressed by authorities which have a greater proximity and expertise in respect of action taken – the Member States.[78]

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[67] Case C-547/14 *Philip Morris Brands SARL and Others v Secretary of State for Health* [2016] ECLI:EU:C:2016:325, para 226-227.
[68] Case C-508/13 *Republic of Estonia v European Parliament and Council of the European Union* [2015] ECLI:EU:C:2015:403, paras 51, 62.
[69] TEU (n 16) art 5(3).
[70] See Case C-58/08 *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECLI:EU:C:2010:321, paras 72-73; Case C-59/08 *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECLI:EU:C:2009:596, Opinion of AG Poiares Maduro, para 28; Case C-358/14 *Republic of Poland v European Parliament and Council of the European Union* [2016] ECLI:EU:C:2016:323, para 114; Opinion of AG Kokott (n 62) para 142.
[71] Panara (n 17) 269; Opinion of AG Kokott (n 62) para 142.
[72] Opinion of AG Kokott (n 62), para 142-153, 161-168.
[73] ibid, para 142.
[74] Opinion by AG Kokott (n 62) para 151.
[75] The regulatory delivery method is a framework to assess and improve regulatory *delivery*, addressing challenges in enforcement that may arise in practice. The framework thereby moves beyond looking at the design of regulation only, but also focuses on its functioning in practice and is particularly useful for the (re)evaluation of enforcement designs, see Graham Russel and Christopher Hodges, *Regulatory Delivery* (Bloomsbury Publishing 2019).
[76] ibid, 24-26.
[77] ibid, 27-28.
[78] ibid, para 152.

III. Whether the problem has a ***cross-border dimension***, which, by their nature, cannot be effectively addressed at national, regional or local level.[79]

The second step to subsidiarity according to AG Kokott is the 'positive component of the test', namely, whether action can be better achieved on the EU level due to its scale and effect.[80] AG Kokott specifies that the second step involves comparison, and asks the question of 'whether action by the EU institutions offer *added value* in the sense that the general interests of the EU can be better served by action at the EU level rather than action by the national level'.[81] Here, she suggests to use quantitative and qualitative parameters to assess the scale and effects, and whether indeed an added value might be present.[82] For instance, quantitatively, EU action might have added value where a large number of economic operators and/or citizens are affected by the relevant measures. Or alternatively, from a qualitative point of view, added value can be measured in light of the economic, political or social importance of the relevant policy field in light of the overall EU objectives under Article 3 TEU.[83] She further specifies that under this step, 'all these considerations must always be applied with a view to the general interest of the European Union; the situation of any particular Member State taken individually is normally not relevant'.[84] Ultimately, AG Kokott believes there is a strong presumption of added value for action at EU level where it aims to solve cross-border problems, for instance related to the internal market.[85] At the same time, she also points out that, 'an internal market dimension cannot automatically lead to the conclusion that [action is better achieved on the EU level]', because 'otherwise the principle of subsidiarity in internal market matters would be deprived of much of its practical effectiveness'.[86]

The elements to the subsidiarity steps as developed by AG Kokott can also be supported by the existing literature on subsidiarity assessment, particularly the theory, or test, of functional subsidiarity. The functional subsidiarity test is a tool for assessing subsidiarity by indicating the main motives for centralization and decentralization.[87] In a perfect market, the motive for centralization is cross-border externalities and economies of scale,[88] which corresponds to what AG Kokott suggests in her opinion. In essence, functional subsidiarity suggests that 'if there is preference heterogeneity, centralization is only desirable when externalities or economies of scale are sufficiently large'.[89]

Functional subsidiarity does, however, also acknowledge that there in practice is no perfect market, and that there might be other factors impacting the choice between decentralization or centralization, such as the existing trust between Member States or other political economic factors, or alternatively, Member States acting in their own national interests.[90] For instance, there is no need for centralization if Member states would otherwise voluntarily cooperate on a specific policy issue.[91] However, if the credibility between the States are low, the cooperation will be unstable and unstainable, and developing policy goals on the central level will then be necessary. Credibility will usually be low in cases concerning imperfect and asymmetrical information, especially in complex policy areas, which will in turn render it difficult to monitor compliance.[92] Additionally, credibility can be low if there are incentives to cheat, or if there is a lack of willingness to impose collective sanctions.[93] Therefore, it may also be necessary to expand the subsidiarity assessment from only assessing

[79] ibid, para 152.
[80] Opinion by AG Kokott (n 62) para 142.
[81] Opinion of AG Kokott (n 62) para 162.
[82] ibid, para 165. This also corresponds to the old Amsterdam protocol that prescribed that qualitative (or quantitative where possible) indicators must substantiate why action on EU level can better be achieved on the EU level. Protocol 30 on the Application of the Principle of Subsidiarity and Proportionality added to the Treaty of Amsterdam [1997] OJ C 340/105, recital 4.
[83] Opinion of AG Kokott (n 62) para 165; TEU (n 16) art 3.
[84] Opinion by AG Kokott (n 62) para 166.
[85] ibid, para 152.
[86] ibid, para 164.
[87] Sjef Ederveen, George Gelauff and Hacques Pelkmans, 'Assessing subsidiarity' in George Gelauff, Isabel Grilo and Arjan Lejour (eds), *Subsidiarity and Economic Reform in Europe* (Springer 2008).
[88] ibid, 23-25.
[89] ibid, 24.
[90] ibid, 24-33.
[91] Ederveen, Gelauff and Pelkmans (n 86) 25.
[92] Ederveen, Gelauff and Pelkmans (n 86) 25.
[93] ibid.

objective, economic and efficiency concerns, to also consider additional factors, such as creditability, that may impact or influence the initial analysis.

In summary, the assessment of subsidiarity under the roadmap essentially concerns whether action should be taken on the EU level in the first place. Here, it is relevant to first establish the inefficiency of the national level to achieve the relevant policy goals. If it can be concluded that the national level is insufficient, arguments must be brought forward to why and how the EU level may be able to sufficiently achieve the policy goals instead. The subsidiary assessment framework as developed by AG Kokott might be both a useful and authoritative source in this regard.

iii. Step 3: Proportionality

If it can be concluded that the national level alone is insufficient to achieve the relevant policy goals, but that the EU level can provide added value, the next step to consider is what *type* of action to take on the EU level. Central to that consideration is the principle of proportionality. In accordance with Article 5(4) TFEU, 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'.[94]

The three famous steps of proportionality in the EU legal order was established by the CJEU in its landmark case of *Fedesa*.[95] The first step is the suitability or appropriateness of the chosen mean to achieve the policy goal. The second step is whether the measure is necessary to achieve the legislative objective, meaning that the goal cannot be achieved by other less intrusive means. The last step is assessing proportionality in the narrow sense or *strictu sensu*, involving balancing between several appropriate measures where 'recourse must be had to the least onerous' and where the 'disadvantages caused must not be disproportionate to the aim pursued'.[96] The test for suitability and necessity differs from the *strictu sensu* test in the way that suitability and necessity relate to 'the relationship between the means and the end'.[97] Central to these tests are empirical in nature, assessing the 'objectively verifiable relationship' – with focus on the efficiency – between means at the one hand, and the goal on the other.[98] Meanwhile, the *strictu sensu* test focuses on *reasonableness* and *values*, and constitutes a balancing test where competing or conflicting interests, goals or rights are balanced. This *strictu sensu* test is therefore almost normative, but within the already exisiting constitutional hierarchy and structure of rights and principles.[99]

The three-step proportionality test has been used as a basis for developing the proportionality step of the roadmap. Since the necessity step requires that the policy goal cannot be achieved by other less intrusive means, the roadmap is structured in a way where the suitability of the least intrusive form of EU action is considered first (harmonisation). The most intrusive form of EU action is considered last (direct action), and only when the two other less intrusive actions prove to be insufficient to reach the goal. The structure thereby also reflects the first step of the proportionality test, namely: suitability. For the sake of simplicity and clarity, only three types of EU action have been included in the suggested roadmap, representing three different degrees of involvement of the EU level in the enforcement of EU law. The choice is furthermore justified by the fact that in practice, the EU legislature is most commonly choosing between harmonisation, establishing networks of national authorities and EU agencies when designing enforcement structures on the EU level.[100]

With regard to the requirements for complying with the principle of proportionality, the CJEU has adopted different approaches depending on whether its reviewing EU legislation, or national measures of the Member States.[101] For national measures, the three-step approach to proportionality from *Fedesa* is usually applied, albeit with varying degrees of following the three steps strictly and explicitly.[102] When it comes to the proportionality review of measures from the EU level, however, the CJEU has reserved itself to only assess

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[94] TEU (n 16) art 5(4).
[95] Case C-311/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990] ECLI:EU:C:1990:391.
[96] Case C-311/88 *Fedesa* (n 94) para 13.
[97] Tor-Inge Harbo, *The Functioning of Proportionality Analysis in European Law* (Brill 2015) 198.
[98] ibid.
[99] ibid.
[100] Laurens van Kreij, 'The choice of EU agencies or networks of national authorities: exploring relevance of regulated industry characteristics' in Miroslava Scholten (ed), *Research Handbook on the Enforcement of EU law* (Edward Elgar, forthcoming) 167.
[101] Wolf Saute, 'Proportionality in EU Law: A Balancing Act? (2013) 15 Cambridge Yearbook of European Legal Studies 439, 450; Chiara Zilioli, Proportionality as the organizing principle of European Banking Regulation' in T Baums and others, *Zentralbanken, Wahrungsunion und stabiles Finanzsystem (in the honor of Helmut Siekman)* (Duncker and Humlot 2019) 5.
[102] See e.g. Case C-302/86 *Commission v Denmark* [1986]ECLI:EU:C:1988:421, para 13; Case C-147/03 *Commission v Austria* [2005] ECLI:EU:C:2005:427, paras 63-66; Case C-110/05 *Commission v Italy* [2009] ECLI:EU:C:2009:66, paras 65-66; Case C-17/00 *François De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort* [2001] ECLI:EU:C:2001:651, paras 37-38; Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECLI:EU:C:2003:333, para 93; Case C-320/03 *Commission v Austria* [2005] ECLI:EU:C:2005:684, paras. 89-91.

whether it is 'manifestly disproportionate',[103] similar to its subsidiarity review. This approach was already established in *Fedesa*,[104] and has been reaffirmed in subsequent case law from the CJEU since.[105] In practice, this means that the legislature has discretion in defining the objective to be pursued, and in choosing the means to achieve them as long as it is not manifestly disproportionate.[106] Moreover, the CJEU has also confirmed that the legislature has some discretion 'to the finding of the basic facts' when designing these measures, and that the CJEU therefore cannot 'substitute [their] assessment of scientific and technical facts for that of the legislature'.[107] An EU measure can therefore only be declared invalid if it is manifestly disproportionate in relation to the objective it aims to pursue.

Zilioli has further explained that the difference in approach stems from how the scope for policy decision is broader when it comes to adoption of legislative act on the EU level, in contrast to when implementing EU law on the national level.[108] In such cases, the CJEU respects the discretion of the legislation and the economic, technical and/or social considerations that have been taken into account during the legislative process. Meanwhile, for national measures that are stemming from EU secondary sources, the CJEU has 'more exhaustive parameters against which a concrete measure can be assessed'.[109] Saute has also voiced that the degree of harmonisation is crucial when determining the standard of proportionality review that is applied.[110]

Although the CJEU adopts a 'light' proportionality review of the EU legislature, for the purpose of the enforcement competence test as developed in this paper, it is still relevant to elaborate on how to conduct the proportionality assessment, and what elements to consider when determining whether one type of enforcement design is more proportionate than another.

There is a large body of literature arguing for a functionalist approach to the proportionality assessment, where utility considerations like effectiveness and cost-benefit analysis are key in determining the most proportionate form of EU action.[111] According to this view, proportionality essentially consists of an assessment of whether the overall costs of a measures generate the greater overall benefits than the costs, and whether the specific measures maximize the net benefits when compared to other measures.[112] In other words, the assessment essentially considers what type of enforcement structure would benefit the effectiveness and efficiency of the EU policy the most, at the lowest cost.[113] In *theory*, the functional approach appears to be an objective and

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[103] Case C-311/88 *Fedesa* (n 94) para 8; Saute (n 100) 450; Harbo (n 96) 177-178. For examples, see Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECLI:EU:C:2002:741, para 123; Joined Cases C-154/04 and C-155/04 *The Queen, on the application of Alliance for Natural Health and Nutri-Link Ltd v Secretary of State for Health and The Queen, on the application of National Association of Health Stores and Health Food Manufacturers Ltd v Secretary of State for Health and National Assembly for Wales* [2005] ECLI:EU:C:2005:449, para 52; Case C-62/14 *Peter Gauweiler and Others v Deutscher Bundestag* [2015] ECLI:EU:C:2015:400, paras 81 and 91.

[104] Due to the fact that the EU legislature enjoys discretionary powers, the CJEU noted that 'judicial review must […] be limited to examining whether the measure in question is vitiated by a manifest error or misuse of powers and that the authority concerned has not manifestly exceeded the limits of discretion'. See Case C-311/88 *Fedesa* (n 94) para 8

[105] See Case C-491/01 *British American Tobacco (Investments) Ltd* (n 111) para 123; Case C-343/09 *Afton Chemical Limited v Secretary of State for Transport* [2010] ECLI:EU:C:2010:419, para 46; Case C-157/14 *Société Neptune Distribution v Ministre de l'Économie et des Finances* [2015] ECLI:EU:C:2015:823, para 76; Joined cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECLI:EU:C:2002:161, para 63; Case C-344/04 *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport* [2006] ECLI:EU:C:2006:10, para 80; Case C-570/19 *Irish Ferries Ltd v National Transport Authority* [2021] ECLI:EU:C:2021:664, para 151.

[106] Case C-27/95 *Woodspring District Council v Bakers of Nailsea Ltd* [1997] ECLI:EU:C:1997:188, para 32.

[107] ibid, para 95; Case C-626/18 *Republic of Poland v European Parliament and Council of the European Union* [2020] ECLI:EU:C:2020:1000, para 95; Case C-5/16 *Republic of Poland v European Parliament and Council of the European Union* [208] EU:C:2018:483, para 150.

[108] Chiara Zilioli, Proportionality as the organizing principle of European Banking Regulation' in T Baums and others, *Zentralbanken, Wahrungsunion und stabiles Finanzsystem (in the honor of Helmut Siekman)* (Duncker and Humlot 2019).

[109] ibid, 7.

[110] Saute (n 100) 452-453.

[111] See e.g. Aurlien Portuese, 'Principle of Proportionality as Principle of Economic Efficiency' (2013) 19(5) European Law Journal 612, 617; Bukard Eberlein and Abraham Newman, 'Escaping the International Governance Dilemma?' (2008) 21(1) Governance: An International Journal of Policy, Administration, and Institutions 25.

[112] Portuese (n 110) 617.

[113] Toni Marzal, 'From Hercules to Pareto: Of Bathos, Proportionality, and EU law' (2017) 15(3) International Journal of Constitutional Law 621; Portuese (n 110) 612.

well-considered approach to assess the proportionality enforcement measures. However, it may be more complicated to adopt a functional approach in practice.

There is also literature arguing that a purely functional and economic reading of proportionality does not depict reality, and that it is necessary to also consider the role that, for instance, political elements might play in the proportionality assessment.[114] According to this view, the EU legislature does also choose the form of enforcement that realises their strategic interests, such as national distributive concerns, or considerations of bureaucratic control.[115] Because of this 'political reality', da Silva suggests to also incorporate political considerations when determining what is considered to be 'necessary' under the second step of the proportionality test.[116] Da Silva highlights that if the legislative and executive branches have any form of discretion in defining which right or policy should have priority in a certain given context, then the assessment of whether the measure is necessary cannot be assessed against its strict dictionary and technical meaning.[117] In this case, what is 'necessary' would to some degree also depend on current political priorities. In fact, the support for the consideration of political elements in the assessment of proportionality aligns with the 'manifestly disproportionate' approach of the CJEU, respecting the political discretion of the EU legislature.

Moreover, it has also been suggested that other elements beside both functional economic and political elements, may influence what measures are adopted on the EU level. For instance, according to an institutional perspective, path-dependency may affect the choice of future enforcement structures, where pre-existing choices and structures influence and shape future structures by transferring institutional characteristics.[118] Likewise, van Kreij has suggested that regulated industry characteristics may also affect the choice between EU agencies and networks of national authorities.[119] According to van Kreij, there are preferences for enforcement by an EU agency when a regulated industry is highly concentrated and internationally active.[120] Similarly, there will be strong preferences for enforcement by an EU network of national authorities when the regulated industry is fragmented, cast and dispersed throughout the EU.[121] Furthermore, it has been proposed that effectiveness of enforcement can be increased by considering a risk-based approach. According to this approach, instead of adopting a 'one size fits all' form of enforcement, enforcement is instead tailored according to the supervisees level of risk and previous compliance of rules.[122]

Ultimately, these various forms of approaches to how to achieve effective or 'successful' enforcement demonstrate that elements such as the specifics of the relevant policy sector, resources available, experiences and behaviours of supervisors and supervisees, or unwritten norms and culture all can affect the design choices of enforcement structures.[123] In turn, this simultaneously demonstrates how the proportionality assessment of whether enforcement action should constitute harmonization, networks or direct action, cannot be summarized into a simple and short list of elements or questions, as this can highly depend on a number of factors, like the policy field or industry. However, in any case, the takeaway is that any action on the EU level must be carefully considered and justified in light of proportionality.

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[114] Daniel Kelemen and Andrew Tarrant, 'The Political Foundations of the Eurocracy' (2011) 34(5) West European Politics 922.

[115] ibid; Franscesca Vantaggiato, 'Regulatory relationship across levels of multilevel governance system: From collaboration to competition' (2019) 33(1) Governance 173.

[116] Virgilio Afonso da Silva, 'Standing in the shadows of balancing: Proportionality and the necessity test' (2022) 20(5) International Journal of Constitutional Law 173, 1741-1742.

[117] ibid.

[118] E.g. see: Nina Boeger and Joseph Corkin, 'Institutional Path-Dependencies in Europe's Networked Modes of Governance' (2017) 55(5) Journal of Common Market Studies 974.

[119] Laurens van Kreij, 'The choice of EU agencies or networks of national authorities: exploring relevance of regulated industry characteristics' in Miroslava Scholten (ed), *Research Handbook on the Enforcement of EU law* (Edward Elgar, forthcoming).

[120] ibid, 167, 172.

[121] ibid.

[122] Florentin Blanc and Michael Faure, 'Smart Enforcement: Theory and Practice' (2018) 20(4) European Journal of Law Reform 78; Florentin Blanc and Michael Faure, 'Smart enforcement in the EU' (2020) 23(11) Journal of Risk Research 1405.

[123] Miroslava Scholten, 'Enforcement' in Martino Maggetti and others, *Handbook of Regulatory Authorities* (Edwar Elgar 2022) 394.

iv. If the roadmap leads the legislator to the last step of direct action…

If no other means can be taken on the EU level to effectively achieve the policy goals, then direct action on the EU level can be considered legitimate, as it can be argued for there being no other less intrusive means. However, the proposed direct action still has to be compliant with the delegation doctrine of *Meroni* and *ESMA-short selling*, as established by the CJEU in its case law.[124]

In *Meroni*, the CJEU established that although the EU institutions can under certain circumstances delegate powers, these powers can only be *implementing* powers that are clearly defined, and where the delegating institution can supervise the delegate based on objective and specific criteria. Powers of a regulatory nature, also referred to as 'discretionary powers', cannot be delegated. This stems from the fact that such powers involve a high degree of political considerations. If the authorities would be allowed to exercise discretionary powers, it would be incompatible with the limits set by the treaties regarding the balance of powers between the various institutions.[125] As further explained by the CJEU, 'the delegation of the first kind [implementing powers] cannot appreciably alter the consequences involved in the exercise of powers concerned, whereas a delegation of the second kind [discretionary powers], since it replaces the choices of the delegator by the choices of the delegate, brings about an actual transfer of responsibility'.[126] The case of *Meroni* did not, however, concern the delegations of powers to EU bodies specifically.

Unlike in *Meroni*, the CJEU addressed the delegation of powers to EU bodies in the case in *ESMA-short selling.*[127] In *ESMA-short selling*, the United Kingdom contested that ESMA's powers in relation to short selling involved discretionary powers, and therefore conflicted with the *Meroni* non-delegation doctrine.[128] The CJEU noted that ESMA does not have 'any autonomous power […] that goes beyond the bounds of the regulatory framework established by the ESMA Regulation'.[129] Moreover, the CJEU highlighted that its 'exercise of powers […] are circumscribed by various conditions and criteria which limit ESMA's discretion' and amenable to judicial review.[130] Thereby, 'it follows that the powers available to ESMA […] are precisely delineated and amenable to judicial receive in light of the objectives established by the delegating authority'.[131] As formulated by Scholten and van Rijsbergen, 'without mentioning it explicitly, the Court formulated a new delegation doctrine in relation to EU agencies' in that they 'can be the recipients of executive discretionary powers if this discretion is limited'.[132] That is, if it is clearly stipulated when the authority can act, whom it should notify and consult, and what elements it is to consider before adopting a decision.[133] In *ESMA Short-selling*, the CJEU essentially blurred the distinction between implementing and discretionary powers that was underlined in *Meroni,* and established that as long as the powers of the authorities are precisely delineated; there are conditions and criteria delineating its discretion when exercising its powers; and there is possibility of judicial review of its decision, the delegation complies with the non-delegation doctrine.[134] These conditions

[124] Case 9/56 *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* [1957] ECLI:EU:C:1958:7, 151-152; Case C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* [2014] ECLI:EU:C:2014:18 (*ESMA Short-selling*).
[125] Case 9/56 *Meroni* (n 123) 151-152.
[126] ibid, 152.
[127] C-270/12 *ESMA Short-selling* (n 123).
[128] ibid, paras 27-40.
[129] ibid, para 44.
[130] ibid, para 45.
[131] ibid, para 53.
[132] Miroslava Scholten and Marloes van Rijsbergen, 'The *ESMA-Short Selling* Case: Erecting a New Delegation Doctrine in the EU upon the *Meroni-Romano* Remnants' (2014) 41(4) Legal Issues of Economic Integration 389, 390. There are different views in the literature regarding whether ESMA short-selling constitutes a new doctrine separate from *Meroni*, or whether it simply rephrases and/or constitutes an extension of the same *Mero*ni doctrine. For the purpose of this paper and the suggested roadmap, the point of departure is the view that the two cases essentially describe the same doctrine, and that ESMA-short selling is simply an extension of (or alternatively: blur of) of from Meroni. For different views, see: e.g. Dariusz Adamski, 'The ESMA doctrine: a constitutional revolution and economics of delegation' (2014) 39(6) European Law Review 812; Merijn Chamon, 'The Empowerment of Agencies under the Meroni doctrine and Article 114 TFEU: Comment on United Kingdom v Parliament and Council (Short-selling) and the proposed Single Resolution Mechanism' (2014) 39(3) European Law Review 380.
[133] Scholten and van Rijsbergen (n 139) 395.
[134] ibid, 401.

will thereby also form the basis for assessing whether a proposed direct action in the field of enforcement can be considered legitimate in light of the competence test roadmap.

v. Framework for application

Based on the legal doctrinal and theoretical findings in the previous sub-sections, it is possible to develop the following framework that functions both as a more detailed elaboration of the principles roadmap as presented in the beginning of this section, but also as the framework (i.e. the roadmap) that will be applied to the case study in the following section. The framework consists of the following questions:

1. *Conferral*
    a. Does an explicit enforcement competence exist in the relevant policy field?
    b. If not, does an implicit enforcement competence exist in the relevant policy field?

2. *Subsidiarity*
    a. To what extent is national enforcement sufficient to achieve the policy goal?
        i. Technical and financial capabilities.
        ii. National, regional or local features.
        iii. Cross-border dimension.

    b. If the national level is insufficient, to what extent can enforcement action on the EU level provide added value?
        i. Scale and effects (quantitative).
        ii. Economic, social or political importance (qualitative).
        iii. Other factors (e.g. trust between national authorities).

3. *Proportionality*
    a. To what extent extent is the enforcement structure appropriate to achieve the policy goal?
    b. To what extent is the enforcement structure necessary, or are there less intrusive enforcement structures that can also achieve the policy goal?

    c. Proportionality *strictu sensu* .

    d. If the preferred enforcement structure is direct action on the EU level, to what extent does the enforcement structure comply with the *Meroni* and *ESMA short-selling* non-delegation doctrine as developed by CJEU case law?

        i. To what extent are the powers precisely delineated?
        ii. To what extent are there delineated criteria and conditions limiting discretion when exercising powers?
        iii. Is judicial review possible?

III. Chapter 2: Case study: The European Securities and Markets Authority

The financial supervisory authority ESMA is one of the most powerful EU enforcement agencies, with exclusive and direct supervisory powers in selective areas, including the power to directly impose sanctions.[135] The legitimacy of ESMA and its powers has been frequently questioned in the academic literature, particularly in light of the lack of an express legal basis for its establishment, and in light of the non-delegation doctrine developed by the CJEU in its case law.[136] Against this background, ESMA therefore serves as an excellent case study for the application of the enforcement competence test roadmap, as introduced in this paper. Does the critique against ESMA hold? This section will explore this further by applying the principles roadmap to ESMA and its legislative history.

A number of legal acts and their legislative history are relevant to consult when applying the roadmap to the legal design of ESMA. That includes the EU initiated expert report on the future of European financial regulation and supervision after the financial crisis, the 'Larosière Report',[137] and the following Commission communications.[138] The first ESMA Regulation (1095/2010) was a direct result of the Larosière report and the communications.[139] It will also be relevant to consider the legislative history of the amended ESMA Regulation (2019/2175).[140] In addition to the two regulations on ESMA, it is also necessary to consider the legislative history of the Credit Rating Regulation from 2011 (513/2011), as it awards ESMA exclusive supervisory powers over credit rating agencies.[141] The legislative history of the European Market Infrastructure Regulation(EMIR)[142] and its amendment (EMIR refit)[143] is also relevant, considering it awards ESMA with

[135] Miroslava Scholten, 'A "house of cards" construction for the expanding mandate of supervision of financial markets in the EU' (2022) Jean Monnet Network of EU Law Enforcement, Working Paper Series No. 35/22, 6.
[136] See e.g. Dariusz Adamski, 'The ESMA doctrine: a constitutional revolution and the economics of delegations' (2014) 39(6) European Law Review 812; Miroslava Scholten and Marloes van Rijsbergen, 'The ESMA-Short Selling Case: Erecting a New Delegation Doctrine in the EU upon the Meroni-Romano Remnants' (2014) 41(4) Legal Issues of Economic Integration 389, 390; Marloes van Rijsbergen and Marta Simoncini, 'Controlling ESMA's enforcement powers' in Miroslava Scholten and Alex Brenninkmeijer (eds), *Controlling EU Agencies: The Rule of Law in a Multi-Jurisdictional Legal Order* (Edward Elgar 2020).
[137] The de Larosière Group, *The High-Level Group on Financial Supervision in the EU* (Brussel 25 February 2009) (The Larosière Report).
[138] European Commission, *Communication for the Spring European Council: Driving European Recovery* (COM(2009) 114 final, 4 March 2009); European Commission, *Communication from the Commission: European Financial Supervision* (COM(2009) 252 final, 27 May 2009); European Commission, *Communication for the Spring European Council: Driving European Recovery* (COM(2009) 114 final, 4 March 2009).
[139] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority' COM(2009) 499 final (Proposal for first ESMA Reg.), 2; 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 2009/77/EC [2010] OJ L 331/84.
[140] Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) [2019] OJ L 334/1.
[141] Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies [2011] OJ L 145/30; Regulation (EU) No 462/2013 of the European Parliament and the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies [2013] OJ L 146/1. The two other credit rating regulations (1060/2009 and 426/2013) will not be taken into account, as the predecessor (1060/2009) does not relate to ESMA, and the amended regulation (426/2013) consisted primarily of substantive amendments, with no changes made to the enforcement design or ESMA's supervisory powers from Regulation 513/2011. See Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies [2009] OJ L 302/1; Regulation (EU) No 462/2013 of the European Parliament and the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies [2013] OJ L 146/1.
[142] 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 L 201/1.
[143] Regulation (EU) 2019/834 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories [2019] OJ L 141/42.

supervisory powers and responsibilities within the area of financial market infrastructures, specifically trade repositories.[144]

The application of the roadmap to the legal design of ESMA, particularly the EU's legislature's compliance with the principles of subsidiarity and proportionality, will be done in line with the 'manifest error' approach of the CJEU, as elaborated in the previous section. The application of the roadmap in this section is therefore limited to assessing whether the EU legislature presented and factually substantiated their arguments in light of the core legal principles, and *not* by conducting a separate efficiency assessment of whether the methods of financial supervision proposed by the EU legislature indeed are the most efficient options to achieve the relevant policy goals.

i. Conferral

Following the steps of the roadmap, the first question to ask is whether there is an explicit competence, i.e., an *express* legal basis in the treaties, to establish a supervisory agency in the field of financial supervision. As already mentioned earlier in this paper, generally, there are no express legal bases for an EU competence in the field of enforcement,[145] including in the area of financial supervision. The conclusion to the first sub-question renders it necessary to continue to the next sub-question under the step of conferral, namely, whether there exists an *implicit* competence to establish an agency in the field of financial supervision. In all the proposals to all the relevant legal acts that are considered under this section (ESMA, credit rating agencies, and EMIR), Article 114 TFEU on internal market approximation was referred to as the legal basis to establish ESMA and its powers.[146]

In *ESMA short-selling*, the CJEU reaffirmed that in order to rely on Article 114 TFEU as a legal basis, the legislative act must, first, concern measures for approximation of laws, action or regulation in Member States. Second, the measure must have the objective related to the establishment or functioning of the internal market.[147] With regard to the need for the measure to concern approximation of laws, the CJEU has confirmed that the EU legislator generally enjoys wide discretion in determining the appropriate form of approximation measure necessary.[148] In fact, in the case of *ENISA*, the CJEU confirmed that Article 114 TFEU can be relied on to establish an EU body or agency where the substantive measures adopted depend on specific technical and professional expertise.[149] However, the tasks granted to the body has to have close links to the subject of the legal acts that are approximating national rules for the functioning of the internal market.[150] With regard to the need for the measure to have an internal market objective, the CJEU has established that in order to legitimately rely on Article 114 TFEU as a legal basis, the relevant measures must *genuinely* have an internal

[144] A **trade repository** a centralized registry that maintains an electronic database of open derivative transaction records, meaning all contracts. See 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 L 201/1; European Commission, 'Impact Assessment Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories' SEC(2010) 1058.
[145] See section 2.1.
[146] See Proposal for first ESMA Reg. (n 139) 3-4; European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Market Authority) (20 September 2017) COM(2017)536 final (Proposal for amended ESMA Reg.) 9; European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on amending Regulation (EC) No 1060/2009 on credit rating agencies' COM(2011) 747 final (Proposal for credit rating agency reg.) 3; **European** Commission, 'Proposal for a Regulation of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories' COM(2010) 484 final (Proposal for EMIR reg.) 5.
[147] Case C-270/12 *United Kingdom v Parliament and Council* [2014] ECLI:EU:C:2014:18, para 100. For more on the use of Article 114 TFEU as a legal basis, see Manuel Kellerbauer, 'Article 114 TFEU' in Manuel Kellerbauer and others (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019).
[148] C-270/12 *ESMA Short-selling* (n 154) para 102.
[149] Case C-217/04 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* [2006] ECLI:EU:C:2006:279, para 44; C-270/12 *ESMA Short-selling* (n 154) para 105; Kellerbauer (n 154) 1237.
[150] Case C-217/04 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* [2006] ECLI:EU:C:2006:279, para 45.

market considerations as their objective.[151] Moreover, it is not possible to rely on the legal basis for addressing abstract risks to the functioning of the internal market.[152] Neither is it possible to rely on Article 114 TFEU to correct disparities between Member States if they do not hinder the functioning of the internal market.[153] In essence, it has to be objectively and actually apparent that the proposed act regulates and deals with an issue related to the internal market.[154]

In its proposal for the first ESMA Regulation, the Commission elaborates why Article 114 TFEU can be relied on to establish a supervisory body in the field of financial supervision.[155] In addition to referring to the relevant CJEU case law on the use of Article 114 TFEU to establish an EU body,[156] the Commission noted that the financial crisis put the stability of the internal market at serious risk, and that 'restoring and maintaining a stable and reliable financial system is an absolute prerequisite to preserving trust and coherence in the internal market, and hence to preserve and improve the conditions for the establishment of a fully integrated and functioning internal market in the field of financial services'.[157] The Commission highlights that a more integrated financial market is more stable, as it is better suited for absorbing future economic shocks due to better opportunities for risk diversification and financing.[158] In addition to establishing supervisory authorities, the Commission specifies that a single rulebook for the uniform application of the relevant EU rules across the internal market will be established, and thereby strengthen the functioning of the internal market.[159] Moreover, the Commission explains that 'the tasks conferred on the Authorities are closely linked to the measures put in place as a response to the financial crisis'.[160] In the other proposals for the amendment of the ESMA regulation, the credit rating regulation, and the EMIR regulation, the Commission offered limited elaborations on the choice of legal basis.[161]

Based on the arguments as presented by the Commission, it is possible to deduce that the establishment of ESMA and its powers relates to a genuine internal market objective: to create a more stable and integrated EU financial market for financial services, which is essential for the functioning of the internal market. Moreover, the acts are not addressing an abstract problem, but rather responding to a previous financial crisis in order to ensure a more stable and resilient financial (internal) market against potential future shocks. Additionally, the Commission also specifies that the relevant authorities are conducting their work in light of the relevant approximation rules in the area of financial services – which is in line with the CJEU case law on using Article 114 TFEU as a legal basis to establish an EU body. Thereby, it can be established that the EU does have an implicit competence to act in the field of financial supervision under Article 114 TFEU. Subsequently, it is possible to proceed to the next step of the roadmap: subsidiarity.

ii. Subsidiarity

In accordance with the roadmap, the first question to ask under the subsidiarity step is whether the national level is sufficient to attain the policy goal. In the case of financial supervision, the specific policy goals in

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[151] Case C-547/14 *Philip Morris Brands SARL and Others v Secretary of State for Health* [2016] ECLI:EU:C:2016:325, para 58; Case C-58/08 *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECLI:EU:C:2010:321, para 32; Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*. [2002] ECLI:EU:C:2002:74, paras 59-60; Case C-376/98 *Federal Republic of Germany v European Parliament and Council of the European Union* [2000] ECLI:EU:C:2000:5 (C-376/98 *Germany v EP and Council*), para 83.
[152] C-376/98 *Germany v EP and Council* (n 158) para 84.
[153] ibid.
[154] C-270/12 *ESMA Short-selling* (n 154) para 113; Case C-217/04 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* [2006] ECLI:EU:C:2006:279, para 42.
[155] Meanwhile, a similar elaboration has not been included in the other legal acts. Proposal for first ESMA Reg. (n 146) 3-4.
[156] Proposal for first ESMA Reg. (n 139) 3-4.
[157] ibid, 3.
[158] ibid.
[159] ibid, 4.
[160] ibid, 3.
[161] Proposal for amended ESMA Reg. (n 139) 6; Proposal for the Credit Rating Agency Reg. (n 146) 4; Proposal for EMIR Reg. (n 146) 5.

question are to ensure the effective supervision of the financial market in order to avoid, but also to build resilience against, future crises.[162]

The first element to consider when assessing whether the national level is sufficient, is the *technical and financial capabilities of the Member States*. In the Larosière Report, the expert group noted that a number of supervisory problems emerged to the surface during the financial crisis.[163] One of these issues identified were 'problems of competence', where there have been failures in the supervision by national supervisors, demonstrating a need for increased staff levels, experience and training.[164] Furthermore, lack of expertise and information about dealing with cross-border issues were identified as an important technical issue of supervision on the national level.[165] Additionally, the lack of resources was also identified as a persisting problem.[166]

With regard to the second element of assessing the sufficiency of the national level to reach the policy goals – *whether there are any particular national, regional or local features to be taken into account* – both the Larosière report and the legislative documents remained silent in this regard. No notes of national, regional or local features were included in the legislative history, apart from noting that supervision on the national level can be useful for the supervision of smaller financial services providers with local features, as national supervisors are closer to the markets and institutions they supervise.[167]

The third element of whether there is a *cross-border dimension* was, however, referred to abundantly in the expert report and in all relevant legislative documents. When it comes to the EU financial (services) market, the cross-border dimension is significant. There are a large number of EU-wide cross-border firms that operate in the EU market, both originating from within the EU but also from third countries, something which was also highlighted during the legislative process.[168] For instance, in the impact assessment to the credit rating regulation, the unique cross-border nature of the credit agencies was underlined.[169]

The legislature therefore concluded that by leaving supervision of the financial services operators fully to the national level, that the goal of further market integration in the EU would not be optimally attained, and the reality of the growth of cross-border financial services hindered.[170] Based on the arguments put forward in the relevant legislative documents, it may be possible to conclude that the EU legislature did not commit any 'manifest error' when assessing whether the national level is sufficient to achieve the relevant policy goals. In accordance with the roadmap, it will be necessary to proceed to the next sub-question. Namely, whether the EU legislator addressed whether action on the EU level can provide added value.

In the legislative documents, numerous arguments were put forward for why action on the EU level has added value in certain areas of financial supervision, but particularly the scale of international financial cross-border activity and the value of assets circulating in the EU financial market. For instance, it was noted that 'currently around 70% of EU banking assets is in the hands of some 40 [international] banking groups with substantial cross-border activities',[171] and that the value of cross-border mergers and acquisitions (M&A) in the EU market constituted in 2005 '50% of the total M&A value in the euro area banking system'.[172] Because of these scales and the importance of financial services in the EU internal market, in addition to the issues identified with national supervision of cross-border financial services, it was recommended in the Larosière report to supervise

[162] Proposal for first ESMA Reg. (n 139) 2.
[163] The Larosière Report (n 137) 39-42.
[164] ibid, 40.
[165] ibid.
[166] ibid, 41.
[167] See e.g. ibid, 52-53; Commission Communication, May 2009 (n 140) 9; European Commission, *Commission Staff Working Document: Accompanying document to the Communication from the Commission European Financial Supervision: summary of the impact assessment* (SEC(2009) 751 final, 27 may 2009) 19-20.
[168] See e.g. Commission Communication, May 2009 (n 140) 5-6.
[169] European Commission, *Commission staff working document - Impact assessment Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on credit rating agencies (2 June 2010)* COM(2010) 289 final (Impact assessment to the CRA Reg. 513/2011) 6-11.
[170] The Larosière Report (n 137) 46-48; Impact assessment to Commission Communication (n 167) 35-37.
[171] Impact assessment to Commission Communication (n 167) 5-6.
[172] ibid.

large cross-border institutions that can pose systemic risks to the financial markets on the supranational level.[173] At the same time, it was acknowledged that national supervisory authorities should continue to carry out the day-to-day supervision as they are the closest to the markets and institutions they supervise.[174]

Similarly, the impact assessment to the Commission Communication concluded in line with the Larosière report that financial supervision for entities with an 'EU-wide reach' can be more effectively carried out at the EU level, as fragmented national supervision hinders proper functioning of the financial internal market through distorted competition and inefficient supervision.[175] In the impact assessment to the first ESMA Regulation, it was further explained that supervising entities with an EU-wide reach on the EU level is simply logical, considering the EU dimension of the entities' existing activities. Granting exclusive competences on the EU level in certain areas would be more coherent and effective instead of sharing it between the EU and national level.[176] In the impact assessment to the first ESMA regulation, it was further noted that, for instance, in emergency situations, coordination from the EU level would be better suited to ensure that there is a flow of information between authorities, and in guiding the authorities in what measures to adopt, which would ultimately facilitate adoption of remedial action and the speed up the process in which this is done.[177]

Based on the above mentioned report and impact assessments, the Commission concluded in its proposal to the first ESMA regulation that EU action is necessary in the area of financial integration because the objective of 'improving the functioning of the internal market by means of ensuring a high, effective and consistent level of prudential regulation and supervision […], cannot be sufficiently achieved by the Member States', while 'EU action can address the weaknesses highlighted by the crisis and provide a system that is in line with the [policy] objective of a stable and single financial market for financial services'.[178]

Following the manifest error approach to the CJEU, it can be concluded under the second step of the principles roadmap that the EU legislature has sufficiently substantiated why action on the EU level is necessary to achieve the relevant objectives. However, *any* form of EU action is not automatically legitimised by complying with the principal subsidiarity. It will be necessary to proceed to the next step of the roadmap, proportionality, to assess whether and how the EU legislature took proportionality considerations into account when designing the EU financial supervision structure.

iii. Proportionality

During the legislative process, the EU legislature considered various forms of actions, and assessed the options in light of proportionality. In the impact assessment to the Commission Communication, the focus of the assessment was on the *type* of supervisory action to take. Five options to solving the issues that were identified in the Larosière report were presented: A) retaining the base line scenario, consisting of the home country model and the *Lamfalussy* framework[179]; (B) step back to a host country model only, granting national supervisors full responsibility for the supervision; (C) adopt a lead supervisor model, where the national supervisor of the home country is given extra supervisory responsibilities for cross-border operations of subsidiaries and branches as well; (D) establish separate European authorities for the supervision and coordination of national supervisors; or (E) establish a single EU level supervisor with all supervisory competences.[180]

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[173] The Larosière Report (n 137) 46-47.
[174] ibid, 46-47.
[175] Impact assessment to Commission Communication (n 167) 31.
[176] European Commission, *Commission Staff Working Document accompanying document to the Proposal for a Regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority: Impact Assessment* (SEC(2009) 1234, 23 September 2009) 26.
[177] ibid.
[178] Proposal to the first ESMA Regulation (n 139) 3-4.
[179] The Lamfalussy framework consisted of committees with representatives from national supervisory authorities. These committees tasls were to advice the Commission, but also to ensure cooperation and convergence of practices between national authorities in different Member States. See European Commission, 'Communication from the Commission – Review of the Lamfalussy Process – Strengthening supervisory convergency' (COM(2007) 727 final.
[180] Impact assessment to Commission Communication (n 167) 17-20.

Justifications for the chosen enforcement design

The impact assessment concluded that only the two last option were appropriate to achieve the relevant goals.[181] The fourth option, establishing European supervisory authorities that coordinate the work of the national authorities, was considered to be an appropriate option, as the authorities would contribute to develop common supervisory approaches, act as guarantors of a consistent application of EU law, and exercise a role in crisis management.[182] The fifth and last option, establishing a single EU-level supervisor, was also considered to be appropriate as it would create a regulatory and supervisory playing field for both EU-wide and domestic banks.[183]

When it comes to the question of necessity and finding the least intrusive means available, the two options were compared in the impact assessment in light of *effectiveness* ('the greatest possible effectiveness of supervision'), *efficiency* ('the extent to which objectives can be achieved for a given level of resources/at least cost') and *coherence* ('the extent to which options match the overarching objectives of EU policy and the extent to which they are likely to limit trade-offs across the economic, social and environmental domain').[184] The last criterion of coherence resembles to a large extent an assessment of proportionality *strictu sensu*. However, in the impact assessment it was concluded that both options 'are consistent with the overall objectives of the EU to contribute to sustainable economic growth and job creation' and 'to foster the Single Market'.[185] Proportionality *strictu sensu* will therefore not be discussed further in relation to these options.

With regard to effectiveness, it was concluded that the fourth option would be the most effective to achieve the relevant goals. The reason for this was explained by how the fourth option can better take into account the many small and medium-sized financial institutions that operate within the borders of one Member State only. In such cases, there is no need for centralised supervision. In fact, supervision on the local level would in such cases be beneficial due to knowledge of local market conditions, and the proximity to their activities. In comparison, by having one single EU supervisor, the distance between supervisor and the institutions would be too large, both in terms of expertise and physical distance.[186] With regard to efficiency, it was concluded in the impact assessment that from the view of the EU budget, the fourth option would be less costly as it would achieve the same objectives, without having to fully finance an EU level supervisor.[187]

In conclusion, the impact assessment regarded the fourth option of establishing a network of supervision with national authorities and European authorities, to be the option that would solve the issues and achieve the policy goal in the least intrusive manner.[188] Similar arguments were presented in the impact assessment to the amended ESMA Regulation, concluding that the option of granting ESMA additional direct supervisory powers in targeted areas related to cross-border activities, would be less intrusive than converting ESMA into the single supervisor in the EU.[189]

Justifications for direct and exclusive supervisory powers in certain areas

Despite of ESMA not resulting as the sole, single European financial supervisor for all financial services in the EU, ESMA nonetheless received some exclusive direct supervisory powers in certain areas. More specifically, for credit rating agencies (CRAs) and for trade repositories.[190] ESMA's supervisory powers in

[181] ibid, 27.
[182] ibid, 19, 26-27.
[183] Impact assessment to Commission Communication (n 167) 17, 19-20, 27.
[184] ibid, 30.
[185] ibid, 30.
[186] ibid, 28-29.
[187] ibid, 30.
[188] Impact assessment to Commission Communication (n 167) 30-31.
[189] European Commission, COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT Accompanying the document Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) (20 September 2017) SWD/2017/0308 final, 41-43.
[190] Credit Rating Agency Reg. 513/2011 (n 140) arts 15-21, 23c-23d, 24, 36a-36b; EMIR Reg. 648/2012 (n 140) arts 55-60, 62-66.

these areas encompasses all the main stages of enforcement, including monitoring, investigation and sanctioning.[191] From the perspective of the roadmap, these two areas of supervision are interesting to look further into. How did the EU legislator argue for and justify a different type of action in the areas of CRAs and trade repositories, and is the direct action compatible with the non-delegation doctrine from the CJEU?

Credit rating agencies (CRAs)

In the impact assessment to the credit rating Regulation 513/2011, four options were considered for achieving the policy goal of ensuring effective supervision of CRAs in the EU.[192] For the supervision of credit rating agencies to be effective, there is a need for a single point of contact, clear competences, consistent application of rules, and alignment of incentives for the supervisory authorities with the pan European activity of supervised entities.[193] The first option considered was maintaining the status quo, where the competent national authorities in each Member State had the primary role of issuing registrations and supervising the CRAs, with the Committee on the EU level only exercises an advisory and coordinating role.[194] The second option was to establish a combined enforcement structure, consisting of the old college structure and ESMA.[195] The third and fourth option was awarding ESMA either with direct oversight of groups of CRAs that have presence in more than one Member State, ***or*** all EU-based CRAs.[196]

In the impact assessment, a detailed analysis was conducted in light of how well the options would ensure effective supervision of credit rating agencies.[197] The only option that was considered to be appropriate to achieve all of the supervisory goals was the fourth option of ESMA having direct oversight of all EU-based CRAs.[198]

In addition, various options for a sanctioning regime for credit rating agencies were also considered in the impact assessment.[199] According to the impact assessment, 'effective supervision needs to be accompanied by an effective sanctioning regime'.[200] More specifically, it was identified that there is a need to minimise the risks of an uneven playing field and inconsistent application of relevant rules.[201] The following three options were considered: (1) retaining sanctioning power on the Member State level, (2) transfer them to ESMA, or (3) transfer them to the Commission.[202]

In assessing the first option, it was concluded that it will be difficult to ensure a level playing field if sanctioning power is retained at the Member State level – even if there is list of sanctions and detailed rules on how to apply them. [203] The reason for this stems from the fact that each national authority will still retain some discretion.[204] Additionally, separating the authority that supervises and the authority that is sanctioning would make the enforcement system more complex, and potentially make the process less efficient in cases where there would be a need to reassess whether a breach took place.[205] In assessing the second option, it was suggested for ESMA to apply sanctions based on a list of breaches, and impose fines with a minimum and maximum rate.[206] However, it is noted in the impact assessment that this option potentially could raise concerns

[191] Marloes van Rijsbergen and Miroslava Scholten, 'ESMA Inspecting: The Implications for Judicial Control under Shared Enforcement' (2016) 7(3) European Journal Risk Regulation 569, 570.
[192] European Commission, Commission staff working document - Impact assessment Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on credit rating agencies (2 June 2010) COM(2010) 289 final (Impact assessment to credit rating Reg. 513/2011) 13-15.
[193] ibid, 12-13.
[194] ibid, 14, 27.
[195] ibid, 14-15.
[196] ibid, 15.
[197] ibid, 15-26.
[198] ibid, 26.
[199] ibid, 26-32.
[200] ibid, 28.
[201] ibid, 28-29.
[202] ibid, 29-30.
[203] ibid, 30-31.
[204] ibid.
[205] ibid, 30.
[206] ibid, 30-31.

in relation to the *Meroni* case law.[207] In assessing the third option, it was again noted that the separation of the authority that supervises and the one that sanctions can bring about less efficiency and make the sanctioning more complex. At the same time, it was eventually concluded that the third option would be the most suitable sanctioning regime due to how it would ensure an equal level playing field, while additionally being consistent with the *Meroni* case law.[208]

Based on the findings in the impact assessment, the Commission proposed to adopt the third option of granting the Commission the sanctioning powers.[209] However, during the legislative process, the European Parliament proposed during its first reading to transfer the sanctioning power to ESMA instead.[210] The European Parliament did not provide any publicly available justifications or explanation why the sanctioning power should rest with ESMA, and not the Commission. The EP Committee on legal affairs did, however, include an explanation stating that: 'If ESMA is to have the power to penalise agencies, inter alia by withdrawing their registration (the most severe measure available), a measure such as imposing a fine should also enter within its competence, on the basis of the principle "more also means less"'.[211] The final regulation grants sanctioning power to ESMA.[212]

Trade repositories

A trade repository is a centralized registry that maintains an electronic database of open derivative transaction records and contracts.[213] Trade repositories allow for increased transparency and integrity.[214] During the financial crisis, there were issues in relation to the speed that regulators could access information on the single trade repository that existed at the time, mainly due to the fact that in many cases a court order was necessary to access the information.[215] The particular policy objectives that were aimed to be ensured were: the safety and integrity of the data stored; create a level playing field; and ensure that competent authorities have access to the information stored.[216] In the impact assessment for the EMIR Regulation, two different policy options for the registration and supervision of trade repositories were considered to attain these policy objectives: (1) the base line scenario, being national surveillance and registration, or (2) EU registration and surveillance by ESMA.[217]

Registration and surveillance on the national level would according to the impact assessment result in 'cumbersome and possibly not frictionless procedures'. [218] This would especially be the case if all EU market participants need to be reported, and if all EU regulators should have unfettered access to the repositories.[219] According to the impact assessment, centralised registration and surveillance on the EU level would in that case be more efficient.[220] A standardised access procedure to trade registries that are located in different Member States and outside the EU through ESMA, would significantly increase efficiency by reducing costs for both trade repositories and regulators.[221] Meanwhile, if access to and responsibility of trade repositories' functioning had pass through the national competent authorities, it would cause a more cumbersome and less

[207] ibid, 31.
[208] Here it is important to note that at time, the *ESMA Short-selling* case was not yet a reality. ibid, 30-31.
[209] Proposal for Credit Rating Agency Reg. 513/2011 (n 140).
[210] European Parliament, 'Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on credit rating agencies' (2010/0160 (COD)), amendments 7, 56, 62, 63, 64, 65, 66.
[211] European Parliament, *Opinion of the Committee on Legal Affairs for the Committee on Economic and Monetary Affairs on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on credit rating agencies* (C7-0143/2010 – 2010/0160(COD)), amendment 4 justification.
[212] Credit Rating Agency Reg. 513/2011 (n 140) arts 65-66.
[213] European Commission, *Commission staff working document - Impact assessment Accompanying document to the Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on OTC derivatives, central counterparties and trade repositories* (SEC(2010) 10 final) 81.
[214] ibid, 81.
[215] ibid, 80.
[216] ibid, 83.
[217] ibid, 84.
[218] ibid, 85.
[219] ibid.
[220] ibid.
[221] ibid, 85-86.

frictionless procedure, especially for trade repositories located outside of the EU.[222] On the basis of this argumentation, the impact assessment concluded that the preferred option would be to grant ESMA exclusive direct supervisory responsibilities over trade repositories.[223]

Compared to the assessment of supervision and enforcement options for credit rating agencies, the assessment of whether the supervision and enforcement of trade repositories should be centralized was relatively brief. Moreover, there were only two options considered, where neither constituted an enforcement mix involving both the national and EU level. More details on what exact powers ESMA would have in relation to the registration, investigation, and sanctioning of trade repositories, was first provided in the Commission proposal.[224]

iv. Compliance with the *ESMA Short-selling doctrine*

On the basis of the impact assessments, the EU legislature concluded that only exclusive direct supervisory powers on the EU level would be appropriate to ensure the effective and sufficient supervision of CRAs and trade repositories.[225] However, according to the proposed competence roadmap, for direct action on the EU level to be legitimate, it also has to comply with the non-delegation doctrine of the CJEU, as most recently elaborated in the case of *ESMA short selling*.[226] As elaborated in the previous section, three criteria will be used to determine whether ESMA's direct powers in the field of credit rating agencies and trade repositories is in line with the doctrine, and thereby legitimate.[227] The three criteria encompasses (1) whether the powers have been specifically delineated, (2) whether there are delineated conditions and criteria limiting ESMA's discretion, and (3) whether the decisions of ESMA are amenable to judicial review.[228]

When consulting the relevant legal instruments, it is possible to identify that ESMA's powers are specifically defined in both the fields of credit rating agencies, and trade repositories. Moreover, there are also detailed instructions and conditions governing *how* ESMA is expected to exercise its powers in practice. For instance, in both annex III to the credit rating regulation 513/2011 and in annex I to the EMIR Regulation, detailed requirements have been provided for the determination of whether an infringement has taken place by a credit rating agency or trade repository.[229] This effectively limits ESMA's discretion in determining when an infringement has occurred. Furthermore, in both the Credit Rating Regulation and in the EMIR Regulation, there have also been outlined detailed steps ESMA needs to take before imposing fines for any of the infringements described in the annex.[230] In addition, the amount in fines that ESMA can issue has also been specified and conditioned.[231] In Article 24 of the Credit Rating Regulation, it is even provided that 'the nature and seriousness of the infringement' needs to be taken into account when ESMA decides on which of the five actions to implement, followed by four criteria to consider when determining the 'nature and seriousness of the infringement', such as the duration and intent.[232] A similar example of the detail of the conditions can also be found in the EMIR Regulation, which sets out the exact elements that needs to be included in an request for information sent to trade repositories from ESMA. According to Article 61 of the EMIR Regulation, a request for information needs to refer to the relevant article (Article 61), state the purpose of the request, specify the information requested, and the time limit for providing it.[233] These examples demonstrate that precisely

[222] Impact assessment to EMIR Reg. 648/2012 (n 212) 85-86.
[223] ibid, 26.
[224] Proposal for EMIR Reg. 268/2012 (n 141).
[225] Proposal for EMIR Reg. 268/2012 (n 141); Proposal for Credit Rating Agency Reg. 513/2011 (n 140).
[226] Case C-270/12 *United Kingdom v Parliament and Council* [2014] ECLI:EU:C:2014:18.
[227] See section 2.3.3. Miroslava Scholten and Marloes van Rijsbergen, 'The *ESMA-Short Selling* Case: Erecting a New Delegation Doctrine in the EU upon the *Meroni-Romano* Remnants' (2014) 41(4) Legal Issues of Economic Integration 389, 401.
[228] ibid.
[229] Credit Rating Agency Reg. 513/2011 (n 140) ANNEX III List of infringements referred to in Article 24(1) and Article 36a(1).
[230] Credit Rating Agency Reg. 513/2011 (n 140) art 23e; EMIR Reg. 648/2012 (n 141) art 64.
[231] The amount depends on the infringement that has taken place and on the annual turnover of the credit agency. Credit Rating Agency Reg. 513/2011 (n 140) art 36a, annex IV; EMIR Reg. 648/2012 (n 141) arts 65-66, annex II.
[232] Credit Rating Agency Reg. 513/2011 (n 140) art 24.
[233] EMIR Reg. 648/2012 (n 141) art 61.

formulated criteria and conditions for exercising ESMA's powers have been provided under the regulations, which contributes to both clarifying what powers ESMA actually holds, in addition to also effectively limit the discretion ESMA has when exercising them.

Van Rijsbergen and Foster has noted, however, that while it appears to be the case that ESMA has virtually no discretion when it comes to its decision of whether to investigate an alleged breach, ESMA has discretion in choosing *how* to investigate. The authors deduce this based on the wording of certain provisions, for instance the use of 'shall' in Article 64(1) of the EMIR Regulation and Article 23e in the Credit Rating Regulation on the appointment of investigation officers in cases of 'serious indications' of infringements.[234] At the same time, van Rijsbergen and Foster points out that outside alleged breaches, ESMA has significantly more discretion in deciding whether it actually wishes to exercise certain powers or not. This is deduced based on the use of the word 'may' in certain provisions, e.g. related to conducting investigations or on-site inspections.[235] In this regard, it is useful to note that it remains unclear from the reasoning adopted by the CJEU in *ESMA Short-selling* on how much discretion is allowed, and where its outer boundaries lie.[236]

With regard to the third criterion of the decisions being amenable to judicial review, all relevant legal instruments are clear on the fact that the CJEU has jurisdiction to review all relevant decisions by ESMA. In Article 61 of the first ESMA Regulation (2010/1095), it is specified that the annulment procedure under Article 263 TFEU can be applicable for decisions of ESMA, and that also Article 265 TFEU can be applicable for failure to act by ESMA.[237] Moreover, in credit rating Regulation 513/2011, it is specified that the CJEU has jurisdiction to review ESMA's decisions to credit rating agencies related to general investigations (Art. 23c), requests for information (Art. 23b), onsite inspections (Art. 23d), allocation of fines and periodic penalty payments (arts. 36d and e). Similar jurisdiction and possibilities for judicial review has been granted in the EMIR Regulation 648/2012 related to decisions on the registration of trade repositories (art. 59), requests to information (art. 61), general investigations (art. 62), on-site inspections (art. 63), and on fines and periodic payments (art. 69). Moreover, also national courts have the jurisdiction to review decisions from ESMA in specific circumstances.[238] ESMA thereby complies with all three criteria of the non-delegation doctrine as deduced from *ESMA short-selling*.

In sum, arguments have been put forward in the relevant legal documents for why exclusive direct supervisory powers for ESMA is the only appropriate option to sufficiently safeguard the effective enforcement of credit rating agencies and trade repositories. Moreover, the powers awarded to ESMA in these fields do also comply with the delegation doctrine of *ESMA Short-selling*, by the powers being specific and by including detailed instructions on how they should be exercised. Additionally, decisions by ESMA are subject to judicial review. In light of the manifest error approach, the EU legislature has sufficiently taken into account the principle of proportionality during the legislative process of designing ESMA and its powers.

Conclusively, by applying the enforcement competence test roadmap to the legal design of ESMA, this section has demonstrated that ESMA and its powers are legitimate, and that consequently, the EU legislature had a legitimate enforcement competence in the field of financial supervision - at least in accordance with the current standards set by the CJEU for the compliance with the EU guiding principles during the EU legislative process.

[234] Marloes van Rijsbergen and Jonathan Foster, '"Rating' ESMA's accountability: "AAA" status' in Miroslava Scholten and Michiel Luchtman (eds), *Law Enforcement by EU Authorities: Implications for Political and Judicial Accountability* (Edwar Elgar 2017) 65.
[235] Rijsbergen and Foster (n 233) 64.
[236] Scholten and van Rijsbergen (n 226) 395.
[237] ESMA Reg. 2010/1095 (n 139) art 61.
[238] For more on this, see van Rijsbergen and Foster (n 226).

IV. Conclusions

This paper has demonstrated that although the EU does not have a general, express competence under the EU treaties to regulate the enforcement of EU law, the need to ensure the effectiveness of EU law may nonetheless give rise to an implicit enforcement competence in certain contexts. However, this paper has simultaneously demonstrated that the implicit enforcement competence of the EU can only be established and become legitimate when complying with the core legal principles of conferral, subsidiarity and proportionality. On this basis, a clear and simple step-by-step guide, the enforcement competence test roadmap, has been introduced as a tool that can be utilised to establish legitimate enforcement competences, and to determine their legitimate use, when designing enforcement of EU law.

In theory, it always possible to change the degree and form of centralisation to more decentralisation. However, in practice, this might prove to be both challenging and improbable.[239] The decision to involve the EU level in the enforcement of EU law must therefore be made carefully, and the proposed 'enforcement competence test roadmap' as presented in this paper, may contribute to bring more clarity to the legitimacy aspects of the decision-making process.

The competence test roadmap has been applied to the legal design of ESMA. ESMA is one of the most powerful EU agencies, but also one of the most critiqued agencies legitimacy wise. The developed roadmap has been used to assess whether ESMA and its powers are legitimate. Based on the findings in the case study, ESMA and its powers can be considered legitimate in light of the enforcement competence test roadmap.

It is important to highlight, however, that the enforcement competence test roadmap, and its application to ESMA, is based on the current standards as laid down in the EU treaties and case law. That includes both judicial review in light of manifest error only, and the seemingly broad delegation doctrine as developed by the CJEU in *ESMA-short selling*. The fact that the current paper has demonstrated that the EU enforcement competences can be established, or that the legal design of agencies like ESMA can be considered to be legitimate, does not necessarily suggest that the current standards are ideal from a normative perspective. The existing literature certainly seems to advocate for more stringent requirements and methods for when it comes to the justifications in light of the principles for action on the EU level, than what is currently been confirmed by the CJEU to be required.[240] As has been voiced in the literature, perhaps there is indeed a need for a treaty amendment to create a more long term solution, with clearer and more explicit enforcement competences.[241] Until then, the 'enforcement competence test roadmap' can be used to ensure that future (re)designs of enforcement on the EU level is legitimate according to current treaty standards and jurisprudence.

It is equally important to end this paper with a note that the roadmap developed in this paper is only a first suggestion to how such a competence test or framework to assess the legitimacy of EU enforcement (re)design can look like. Future research is encouraged to further develop the roadmap, by for instance adapting it to specific policy fields, or to include other elements from the theoretical and empirical research on what contributes to 'successful' enforcement.

[239] Sjef Ederveen, George Gelauff and Hacques Pelkmans, 'Assessing subsidiarity' in George Gelauff, Isabel Grilo and Arjan Lejour (eds), *Subsidiarity and Economic Reform in Europe* (Springer 2008) 38.
[240] Daniel Halberstam, 'Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach (2021) 23 Cambridge Yearbook of European Legal Studies 128, 141-144.
[241] Miroslava Scholten, 'A "house of cards" construction for the expanding mandate of supervision of financial markets in the EU' (2022) Jean Monnet Network of EU Law Enforcement, Working Paper Series No. 35/22, 7.

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