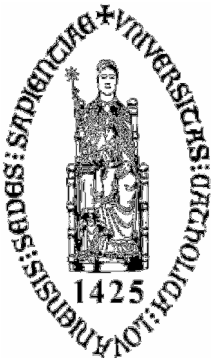

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FROM SHARED COMPETENCES TO INSTITUTIONAL HETERONOMY

The constitutional architecture of supranationally structured market supervision

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Introduction

1. *Converging supervisory structures* – The development of the EU's internal market resulted in the complementary establishment of supranationally structured market supervision arrangements. These arrangements seek to ensure the effective application and enforcement of supranational regulation.[1] Building on the constitutional premises of undistorted competition[2]

[1] On the notion of *regulation* in general, see A. Ogus, *Regulation. Legal Form and Economic Theory* (Oxford, Clarendon, 1994), 1. References to regulation and to supervision abound in legal scholarship, without a clear distinction being established between both concepts. In its general Anglo-American meaning, regulation or regulatory refers to the exercise of control – e.g. price control – or direct government intervention into an otherwise autonomous sphere (e.g. the market for the supply of particular goods or services). See in that respect, S. Breyer, *Regulation and its Reform* (Cambridge, Harvard University Press 1982), 1. From that perspective, regulation is frequently opposed to competition, a state in which freedom to act and operate is not governed by particular rules. At the same time however, the establishment of competition by means of a legal framework presupposes some regulatory intervention as well, resulting in competition law itself constituting an example of regulation. See I. Maher, 'Regulation and Modes of Governance in EC Competition Law. What's new in enforcement?', 31 *Fordham International Law Journal* (2007-2008) 1716; for a similar perspective, see R. Ahdieh, 'Dialectical Regulation', 38 *Connecticut Law Review* (2006), 863- 927. Selznick's definition considers regulation as 'sustained and focused control exercised by a public agency over activities that are valued by a community' (as in P. Selznick, 'Focusing Organizational Research on Regulation' in R. Noll (ed.), *Regulatory Policy and the Social Sciences* (Berkeley, University of California Press 1985), 363). A similar definition can be found in A. Young, 'The Politics of Regulation and the Internal Market', in K.E. Jorgensen, M. Pollack and B. Rosamond (eds.), *Handbook of European Union Politics* (London, Sage, 2007), 374, who describes regulation as public actors adopting and policing rules aimed at disciplining the behaviour of economic actors'. In that understanding, the notion of regulation remains focused on rule-making, see P. Schammo, 'EU Day-to-Day Supervision or Intervention-based Supervision: Which Way Forward for the European System of Financial Supervision?', *Oxford Journal of Legal Studies* (2012), 771. On the basis of these definitions, I will understand the concept of regulation as any public activity aimed at establishing a workable system of rules and principles governing society. My understanding of regulation particularly refers to the direct or indirect legal consequences enabled by these public activities. This understanding of regulation as public activity bearing legal effects also appears in N. Chowdury and R. Wessel, 'Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?', 18 *European Law Journal* (2012), 348. To the extent that this activity is directly related to structuring and maintaining markets and market interactions, such public activity could be conceptualized as *market regulation.* The notions of *supervision* and *market supervision* can equally be encapsulated within that broad understanding. Supervision particularly refers to a framework governing the oversight of market interactions and the compliance of market actors with these rules. See also A. Gil Ibañez, *The Administrative Supervision and Enforcement of EC Law: Powers, Procedures and Limits* (Oxford, Hart, 1999), 20-24, distinguishing between regulatory execution as the process of adopting rules, administrative execution as a process of applying these rules and supervision as the monitoring of the implementation and execution stages. In that understanding, the notion of supervision refers to the activity of monitoring the implementation and execution of market regulation. Supervisory activity presupposes its own regulatory standards that facilitate and structure the monitoring of market rules. Supervision specifically considers the public enforcement through criminal or administrative sancions of compulsory rules, see A. Pacces and R. Van den Bergh, 'An introduction to the Law and Economics of Regulation' in A. Pacces and R. Van den Bergh (eds.), *Regulation and Economics – Encyclopaedia of Law and Economics* (2nd Edition, Cheltenham, Edward Elgar, 2012), 4. Market supervision particularly refers to the activity of monitoring of rules aimed at regulating market operators' behaviour.

[2] The EU Treaty framework does not refer to unrestricted competition as an end of European integration in its own right. Protocol No. 27 nevertheless states that the Internal Market shall include a system ensuring that competition is not distorted. A protocol bears the same legal status as as the Treaty. On the background and meaning of the inclusion of competition in a separate protocol, see R. Barents, 'Constitutional Horse Trading: Some Comments on the Protocol on the Internal Market and Competition' in M. Bulterman *et al.* (eds.), *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot* (Kluwer, Alphen a/d Rijn 2009), 123-132.

and the free movement of goods, persons, services and capital[3], supranational market supervision operates on a sliding scale between a supranational monitoring and enforcement monopoly[4] and a national supervision system devoid of any *direct* supranational input.[5] Recently however, such highly diversified supervisory regimes have been subject to similarly structured supranational enhancements or modifications.[6] These enhancements or modifications showcase that the constitutional framework of European integration promotes or at least allows for a *convergence-oriented* EU-wide market supervision framework to emerge.[7]

2. *Aim of this dissertation* – This dissertation identifies and structures the constitutional provisions and principles structuring a supranational convergence-oriented framework. It argues that this framework originates in novel constitutional interpretations of the foundational Treaties' legal bases, institutional operations centred on fundamental cooperative rights and converging judicial review requirements. These constitutional benchmarks shape an image of *shared* supervisory *competences* between the Union and its Member States. The dissertation argues that recent interpretations of these benchmarks – highlighted in both EU legislation and Court of Justice case law – particularly promote a constitutional image of

[3] According to Article 3(3) TEU, the Union shall establish an internal market. Article 3(2) provides for an area in which the free movement of persons is guaranteed. See also Article 26(2) TFEU, which states that the Internal Market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

[4] E.g. the supervisory regime in monitoring and enforcing State Aid provisions in Articles 107-109 TFEU.

[5] In general, the EU Treaty framework only provides a generally applicable *indirect* Member State supervision system. Articles 258-260 TFEU allow the European Commission to monitor and bring to court Member States failing to implement and apply EU law. For details on this procedure, see A. Gil Ibañez, 'The "Standard" Administrative Procedure for Supervising and Enforcing EC Law: EC Treaty Articles 226 and 228', 68 *Law and Contemporary Problems* (2004), 135-159; L. Prete and B. Smulders, 'The Coming of Age of Infringement Proceedings', 47 *Common Market Law Review* (2010), 9-61 for an overview of procedure and case law evolutions. That system can result in the imposition of both lump sums and periodic penalty payments on Member States, see Case C-304/02, *Commission* v. *France*, [2005] ECR I-6263, para 82. For background, see A. Schrauwen, 'Fishery, waste management and persistent and general failure to fulfill control obligations: The role of lump sums and penalty payments in enforcement actions under Community law', 18 *Journal of Environmental Law* (2006), 289-299; I. Kilbey, 'Financial Penalties under Article 228(2) EC: Excessive Complexity?', 44 *Common Market Law Review* (2007), 743-759; P. Wenneras, 'Sanctions against Member States under Article 260 TFEU: Alive, but not kicking?', 49 *Common Market Law Review* (2012), 145-176; S. Peers, 'Sanctions for Infringement of EU Law after the Treaty of Lisbon', 18 *European Public Law* (2012), 33-64; M. Varju, 'The shaping of infringement procedures in European Union law: the rights and safeguards of the defendant Member State', 19 *Maastricht Journal of European and Comparative Law* (2012), 400-420.

[6] The recently Europeanized field of asylum illustrates that this evolution even transcends the narrow field of Internal Market integration. In accordance with Article 78 TFEU, the European Parliament and the Council shall adopt a uniform status of asylum for nationals of third countries, valid throughout the Union. This resulted in Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, [2003] O.J. L 31/18 and Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [2004] O.J. L 304/12. The implementation and application of these provisions for long remained exclusively with the Member States. Only in 2010 did the EU establish a European Asylum Support Office (EASO). The EASO's role mainly consists in facilitating national application of EU asylum rules; see Regulation 439/2010 of 19 May 2010 establishing a European Asylum Support Office, [2010] O.J. L 132/11.

[7] I do explicitly refer to a *convergence-oriented* rather than a *converging* framework. It will be submitted that although principles and elements of institutional organization are effectively enabling convergence under the banner of EU law, convergence does not present a constitutional value in its own right. It is rather a consequence of convergence-oriented principles of EU constitutional law having taken shape. See for a similar approach cautioning against convergence as a self-standing value, F. Chirico and P. Larouche, 'Conceptual Divergence, Functionalism and the Economics of Convergence' in S. Prechal and B. Van Roermund (eds.), *The Coherence of EU Law. The Search for Unity in Divergent Concepts* (Oxford, Oxford University Press, 2008), 463-493.

institutional heteronomy.[8] Rather than imposing an exclusively supranational market supervision blueprint, *institutional heteronomy* includes national legal operations into a converging cooperative[9] market supervision regime.[10] The dissertation argues that the institutional heteronomy image comprises a constitutional and organizational translation of an economics-grounded model of coordinated regulatory competition or *reflexive regulatory coopetition* among institutional actors.[11] Embedded in the EU's constitutional framework, reflexive regulatory coopetition serves as an instrument of constitutional design bringing about a particular format of internal market integration. EU constitutional law is in that understanding structured as a *tool of EU governance* in its own right.

3. *General approach* – The dissertation adopts a constitutional case-study approach to substantiate its argument. It seeks to explore the institutional operations of market supervision in two sectors structured in accordance with a distinct constitutional logic. It distinguishes between *directly* and *indirectly mandated* market supervision arrangements. It subsequently contrasts the *decentralization* of supervisory powers in the directly mandated realm of EU competition law with *centralizing* tendencies structuring the indirectly mandated field of financial market supervision. Both arrangements reflect remarkably similar institutional heteronomy *elements* that allow to extract and refine *constitutional principles* structuring these elements. These principles comprise the translation of an economic-constitutional model of regulatory interaction between the EU and its Member States into EU law and policy

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[8] The notion of heteronomy is not unfamiliar to EU law. Besselink referred to the substantial heteronomy context attached to EU fundamental rights standards, see L. Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union', 35 *Common Market Law Review* (1998), 667: the nationally and ECHR inspired substantive reality of EU fundamental rights standards contrasts with the aspirations for the Union to become a fully autonomous political actor. Besselink's 1998 thesis considered heteronomy to be limiting supranational fundamental rights standards. My understanding of 'institutional heteronomy' works the other way around and better attunes to a 'neo-federal perspective' of European integration that considers the EU system to serve as a comparator with other federally structured systems. In doing so, it concurs with R. Schütze, *From dual to cooperative federalism. The changing structure of European law* (Oxford, Oxford University Press, 2009) and with F. Fabbrini, 'The European Multilevel System for the Protection of Fundamental Rights: A 'Neo-Federalist' Perspective', *Jean Monnet Working Paper 15/10*. In that perspective, the impact of supranationally structured standards and norms on national institutional arrangements formerly governed by a framework of national autonomy are more intensely attuned to supranational requirements. Somewhat paradoxically, reliance on substantively heteronomous fundamental rights will facilitate the emergence of a supranationally steered 'institutionally' heteronomous market supervision framework. For a similar perspective, see C. B. Schutte, *The European Fundamental Right to Property* (Deventer, Kluwer, 2004), 11, arguing that heteronomy can refer to an underlying principle of coordination among different legal orders.

[9] For an overview of cooperation at the heart of EU law federalism, see J. Weiler, 'The Community System: the Dual Character of Supranationalism', 1 *Yearbook of European Law* (1981), 267-306. For a comparative outlook, see K. Lenaerts, 'Constitutionalism and the Many Faces of Federalism', 38 *American Journal of Comparative Law* (1990), 205-263.

[10] In doing so, my argument apparently goes against Robert Schütze's claim that in the realm of shared competences, the EU's regulatory competences present *'no one way road. They permit centralization as well as decentralization; and thus allow the European legislator to periodically change the federal structure of European law'*. See, R. Schütze, note 8, 240. The confrontation with that claim should not be overstated. Schütze argues that the European legislator can indeed periodically change the federal structure of European law and in so doing, can directly guide the EU legal framework towards a single approach. I am mainly arguing that the EU legislator has precisely adopted that approach in the realm of market supervision by grounding particular choices in a more developed constitutional framework.

[11] D. Esty and D. Geradin, 'Regulatory Co-Opetition', 3 *Journal of International Economic Law* (2000), 235-255. For an early constitutional exploration of a similar framework, see M. Dorf and C. Sabel, 'A constitution of democratic experimentalism', 98 *Columbia Law Review* (1998), 267-473 and its translation to the EU level, C. Sabel and J. Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU', 14 *European Law Journal* (2008), 271-327.

discourse. They equally serve as *institutional design* benchmarks for future market supervision initiatives in sectors that recently witnessed more stringent supranational supervisory attention.

Part I. Research problem: constitutional convergence in 'Europeanizing' market supervision arrangements

4. *Overview of this part* – The first part of this dissertation contextualizes the research problem. It comprises three chapters. A first chapter develops a working definition of market supervision in EU law. A second chapter devotes attention to the converging 'Europeanizing' features of market supervision arrangements in the EU constitutional framework. It identifies an apparent paradox in the language surrounding recent institutional arrangements. With a view to explain and structure that apparent paradox, the chapter adopts an alternative constitutional perspective that aims to approach the emergence of supranationally structured market supervision into two types of constitutional mandates. That position allows to develop and frame a research question.

The third chapter outlines the methodological approach relied on in this dissertation. It relies on a cyclical model in which law can be read as incorporating and supporting particular economic conceptions. That cyclical understanding justifies a *law and economics* perspective underlying this dissertation.

Chapter 1. Conceptualizing market supervision in EU law

5. *Introduction* – The European Union at heart remains an international organization focused on *economic integration* cloaked in the language of *federal constitutionalism.*[12] The legal-institutional framework enabling economic integration is not however set in stone.[13] It continuously engages a multitude of institutional actors in a continuous redefinition of the scope and structure of integration.[14] The concept and operationalization of 'market supervision' demonstrate such *transformable* attitude.

1. The concept of market supervision in EU law

6. *An elusive concept* – Market supervision is an elusive and undefined concept. It does not feature as such in the EU Treaties, nor does the EU framework provide a clear demarcation of the supervisory field. The concept of supervision – detached from its market epithet- on the other hand frequently appears throughout the Treaty framework. Article 38 TFEU, referring to the establishment of a common agricultural policy, seems to presuppose the existence of a supervisory regime supporting its policy objectives. Article 65 TFEU refers to Member

[12] See in that regard among many others, G. De Búrca, '*Europe's* raison-d'être', 18 *Maastricht Journal of European and Comparative Law* (2011), 418-420; G. De Búrca, 'The Road not Taken: The European Union as a Global Human Rights Actor', 105 *American Journal of International Law* (2011), 649-693; E. Stein and D. Halberstam, 'The United Nations, the European Union and the King of Sweden: Economic sanctions and individual rights in a plural world order', 46 *Common Market Law Review* (2009), 13-72; A. Somek, *Individualism. An essay on the authority of the European Union* (Oxford, Oxford University Press 2008), 307 pp.; J. Weiler, 'The Autonomy of the Community legal order: through the looking glass' in J. Weiler, *The Constitution of Europe* (Cambridge, Cambridge University Press 1999), 286-323; T. Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations', 37 *Harvard International Law Journal* 1996, 389-409. On the EU's functioning as a Union of Nation States in the wake of the failed Constitutional Treaty, see N. Scicluna, 'When Failure isn't Failure: European Union Constitutionalism after the Lisbon Treaty', 50 *Journal of Common Market Studies* (2011), 441-456. For an earlier account, see K. Lenaerts, *Le juge et la constitution aux Etats Unis de l'Amérique et dans l'ordre juridique européen* (Brussels, Bruylant, 1988), 817 pp.

[13] Numerous scholarly proposals rely on the EU's transformable nature to imagine a Union of Nation States that moves beyond a mere economic integration approach. Among many others, see J. Nergelius, *The Constitutional Dilemma of the European Union* (Groningen, Europa Law Publishing 2009), 125 pp.; D. Schiek, 'Re-embedding economic and social constitutionalism: normative perspectives for the EU' in D. Schiek, U. Liebert and H. Schneider (eds.), *Economic and social constitutionalism after the Treaty of Lisbon* (Cambridge, Cambridge University Press 2011), 17-46; C. Sabel and O. Gerstenberg, 'Constitutionalising an overlapping consensus: The ECJ and the emergence of a coordinate constitutional order', 16 *European Law Journal* (2010), 514-516; D. Halberstam, 'The Bride of Messina: constitutionalism and democracy in Europe', 30 *European Law Review* (2005), 775-801. For a more nuanced argument, see S. Sieberson, 'Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity under the Treaty of Lisbon', 50 *Virginia Journal of International Law* (2009-2010), 930 and references included therein. For an argument that power politics play an essential role in that regard, see S. Rosato, *Europe United. Power Politics and the Making of the European Community* (Ithaca, Cornell University Press, 2011), 265 pp.

[14] On the living nature of the EU institutional framework, see F. Mancini, 'The Making of a Constitution for Europe', 26 *Common Market Law Review* (1989), 596, stating that the European Court of Justice sought to 'constitutionalise' the Treaty, that is, to fashion a constitutional framework for a federal-type structure in Europe and D. Curtin, 'The constitutional structure of the Union: A Europe of Bits and Pieces', 30 *Common Market Law Review* (1993), 17-69. See more recently K. Lenaerts, 'Federalism and the Rule of Law: Perspectives from the European Court of Justice', 33 *Fordham International Law Journal* (2009-2010), 1376 for examples of that approach in the realm of rights and remedies. See also K. Lenaerts and J. Guttierez-Fons, 'The constitutional allocation of powers and general principles of EU law', 47 *Common Market Law Review* (2010), 1669. Most recently, K. Lenaerts, 'EU Federalism in 3-D' in E. Cloots, G. De Baere and S. Sottiaux (eds.), *Federalism and EU law* (Oxford, Hart, 2012), 13-44. In the executive realm, see D. Curtin, *Executive Power of the European Union. Law, practices and the living constitution* (Oxford, Oxford University Press 2009), 374 pp. For a more elaborate theory of the living constitution outside the EU context, see S. Breyer, *Active Liberty: Interpreting our Democratic Constitution* (Knopf, 2005), 176 pp.

States' freedom to develop prudential supervision mechanisms as a countermeasure to unmitigated free capital movements. Article 103(2)(b) TFEU mentions supervision in the context of establishing EU-wide mechanisms with a view to support EU competition law enforcement. Article 118 TFEU refers to supervision in the context of the establishment of EU-wide intellectual property rights. Article 127(5) TFEU refers to the European System of Central Bank's (ESCB's) contribution to ensuring smooth operations of prudential supervision, whereas Article 127(6) TFEU provides a basis for entrusting the European Central Bank with prudential supervisory responsibilities. An additional protocol outlines these competences in more detail.[15] In those instances, the Treaty directly mandates or operationalizes the creation of mechanisms dedicated to supervision either at the EU or at the national level.

In addition and more generally, the European Commission is called upon, under the auspices of the Court of Justice of the European Union, to 'ensure the application of the Treaties and the measures adopted pursuant to them' as well as 'oversee the application of EU law'.[16] Overall supervisory responsibilities are thus entrusted on both the Commission and the Court of Justice.[17] A particular procedure for Member State infringement of EU law has been incorporated in Articles 258-260 TFEU.

EU institutions have also not shied away from reading supervisory competences in the general legal bases of Article 114 TFEU[18] and Article 352 TFEU.[19] Those bases provided the EU with powers to inaugurate and maintain supervision regimes under the banners of approximation of national laws or 'necessary action to attain one of the objectives of the Treaties'.

7. *One working definition/three dimensions* – The lack of a general constitutional framework results in the absence of a conceptual EU definition of market supervision. A working definition is nevertheless necessary with a view to operationalize and problematize recent market supervision evolutions in EU law.

From a definitional perspective, supervision at least encompasses a *particular activity of monitoring compliance with regulated activities*.[20] Market supervision particularly aims at monitoring the regulation of particular economic or market activities. Within the realm of EU law, market supervision could be described as an activity based upon a set of rules, principles and standards enabling particular institutional actors to monitor whether public or private actors comply with supranational rules regulating the internal market. These supranational rules can either be directly applicable in the national legal orders or require transposition into national law. In case of non-compliance with these (transposed) rules, principles or standards,

[15] Article 25 of Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank.
[16] Article 17(1) TEU, describing the Commission's role.
[17] Ibañez refers to this as administrative execution and its supervision, i.e. the supervision of the implementation and application of EU law in the national legal orders, see A. Gil Ibañez, note 1, 22-23.
[18] According to Article 114 TFEU, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
[19] Article 352 states that if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.
[20] See references in note 1.

the entity responsible for supervision will itself impose sanctions or refer the matter to the courts for sanctioning purposes. For the purposes of this dissertation, market supervision particularly refers to supervisory regimes enforced by *supranational and/or national* public authorities directed at *private* market operators. In that understanding, market supervision refers to a *set of rules, principles and standards enabling national and/or supranational institutional actors to monitor whether private market operators comply with public regulation of the marketplace*.

Three supervisory dimensions could be distinguished in that definition: an institutional framework (1) enabling monitoring (2) and enforcement (3) of obligations resulting from EU law. All three elements rely on specific constitutional and legal provisions that structure their functioning. The scope of these provisions can be summarized as follows:

(1) The institutional framework refers to the set of competences that enables the establishment of regulatory structures of supervision.[21] Any regulatory system of supervision presupposes a legal basis for doing so. That basis determines the allocation of regulatory powers in organizing supervisory activities. An institutional approach would particularly assess what legal bases have been relied on to create EU-wide supervisory organizations. It would also examine how supervisory powers are divided among supranational and national authorities and whether or not a particular review system of supervisory decisions is in operation.
(2) The monitoring dimension focuses on the substantive powers attributed to a supranational or national supervisory entity. This dimension studies what kind of monitoring activities are deployed by the supervisory entity. In particular, it focuses on the substantive scope of decision-making. The substantive law framework thus becomes the focus of a monitoring analysis. This would amount to a detailed study of the provisions of one particular regime and a bird's eye view of their implementation and application by national and EU supervisory authorities.
(3) The enforcement dimension finally focuses on the individual decisions resulting from monitoring activities. It would consider the legal relationships between a supervising entity and its supervisees. This dimension readily focuses on the application of the substantive legal framework and takes the existence and analysis of that framework for granted. From a legal perspective, this would amount to analyzing concrete supervisory decisions, fines imposed and potential appeals lodged. It would also focus on the ways in which the decision-making procedures within the authorities have been applied.

2. Operationalizing market supervision in EU law: a 'Europeanization' perspective

8. *Europeanization* – The identified dimensions of market supervision have all increasingly been captured by EU law. They have been Europeanized.[22] Europeanization should be

[21] Moloney refers to the organisational structure, degree of independence, nature of powers, organisational dynamics and incentives, and resourcing, see N. Moloney, 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (2) Rules in Action', 12 *European Business Organization Law Review* (2011), 186. For a typology of different institutional formats operating in that regard, see D. Coen and M. Thatcher, 'Network Governance and Multi-Level Delegation: European Networks of Regulatory Agencies', 28 *Journal of Public Policy* (2008), 54-57. See also P. Craig, 'Shared Administration and Networks: Global and EU Perspectives' in G. Anthony, B. Auby, J. Morison and T. Zwart (eds.), *Values in Global Administrative Law* (Oxford, Hart, 2010), 81-116 and M. Zinzani, *Market integration through 'Network Governance'* (Antwerp, Intersentia, 2012), 14-16.

[22] See A. Ottow, 'Europeanization of the Supervision of Competitive Markets', 18 *European Public Law* (2012), 191-221.

understood as a tendency to develop, structure or regulate elements of supervision at the EU level. Europeanization does not however *per se* amount to centralization. It mainly denotes the influence of EU law on the organization, operation and institutionalization of supervisory activities. In doing so, Europeanized structures effectively transform national governance developments.[23] Europeanization in particular refers to the uploading of Member State values with a view to create a common EU-wide solution and the downloading of EU-adopted solutions into Member States' legal orders and the impact this downloading has on national legal and political systems.[24] A combined application of uploading and downloading results in a dynamic and multi-layered framework of market supervision. The notion of 'Europeanization' thus encapsulates all legal questions pertaining to the uploading and downloading process.

9. *Vertical/horizontal/transversal EU law problems* – From an EU law point of view, the 'Europeanization' of market supervision arrangements engenders numerous 'vertical', 'horizontal' and 'transversal' problems.[25] These problems allow to identify and refine a jurisprudential inquiry into the nature and features of Europeanized market supervision arrangements.

Vertical problems address interactions among different levels of supervisory activity in EU law. The vertical problems approach on the one hand relates to the interaction between the EU legal regime and national supervisory regimes. It examines to what extent sets of policies move from the national to the supranational level and vice versa.[26] The EU-national law relationship is the focus of this approach. On the other, a vertical approach could also refer to the relationship between the EU and international legal orders. That perspective takes the *sui generis* nature of EU law and EU institutional integration for granted and studies how it interacts with public international law and regimes of international supervisory cooperation and action for that matter. A particular question in that respect could relate to how the EU food safety standards and procedures established by the Commission and the European Food

[23] Europeanization has been described as reflecting changes in domestic governance arising from the economic and political imperatives of EU membership, and impacting upon both procedural and substantive aspects of domestic politics and policies or as an incremental process of reorienting the shape of politics to the degree that EC political and economic dynamics become part of the organisational logic of national politics and policymaking see C. Carter and A. Scott, 'Legitimacy and Governance Beyond the European Nation State: Conceptualising Governance in the European Union', 4 *European Law Journal* (1998) 437 for other definitions and further references as well. See also M. De Visser, *Network-Based Governance in EC Law. The Example of EC Competition and EC Telecommunications Law* (Nijmegen, Wolf Legal Publishers, 2008), 308, stating that Europeanization implies that national authorities exert their mandate with keen awareness of and attention to the wider European context.

[24] T. Börzel, 'Pace-setting, Foot-dragging and Fence-sitting: Member State responses to Europeanization', 40 *Journal of Common Market Studies* (2002), 196.

[25] For a similar endeavour, see E. Chiti, 'The relationship between National Administrative Law and European Administrative Law in Administrative Procedures' in J. Ziller (ed.), *What's New in European Administrative Law?, EUI Working Paper Law 2005/10, 7-9.* Chiti claims that the administrative execution of Union laws and policies is a matter of joint action by Union and national administrations, as well as mixed administrations composed of representatives of both EU and Member States (7). This leads to the emergence of a mixed or joint composite administrative procedural structure (8). That structure has a vertical dimension, because it connects the supranational to the national level. It also signifies a horizontal dimension, as it establishes a relationship within and among the national legal orders themselves. See also M. Hartmann, 'Administrative Constitutionalism and the Political Union', 14 *German Law Journal* (2013), 702.

[26] A. Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford, Hart, 2002), 9.

Safety Authority can be based on or differ from the *Codex Alimentarius Commission*'s conditions as developed by the UN's Food and Agricultural Organization (FAO).[27]

Horizontal problems relate to the interaction, structure and operational ability of different EU or national procedures, institutions and supervisory regimes. This approach examines the institutional balance at the EU level or at the national level and the room such balance creates for specialized agencies to operate and interact in conjunction with existing institutions. At the same time, a horizontal dimension could also investigate the extent to which national supervisory authorities cooperate with each other in the shadows of EU law obligations.[28]

A purely horizontal/vertical distinction is not sustainable in practice, as many institutional regimes do not solely rely on either EU or national powers, but enable cooperative mechanisms between both levels. A transversal approach therefore questions the extent to which multiple levels of supervisory cooperation interact and how these interactions structure, affect or transform horizontal and vertical legal relationships. Taking cooperation as a starting point, it focuses on the legal techniques structuring and fostering such cooperation mechanisms. Interaction between EU, international and national levels thereby constitutes the main focus of research.

10. *Problems meet dimensions* – All three dimensions of EU market supervision – institutional organization, monitoring and enforcement – could be subjected to horizontal, vertical and transversal analysis. The following matrix thus appears[29]:

EU market supervision	institutional organization	monitoring	enforcement
horizontal	institutional balance	horizontal accountability	supranational enforcement action
vertical	federal division of competences	EU structured national supervision	EU structured national enforcement
transversal	interactions national – EU legal architecture	cooperative accountability structures	coordinated enforcement structures

The horizontal line of research focuses either exclusively on the EU level or on the national level. From an *institutional* perspective, horizontal questions relate to the institutional balance the establishment of specific supranational or national agencies entails.[30] The *monitoring*

[27] See among others, E. Millstone and P. Van Zwanenberg, 'The Evolution of Food Safety Policy – making Institutions in the UK, EU and Codex Alimentarius', 36 *Social Policy & Administration* (2002), 593-609.

[28] For an example in the realm of competition law, see S. Brammer, *Co-operation between national competition agencies in the enforcement of EC competition law* (Oxford, Hart 2009), 561 pp.

[29] For the purposes of this dissertation, I do not focus on the international law part of the vertical approach. I only deal with EU – Member State relationships.

[30] See for a general survey, D. Geradin and N. Petit, 'The Development of European Regulatory Agencies: What the EU Should Learn From American Experience', 11 *Columbia Journal of European Law* 2004, 1-52; S. Griller and A. Orator, 'Everything under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine', 35 *European Law Review* (2010), 3-35; On institutional balance and agencification, see X. Yataganas, 'Delegation of Regulatory Authority in the European Union – The Relevance of the American Model of independent Agencies', *Jean Monnet Working* Paper no. 3/01, 68 pp and M. Chamon, 'EU agencies between Meroni and Romano or the Devil and the Deep Blue Sea', 48 *Common Market Law Review* (2011), 1055-1075.

dimension would encompass an analysis of the EU or national law provisions – solely at the EU or national levels that organize monitoring and overseeing and the horizontal accountability issues that arise in that regard. In particular, this approach would study the different monitoring procedures at the EU level and assess the EU's substantive powers. It would also seek to study to what extent the EU institutions control each other. The *enforcement* dimension would analyze the scope of enforcement powers attributed to either agencies or the Commission. Differences in enforcement techniques and particular powers in relation to the imposition of fines and the revoking of licenses would then be the subject of research.[31]

The vertical approach addresses the interactions and division of powers between the EU and national market supervision structures. The vertical approach operates as an EU window to assess the autonomy and/or possibilities left to Member States in a federal system of governance.[32] At the *institutional* level, this entails an enquiry into the legal bases establishing the powers to develop supervisory activities at the EU level. More specifically, questions about the existence of specific competence bases and ensuing power limits – also present in the horizontal dimension – reappear here. The extent to which Article 114 TFEU allows for the establishment of agencies with binding decision making power to the detriment of national supervisory authorities or the scope of Article 103 to allow for competition law application by national authorities are essential elements at this level. It also focuses on the ways in which national supervisory authorities have become – to some extent involuntarily – gatekeepers for the application and monitoring of EU law. The *monitoring* level would require a sector specific assessment and analysis focused on how substantive legal provisions allow national authorities to apply and monitor the application of these sector specific provisions. The *enforcement* dimension surveys the national authorities' powers to enforce compliance with EU provisions and with national provisions structured in the shadow of EU law. In particular, it would examine the extent to which national authorities remain autonomous in determining the scope of sanctions to be imposed and the role of EU law in curbing that autonomy for the sake of its own effective application. It would also investigate the ways in which national authorities and courts have to invoke EU law and determine appropriate sanctions in that regard.

A transversal perspective emphasizes the interactions between EU law and national law and proposes a conceptual framework to grasp relationships that structure these interactions. At the *institutional* level, it aims to establish how particular EU competences promoted the creation of specialized national agencies supporting an established supranational framework. Transversal institutional approaches in that regard pay attention to the legal bases and structures of so-called networks of supervisory authorities or network agencies, allowing national authorities to convene in an informal or formal supranational setting and to adopt particular guidelines. These guidelines could be incorporated either in national or supranational law, or could constitute *tertiary EU legislation*: a hybrid body of codes and principles operating between EU and national law with limited legitimacy and accountability

[31] For a general overview, M. Chamon, 'EU Agencies: Does the Meroni Doctrine make sense?', 17 *Maastricht Journal of European and Comparative Law* (2010), 281-317. Such a study would e.g. analyze the particular powers of the European Medicines Agency (EMA), see for an early example, R. Kingham, P. Bogaert and P. Eddy, 'The new European Medicines Agency', 49 *Food and Drug Law Journal* (1994), 301-322.

[32] Federalism should be understood only to reflect the functional dispersion of public authority into relatively autonomous layers of government at national and European level, see N. Bernard, *Multilevel Governance in the European Union*, (The Hague, Kluwer, 2002), 2. It does not highlight a particular image of European integration that should be pursued at any price.

features.[33] Another element of institutional transversal approaches comprises the interaction between national and EU judges as a matter of EU constitutional law. How does the general constitutional framework of EU judicial protection apply to the operations of supervisory regimes and how does it contribute to establishing a common supervisory law of Europe?[34] More generally, it seeks to structure the extent to which both national and supranational law interact and engage to make the system of market supervision work more perfectly. At the *monitoring* level, the transversal approach focuses on the ways in which supranational and national structures police market behaviour. Networks of national supervisory authorities could once again play an important role in that regard. The ways in which these networks operate, how they determine their input and output and the extent to which their operations contribute to implementing and controlling the scope of supervision contribute to regulatory cooperation also constitutes part of that analysis. At the *enforcement* level, a transversal focus concentrates on the scope and powers of national and EU inspectors to take (administrative) sanctions and the legal bases for doing so. In particular, it questions the extent to which national/supranational sanctions could be imposed on the basis of supranational/national decisions and what alternative enforcement techniques should be available at both governance levels.

11. *Conclusion* – Structuring supervisory arrangements along the abovementioned problem/dimension divide remains a somewhat abstract conceptual approach. Horizontal, vertical and transversal problems are difficult to distinguish in complete isolation from one another. At the same time however, the subdivision of approaches allows to develop a particularly narrow focus when approaching (market) supervision problems from the vantage point of EU law. The problems and dimensions both serve to conceptualize and operationalize an otherwise vague notion of market supervision. As such, they provide inroads for the identification and structuring of the research problem this dissertation seeks to address.

[33] On network-based governance and limited accountability and legitimacy, see M. De Visser, note 23, 363-367 for a summary explanation of such limits. See also G. De Búrca, 'The Institutional Development of the EU: A Constitutional Analysis' in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 1999), 69, arguing that 'some of the important actors and institutions which have come to exercise influence and power are not actually covered by the constitutional guarantees and controls governing the institutional framework. As a result, they do not, for example, fall within the review jurisdiction of the Court, are not subjected to the general constitutional and administrative law principles of good government, and do not satisfy fundamental standards of accessibility and transparency'. De Visser points out that networks are indeed such structures, see M. De Visser, above, 445.

[34] Arguing that networks generally fall outside the realm of EU law, M. Zinzani, note 21, 49. For a proposal to enhance judicial review in networks, P. Van Cleynenbreugel, 'Individuele rechtsbescherming, Europese netwerken van nationale toezichthouders en Lamfalussy-convergentie', *SEW – Tijdschrift voor Europees en Economisch Recht* (2010), 13-31.

Chapter 2. Research question: identifying constitutionally structured convergence across 'Europeanized' market supervision arrangements

12. *Introduction* – The previous chapter identified clusters of research problems relating to the Europeanization of market supervision. These clusters can be relied on to formulate and narrow the particular research problem this dissertation seeks to address. This chapter expounds on that problem. A first section outlines the starting assumption this dissertation engages with. It articulates a paradox in the language of 'Europeanizing' market supervision arrangements across different sectors. Notions of centralization and decentralization directly structure that language. The section nevertheless hypothesizes that the language of (de)centralization actually refers to similar legal developments. These structures promote the emergence of a singularly structured interactive legal sphere structured by supranational law in which national supervisory authorities and regimes function and operate. A second section seeks to address such structural convergence in the language of EU constitutionalism. To that extent, it identifies two types of 'constitutional mandates' structuring the emergence of Europeanized supervisory arrangements. Both types rely on different legal bases, but nevertheless seem to reflect a similar constitutional framework justifying supranationally structured market supervision arrangements. The research question will inquire to what extent both mandates allow for similarly structured arrangements to emerge. A third section will refine that question by identifying sub-questions that will be addressed in the following parts. A fourth section briefly outlines the structure supporting the development of these questions.

1. A putative (de-)centralization paradox

13. *An apparent (de-)centralization paradox* – The 'Europeanization' of market supervision arrangements resulted in diversified institutional regimes taking shape. Some of these regimes have relied on the language of decentralization of supervisory powers, whilst others have been justified by the need for more centralized European intervention. A contrast between the field of competition law enforcement and financial market supervision illustrates that point of view. In both instances, decentralization and centralization have become buzzwords to justify EU-wide reorganizations of supervisory arrangements. Such re-organizations have not however amounted to full centralization of EU supervisory powers or completely decentralized supervision of EU law.

Regulation 1/2003 supposedly decentralized the application and enforcement of EU competition law.[35] Although Regulation 1/2003 significantly enhanced the roles of national competition authorities and national courts, the Commission remained at the helm of EU competition policymaking. In addition, the Court of Justice and its Advocates General have continued to advocate the importance of uniform interpretation and application of EU competition law among different jurisdictions. In particular, the case law following the introduction of Regulation 1/2003 clarified the supranational involvement in the institutional organization of national competition law systems.[36] In lieu of a true decentralization of supervisory competences, Member States' authorities have now become a more integral part of the central EU system of supervision and enforcement.

[35] Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] O.J. L 1/1.

[36] See P. Van Cleynenbreugel, 'Transforming shields into swords. The Vebic judgment, Adequate Judicial Protection Standards and the Emergence of Procedural Heteronomy in EU law', 18 *Maastricht Journal of European and Comparative law* (2011), 522-528 for an overview of such case law.

The centralization of EU supervision in financial markets presents a similar perspective.[37] The establishment of EU-wide financial supervisors and the empowerment of European networks of national financial supervisors have firmly grounded national supervisory practice in an EU regulatory framework. The so-called innovations and transformations of the EU financial supervisory landscape were gradual rather than revolutionary. More centralization could therefore also be read as the confirmation of decentralized supervision sanctioned and structured by EU law.

In both instances, the language of (de-)centralization appears to refer to the exact opposite. Decentralization on the one hand seems to be relied on as a justification for more or continued centralized market supervision. Centralization on the other hand appears to justify a continuous supervisory role granted to national authorities, supplemented by limited supranational intervention. As a result, the paradox of (de-)centralization would amount to one concept actually implying the opposite: decentralization amounts to centralization and vice versa.

It is submitted that this paradoxical reading of the (de-)centralization concept attaches too much importance to the conceptual emptiness of (de-)centralization concepts. Rather than projecting contrasting institutional evolutions, it could equally be argued that the confusing (de-)centralization language does not reflect a paradox at all, but rather a symptom of increasing EU interference within the organisation and functioning of market supervision structures. In that understanding, the language of (de-)centralization refers to policy arrangements that involve more European intervention and the (re-)structuring of national supervisory bodies within an EU-wide framework. In that image however, centralization and decentralization do not amount to contrary institutional evolutions. Both approaches to the institutional organization of market supervision rather reflect a tendency to establish an institutional *settlement* between the EU and the Member States structured by EU law. The extent to which a settlement tendency can indeed be found – despite the polarizing (de)centralization language – constitutes the subject this dissertation sets out to explore.

14. *Preliminary research hypothesis* – Rather than incorporating clearly delineated understandings of legal action, the notions centralization and decentralization pinpoint to the emergence of a supranationally structured interactive sphere of EU – Member State cooperation.[38] Framed differently, a research hypothesis could be presented as follows:

Diverging centralization and decentralization rhetorics underlying the institutional organization of EU market supervision reflect a movement towards converging institutional

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[37] Centralization most notably refers to the creation of new supranational authorities at the EU level. See N. Moloney, 'EU financial market regulation after the global crisis: "more Europe" or "more risks"?', 47 *Common Market Law Review* (2010), 1317-1383 and E. Wymeersch, 'The New European Financial Regulatory Bodies', *Financial Forum – Revue Bancaire and Financière* (2012), 28, highlighting these evolutions as an example of the EU's federal division of powers between the EU and Member States. See also J. Black, 'Restructuring Global and EU Financial Regulation: Character, Capacities, and Learning' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), *Financial Regulation and Supervision. A Post-Crisis Analysis* (Oxford, Oxford University Press, 2012), 36, referring to asymmetric Europeanization, in which a set of centralized legal powers is (mis)matched by very little operational or regulatory capacity to effect change at the supranational level. For a more general picture, see J. Donahue and M. Pollack, 'Centralization and its Discontents: The Rhythms of Federalism in the United States and the European Union' in K. Nicolaïdis and R. Howse (eds.), *The Federal Vision. Legitimacy and Levels of Governance in the United States and the European Union* (Oxford, Oxford University Press, 2001), 98-117.

[38] On the differences between a classical federalism and Union framework of understanding, infra Part III, Chapter 2. For federalism as a functional division of competences among government levels and an example of multi-level government, see N. Bernard, note 32, 2.

arrangements. The EU Treaty framework supports, structures and potentially mandates that movement.

2. Research question: a constitutional approach

15. *A vertical/transversal and institutional perspective* – The abovementioned hypothesis and the federalism assumption already indicate that this dissertation particularly seeks to consider *vertical and transversal approaches* to the *institutional organization* of *Europeanizing* market supervision. It particularly inquires how EU and national supervisory authorities engage and interact within the EU institutional framework in both 'decentralized' and 'centralized' supervisory arrangements. Doing so would enable to identify an institutional *settlement* underlying the EU's institutionalization of market supervision structures.

16. *A constitutional approach* – In order to avoid the polarizing nature of (de)centralization to cloud the converging tendencies hypothesized upon, that institutional perspective will be structured as a *constitutional* approach. That approach will allow specifically to assess the nature and structure of constitutional evolutions at the EU level resulting in the emergence of a particular cross-sector institutional settlement.

The notion of constitutionalism requires further operationalization in that regard. In the well-known *Les Verts* judgment, the Court of Justice emphasized that the EU Treaty reflects a constitutional charter.[39] Whether or not one is willing to attribute a strong normative nation-state related notion to the concept of constitutionalism[40], the reality of EU law is that its progress is supported and determined by a foundational framework that enables and restrains integration. Like any foundational framework, its foundational nature could suffice to be termed a constitution.[41] This dissertation will indeed take that foundational notion of constitutionalism as its starting point. An EU constitution in that image encapsulates the foundations of EU powers and the tools to transform such powers into reality. The EU's foundational or constitutional framework especially focuses on three interrelated issues: attributed competences and legal basis, institutional functioning in a supranational setting and composite judicial review. These three elements will also constitute the basic pedigrees of a *constitutional* approach.[42]

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[39] Case 294/83, *Parti écologiste Les Verts v European Parliament*, [1986] ECR 1339, para 23. See also Case C-2/88, *Zwartveld*, [1990] ECR I-3365, para 16 ; Opinion 1/91, [1991] ECR I-6079, para 1 ; Case C-314/91, *Beate Weber v European Parliament*, [1993] ECR I-1093, para 8.

[40] I am following the common approach in EU law that the EU Treaty framework presents a constitutional framework which does not depend on the traditional notion of a constitution structuring and organizing a nation state, see J. H. H. Weiler, 'Federalism without Constitutionalism: Europe's *Sonderweg*' in K. Nicolaïdis and R. Howse (eds.), note 38, 54-70. See also M. Maduro, *We the Court. The European Court of Justice and the European Economic Constitution: a critical reading of Article 30 of the EC Treaty* (Oxford, Hart 1998), 175, arguing that the framework of EU integration challenges the notion of constitutionalism as inherently attached to a nation state.

[41] For a similar interpretation of constitutionalism, see A. Von Bogdandy, 'Founding principles of EU law: A Theoretical and Doctrinal Sketch', 16 *European Law Journal* (2010), 98. For a tentative conceptual application of a non-normative framework, see W. Devroe and P. Van Cleynenbreugel, 'Observations on economic governance and the search for a European economic constitution' in D. Schiek, U. Liebert and H. Schneider (eds.), note 13, 95-120.

[42] For a different perspective built on similar premises, see D. Curtin, H. Hofmann and J. Mendes, 'Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda', 19 *European Law Journal* (2013), 1-21 and N. Bernard, note 32, 215, claiming that the language of constitutionalism is powerful.

The concepts of attributed competences and legal basis refer to the constitutional necessity for EU law to be grounded in a Treaty legal basis.[43] The Treaty has to provide an explicit or implicit mandate for particular competences to exist and powers to be exercised. The scope of Treaty legal bases is essential to determine the organization of market supervision in the European Union and to establish a framework for cooperation between the EU and its Member States.

Institutional functioning in a supranational setting refers to the supranational legal processes by which Member States and EU institutions cooperate and function as parts of an institutional framework. In so doing, the system shapes a particular dynamic between EU and Member State actors. Methods and mechanisms such as case allocation, last resort intervention, direct binding EU decisions or drafting legislation have all been techniques to ensure a cooperative playing field of regulatory interaction. These mechanisms operate against an increasing background of fundamental rights conformity requirements determining and delineating institutional operations. Fundamental Union rights or entitlements to structure EU-Member State operations in a particular fashion provide the constitutional backing for the establishment of such a system.[44]

Composite judicial review finally structures the scope and role of judges and the particular constitutional relationships that have been established between national judges and the operations of the European Court of Justice in upholding the rule of law at the EU level.[45] From a constitutional perspective, judicial review not only emphasizes the importance of law enforcement, but also aims to structure rule of law requirements at both the supranational and national levels.

17. *Two constitutional mandates* – It is useful to distinguish two kinds or types of constitutional organization in order to approach the centralization-decentralization distinction from a constitutional perspective. On the one hand, the Treaty **directly mandates** the creation of EU-wide market supervision regimes. On the other, the Treaty's general or objective-related[46] legal bases potentially incorporate a mere **indirect mandate** to the EU institutions to establish supranational market supervision structures.

Directly mandated market supervision regimes are limited in scope. As mentioned above, specific Treaty provisions do include references to supervision and could thus be read as a direct constitutional mandate to develop market supervisory regimes. Directly mandated supervision envelops all supervisory activities that are directly based on a specific legal basis. On top of being referenced in the Treaty framework, directly mandated supervision also requires supervisory powers to be based on the Treaty framework as such – and not on secondary legislation establishing market supervision structures. The scope of directly mandated supervision is especially clear in Article 103 TFEU relating to EU competition law. That provision mandates EU institutions to establish a framework of competition law supervision, both in its monitoring dimension and in its enforcement dimension. Article 105

[43] R. Barents, 'The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation', 30 *Common Market Law Review* (1993), 88. For a general approach, R. van Ooik, *De keuze der rechtsgrondslag voor besluiten van de Europese Unie* (Deventer, Kluwer 1999), 483 pp.

[44] On the newfound role of fundamental rights in the post-Lisbon era, among others I. Pernice, 'The Treaty of Lisbon and Fundamental Rights' in S. Griller and J. Ziller (eds.), *The Lisbon Treaty: EU constitutionalism without a constitutional Treaty?* (Vienna, Springer, 2008), 235-256.

[45] On the judicial role in upholding the rule of law, K. Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union, 44 *Common Market Law Review* (2007), 1625-1659.

[46] T. Konstadinides, *Division of Powers in European Union Law. The Delimitation of Internal Competence between the EU and the Member States* (Alphen a/d Rijn, Kluwer Law International, 2009), 187.

TFEU states that the European Commission shall act as the main competition supervisor in the EU.[47] Article 103 requires the interrelationships between the EU institutions and Member States or national authorities to be (re)defined. The supervisory framework can thus directly be based on the Treaty, just like the substantive provisions the supervisory framework is meant to effectuate.

Another example of imposed supervisory procedures consists in the infringement procedure before the European Court of Justice. Articles 258-260 TFEU grant the Commission the role of supervisory institution in ascertaining Member State compliance.[48] The Commission's constitutional monitoring and enforcement roles do however go beyond the particular *market* supervisory roles this dissertation explores. In assessing Member States' failure to fulfil obligations arising from the Treaty framework, the Commission can equally police and enforce Member States' failure to transpose directives or adopt measures that relate to non-market policy fields like environmental law. These provisions are only addressed to the Member States. They do not directly mandate the supervision of market operators. As a result, the Commission only acts as a supervisor of supervisors at best.

Indirectly mandated supervision encompasses supervisory regimes adopted on the basis of generic legal bases allowing harmonization with a view to complete the Internal Market. Although the Treaty does not explicitly mandate the establishment of supervisory regimes, open-ended functional Treaty legal bases - Articles 114-116 TFEU and Article 352 TFEU are most relevant in that regard – allow for such regimes to emerge as well. Article 114 TFEU regulates the adoption of measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. A wide variety of measures could be adopted on the basis of that provision, including the creation of EU agencies engaged in monitoring activities.[49] Article 115 TFEU enables the issuing of directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market. The Council shall in that case act unanimously and consult the European Parliament and European Social and Economic Committee in that regard. In addition, Article 116 allows the Commission and Member States to engage in consultative practices relating to the elimination of distortions of competition in the Internal Market. To that extent, the Council and European Parliament can adopt directives in accordance with the ordinary legislative procedure.[50] The broad open textured nature allows for the institutionalization of supervisory arrangements through directives or regulations based on these provisions as well. Article 352 provides the Union with additional powers to take Union measures that are necessary within the framework of one of the policies defined in the Treaty framework.[51] In that case, the Council shall act

[47] At least to the extent that the Commission's powers have been determined in a secondary legal instrument, see Article 104 TFEU.

[48] According to Article 258, this could occur whenever a Member State fails to fulfill any obligation resulting from EU law, see L. Prete and P. Smulders, note 5, 24.

[49] The ENISA – European Network and Information Security Agency is an example in that regard. Regulation (EC) No 460/2004 of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency, [2004] O.J. L 77/1; See Case C-217/04, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union,* [2006] ECR I-3771.

[50] Article 116 TFEU has in some instances been relied on to enable social law harmonization, see L. Nistor, *Public Services and the European Union. Healthcare, Health Insurance and Education Services* (The Hague, T.M.C. Asser Press, 2011), 10.

[51] Bradley refers to that provision as a last chance saloon, see K. Bradley, 'Powers and Procedures in the EU Constitution: Legal Bases and the Court' in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 2nd Edition, 2011), 100.

unanimously on a proposal of the European Commission, after having obtained Parliamentary consent. In practice, legal bases could also be combined in order to justify particular power mechanisms.[52] Although these provisions do not specifically and explicitly refer to supervision, they have been relied on to create and support the development of particular institutional frameworks of market supervision in the Union. Thus interpreted, these provisions delegate constitutional competences to EU institutions and indirectly allow them to create supervisory agencies at the EU level.

18. *Research question* – The distinction between two types or categories of constitutional frameworks of market supervision presents an inroad into the multitude of supervisory arrangements at the EU level. Both categories provide constitutionally structured benchmarks to consider the extent to which the EU Treaty framework effectively relies on a converging framework governing the seemingly diverging EU market supervision arrangements.

From that perspective, the general research hypothesis could be rephrased in a research question: *To what extent do directly or indirectly mandated supervisory institutional mechanisms reflect a converging constitutional framework for supranationally structured market supervision?*

3. Research sub-questions

19. *Identifying institutional proxies of market supervision* – A satisfactory answer to the research question requires an operational assessment of both directly and indirectly mandated market supervision. Particular proxies governing the institutional organization of market supervision therefore need to be distinguished. Four proxies appear in that regard: locus, object, cooperative functioning and review. These proxies essentially allow to structure the institutional arrangement of market supervision structures.

20. *Locus of supervision proxy* – The locus proxy evaluates whether and to what extent the supervisory institutions entrusted with a monitoring or enforcement function operate at either the EU or the national level. EU legal scholars distinguished the supervision of market behaviour or market activities (first-line supervision) from the supervision of market supervisors (second-line supervision).[53] First-line supervision considers the actual activity of supervision, the institutionalization of a direct relationship between supervisor and supervisee. Second-line supervision encompasses supervisory activities directed at first-line supervisors as an indirect mode of supervising market activity.[54] Traditionally, decentralized first-line supervision has been accompanied by supranational (centralized) second-line supervision. With a view to establish the scope of constitutional transformations and the role constitutional provisions have played in that regard, shifting tendencies in the locus of supervision should be

[52] A combination of legal bases could nevertheless result in differential voting procedures applicable to one single legal instrument. The Court of Justice in that regard adopted pragmatic solutions attuned to the specificities of the case at hand and with a view to increase the democratic legitimacy of the measures adopted, see Case C-155/07, *European Parliament v Council,* [2008] ECR I-8103, para 75-79 (resulting in the highest Parliament involvement possible). See also Case C-166/07, *European Parliament v Council* [2009] ECR I-7135, para 69. According to Corthaut, the Court's approach in that judgment again reflects the most democratically feasible solution, see T. Corthaut, 'Institutional pragmatism or constitutional mayhem?', 48 *Common Market Law Review* (2011), 1295.

[53] P. Eijlander and R. van Gestel (eds.), *Domeinconflicten tussen Europees en nationaal toezicht* (Den Haag, Boom Juridische Uitgevers 2006), 4.

[54] A concise but enlightening encounter with this distinction can be found in G.T.M.J. Raaijmakers, *De effectiviteit van regels in het ondernemings- en effectenrecht*, Inaugurele Rede Universiteit Maastricht, http://www.maastrichtuniversity.nl/web/Main1/Pers/OratiesEnRedes2010/OratiesEnRedes2005.htm.

further analysed. Shifting loci of supervision can be captured by at least three dimensions. First, the creation of specialized agencies or the entrustment of specific supervisory powers in the hands of the European Commission. Second, the shifts from first-line supervision to second-line supervision or vice versa at the EU level. Third, the impact of the abovementioned shifts on the constitutional choices between either Commission or specialised agency supervision. These three dimensions result in the following sub-questions:

To what extent did the EU opt for creating a first- or second-line supervisory regime in specific market supervision sectors? How did it institutionalize that regime?

In what respect did the choice of institutional regime reflect specific constitutional limits underlying that system?

21. *Object of supervision proxy* – Although this dissertation focuses in particular on the institutional operations and constitutional consequences of EU market supervision in relation to constitutionally directly and indirectly mandated supervision, the object of supervision remains a background theme. Even though the epithet 'market' in market supervision presumes a distinctively market regulatory approach, numerous ways to regulate a market through law exist and continue to be developed.[55] Regulating markets by means of competition law is not at all equal to regulating markets through product standards. Competition law supervision generally focuses on structural *market behaviour of businesses* as prohibited or limited by substantive competition law regulation[56]. Supervision of liberalization processes in principle relates to similar competition concerns, albeit in light of specific rules, standards or principles that ought to facilitate a gradual introduction of competition in a specific sector previously subject to intrusive public regulation. Supervisors in that respect mainly focus on monitoring compliance with those particular rules. In other words, not only market behaviour, but also *market conditions and market activity regulation* allowing for competitive behaviour are part of the supervisors' framework. Market activity regulation structures public intervention to regulate particular activities and products without explicitly paying attention to the behaviour of market operators.[57] Financial markets supervision exemplifies market activity regulation supervision, as financial law circumscribes the conditions for financial market operations (regulating and supervising financial products, regulating investor protection etc.).

The object of market supervision can be summarized as the *(sector-specific) market regulatory framework that is subject to monitoring and compliance control by European or national authorities*. Within a single framework, different competing policy goals – e.g. protecting consumers and competitors, maintaining a specific market structure – will coexist and interact. The extent to which these goals interact, could influence the operationalization of the constitutional framework and supervisory powers granted to different national or supranational bodies.

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[55] For an example, see T. Canova, 'Financial Market Failure as a Crisis in the Rule of Law: From Market Fundamentalism to a New Keynesian Regulatory Model', 3 *Harvard Law & Policy Review* (2009), 370-396.

[56] J. Den Hertog, 'General Theories of Regulation' in B. Bouckaert en G. De Geest (eds.), *Encyclopaedia of Law and Economics, Volume III, The Regulation of Contracts*, Cheltenham, Edward Elgar, 2000, 224.

[57] Financial law scholars distinguish financial products regulation and financial firms regulation, see E. Wymeersch, 'Het financiële recht, naar Europese maatstaven herijkt' in M. Tison (ed.), *Belgisch kapitaalmarktrecht op Europese leest* (Antwerp, Intersentia, 2007), 427-428; E. Wymeersch, 'Aspecten van toezicht op het financieel bestel' in M. Tison, C. Van Acker en J. Cerfontaine (ed.), *Financiële regulering: op zoek naar nieuwe evenwichten? Volume II. Financiële transacties – financiële markten – prudentieel recht*, (Antwerp, Intersentia, 2003), 227-249.

The object proxy of market supervision therefore investigates the following question: *To what extent do supranationally structured market supervision regimes translate felt necessities of market regulation into its institutional framework?*

22. *Institutional cooperation proxy* – The creation of market supervision regimes cannot be captured in a classical *either EU or national law* framework. On the contrary, the creation of both 'centralized' and 'decentralized' regimes of market supervision is supported by particular structures of cooperation, in which national supervision authorities cooperate in a broader, EU-wide setting. The cooperative functioning proxy therefore investigates the structures of supervision at the EU level. Different organizational alternatives exist in that regard, including European agencies, informal European networks of national supervisors or national supervisors entrusted with an EU mandate. In the latter case, questions involving the structure of national supervisory authorities, specifically regarding their internal organization, the accommodation and implementation of European substantive and procedural requirements and the possibility of national authorities' discretion in taking supervisory action ought to be considered.

The cooperative function thus incorporates the following research questions: *To what extent do upgraded or transformed mechanisms of EU market supervision incorporate cooperative mechanisms and how do these mechanisms relate to or mirror the constitutional framework of institutional functioning at the EU level?*

23. *(Judicial) review proxy* – Review of supervision decisions reflects an additional constitutional tool of market supervision. In accordance with Article 19(1) TFEU, the Courts should ensure the observance of the law in the interpretation and application of the Treaties. References to 'the law' presuppose a specifically tailored EU rule of law that requires the Court of Justice to ensure judicial protection against acts of institutions that affect the legal position of its addressees or third parties at large.

Judicial protection requirements regulate access to EU courts and the scope of review entertained by them. It is well-known that requirements of individual standing before the European Court of Justice have been interpreted rather restrictively by the European Court of Justice.[58] The newly established fourth paragraph of Article 263 TFEU allows regulatory measures to be contested without having to demonstrate individual concern. Although the Court's case law is unclear at the time of writing, it appears that directives granting significant implementation discretion to Member States cannot be captured by the scope of regulatory acts.[59] The creation of specialized appellate boards reviewing supervisory decisions can in

[58] This was best captured by the CJEU's dismissive stance in Case C-50/00, *Union de Pequeños Agricultores v. Council* [2002], ECR I-6677. For a very clear overview of issues, see E. Biernat, 'The *locus standi* of private applicants under article 230 (4) EC and the principle of judicial protection in the European Community', *Jean Monnet Working Paper 12/03,* http://centers.law.nyu.edu/jeanmonnet/papers/03/031201.rtf.

[59] See Case T-16/04 *Arcelor Mittal v European Parliament and Council* , [2010] ECR II-21, para 123. Case T-18/10, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council,* [2011] ECR II-0000, para 56 maintained that only acts of general application that have not been adopted in accordance with a legislative procedure comprise regulatory acts. In *Microban*, the General Court held that a regulatory act should apply to objectively determined situations and it produces legal effects with respect to categories of persons envisaged in general and in the abstract, see Case T-262/10, *Microban International Ltd and Microban (Europe) Ltd v European Commission*, [2011] ECR II-0000, para 23. On direct concern, see Case T-93/10, *Bilbaína*, para 38. See also Case T-381/11, *Eurofer ASBL v Commission*, order of 4 June 2012, nyr, para 58, holding that a decision which calls for additional supranational and national implementing measures cannot constitute a regulatory act. In a 17 January 2013 Opinion, Advocate General Kokott argued that some implementing measures could still be considered possible in that regard, see Opinion of A.G. Kokott in Case C-583/11 P, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, nyr, para 70-71.

these instances provide additional recourse for those affected by supervisory decisions taken at the EU level.

The particular requirements imposed by an EU rule of law also affect the oprations of national supervisory bodies entrusted with an EU supervision mandate. These bodies' decisions will be reviewed by national courts in accordance with national procedural law. At the same time, national procedural law is necessarily confined by EU law limiting 'national procedural autonomy'. The application of these mitigating conditions to the particularities of market supervision will therefore equally be captured by this proxy.

The review proxy assembles research questions related to the organization of judicial protection at the EU level, at the national level and issues regarding the interactions, frictions and cooperative possibilities among both levels. The proxy results in the following sub-questions: *How does the general constitutional system of judicial protection before the EU courts operate with respect to decisions adopted by EU supervisory authorities or by Europeanized national supervisory authorities? To what extent does the principle of national procedural autonomy remain guiding and how does it affect the operations of a specialized market supervision review system?*

24. *Proxies as a basis to identify potential constitutional convergence/ second set of sub-questions* – The proxies mentioned above outline the analytical basis for a more in-depth, structural assessment of institutional arrangements in both directly and indirectly mandated market supervision arrangements. Consideration of the research sub-questions allows to identify to what extent the constitutional features of competence attribution, supranational rights functioning and composite judicial review have been applied and the extent to which these principles converge across differently structured sectors. The sub-questions outlined above therefore provide the groundwork for sub-questions particularly aimed at such identification and evaluation. These new subquestions seek to identify the *structural* meta-rules that govern the institutional outlook and operations of supranational market supervision structures. According to Curtin, Hofmann and Mendes, 'meta-rules should be perceived as tools capable of infusing core constitutional principles into executive rule-making'.[60] Whilst these authors identify these constitutional principles as *substantive constitutional values* such as democracy, transparency and accountability, this dissertation argues that *structural* constitutional principles of adequate institutional organization equally exist, *in addition to and distinct from these substantive values*.[61] Following sub-questions additionally appear in that regard, specifically focusing on these structural values.

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[60] D. Curtin, H. Hofmann and J. Mendes, note 42, 3 refer to constitutional principles as guiding tools in the design of meta-rules on EU rulemaking. See also D. Chalmers, 'The European Redistributive State and a European Law of Struggle', 18 *European Law Journal* (2012), 668, arguing that EU law should 'seek to internalise […] conflicts [related to redistribution and fiscal transfers among and across Member States] on the grounds that they can be better mediated within collective structures and that they also can have many positive dimensions. This latter strategy would require the EU to reorient its mission. It would no longer be so concerned with the realisation of common goods, policies or values but simply with providing a political settlement within which parties come together to contest points of disagreement which have arisen out of their interdependence'. For an argument as to the incompleteness of such approach, see B. De Witte, 'Executive Accountability under the European Constitution and the Lisbon Treaty: *Nihil Novi sub Sole*?', in L. Verhey, P. Kiiver and S. Loeffen (eds.), *Political Accountability and European Integration,* (Groningen, Europa Law Publishing, 2009), 137-151.

[61] For an overview of the substantive constitutional values at stake, see D. Curtin, H. Hofmann and J. Mendes, note 42, 3-6 and 16-20. See in more detail, J. Mendes, 'Delegated and Implementing Rule Making: Proceduralisation and Constitutional Design', 19 *European Law Journal* (2013), 22-41; T. Christiansen and M. Dobbels, 'Non-Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts', 19 *European Law Journal* (2013), 42-56; E. Chiti, 'European Agencies' Rulemaking

What legal bases have been relied on to establish EU market supervisory regimes? How have the generally accepted limits related to these bases been transformed or interpreted with a view to justify the creation of EU market supervisory regimes? To what extent do these bases enable the EU to create institutional arrangements that are currently operable? How have judicially imposed 'vertical' restraints on the application of a particular legal basis determined the current outlook of the system?

To what extent do the regimes of institutional cooperation and the methods of decision-making operating within the confines of those regimes reflect a particular preference for EU-Member State cooperation? What role do fundamental (procedural) rights play in that regard?

How does the constitutional framework of effective judicial protection promote the adoption of standards of effective national supervision? How does that promotion affect the scope and operations of judicial review provisions developed at the EU level against EU supervisory institutions?

25. *Two sets of sub-questions in need of separation prior to integration* –A clear separation between both sets of questions allows for a coherent constitutional perspective to emerge. Examination of the proxies of supervision constitutes a necessary precondition for a more general constitutional assessment of a particular market supervision regime. That general constitutional assessment is nevertheless necessary to develop an even more general perspective on the scope of constitutionally structured convergence across sectors. Responses to both sets of research questions will therefore enable to provide an answer to the general research question. As such, seemingly disparate sets of questions will serve to provide for an integrated answer relating to the scope of constitutional convergence in the realm of supranationally structured market supervision arrangements.

4. Research structure

26. *Generalizing from two case studies* – The abovementioned research questions will be applied to two specific case studies of constitutionally mandated market supervision. EU competition law supervision mechanisms will be analyzed as a primary example of directly mandated supervision, whilst the regulatory infrastructure of financial supervision will be considered an example of indirectly mandated market supervision. Before proceeding to the analysis of financial supervisory arrangements, the dissertation will structure the institutional delegation mandate within a framework of *Internal Market* supervision. Such structure is deemed necessary to understand the role and scope of specific internal market supervisory arrangements.

Part two of this dissertation essentially adopts this approach. A first chapter will consider the emergence and operations of the present EU competition law enforcement scheme and its direct constitutional mandate. The second chapter will analyze the institutional organization of financial market supervision as an example of indirectly mandated market supervision. Both chapters will comprise two parts. A first part (Part A) will seek to answer the first set of research sub-questions. A second part (Part B) will focus on the constitutional structures outlined in the second set of research sub-questions.

Powers, Procedures and Assessment', 19 *European Law Journal* (2013), 93-110. For a perspective of transnational solidarity grounded in justice legitimizing European integration, see F. De Witte, 'Transnational Solidarity and the Mediation of Conflicts of Justice in Europe', 18 *European Law Journal* (2012), 694-710.

The outcomes of the case studies will subsequently be integrated with a view to determine the extent of constitutional convergence in the institutional organization of differently structured market supervision regimes. Both case studies serve to identify a set of general constitutional principles governing cooperative market supervision in the European Union and clarifying the emergence of converging institutional arrangements. In that respect, questions arise as to what extent the elements of change identified reflect a new EU constitutional settlement. The third part of the dissertation will seek to identify and explain the emergence of such settlement. In doing so, it argues that EU law incorporates or reflects a particular framework of regulatory competition aimed at the efficient structuring of market supervision. Insights from economics will be integrated into this part of the dissertation.

On the basis of these insights, a set of constitutional principles and operational maxims will be identified. These principles and maxims allow to structure the constitutional framework of EU market supervision. They equally serve to explain and predict institutional evolutions taking place across different sectors. The final part of the dissertation will particularly outline how such framework serves to explain institutional arrangements structuring other sectors.

27. *Three generational layers of principles* – The approach adopted in this dissertation attaches particular relevance to the interpretation of vague constitutional principles in specific regulatory settings. Three generations of constitutional principles could be distinguished in that regard.

Any multi-level governance framework – including the European Union – relies on a set of principles governing conflicts between different legal orders. These principles create a regulatory environment in which multiple levels of governance co-exist. They could therefore be defined as *first generation principles.* At the EU level, the principles of direct effect and primacy of EU law particularly allow for conflicts to be created, identified and resolved.[62]

In addition however, more developed multi-level governance structures necessarily rely on *second generation* principles that allow to structure and determine the level playing field created by first generation principles. Structural EU constitutional law principles of competence attribution, subsidiarity, proportionality, sincere cooperation, effective judicial protection and national institutional autonomy exemplify such *second generation* principles, accompanied by more substantive principles of transparency, accountability and national and individual representation.[63] They provide vague guidelines to structure EU-Member State relationships and serve to *legitimise* the intrusive intervention of EU law in accordance with the principles of primacy/supremacy and direct effect. EU regulatory intervention into national legal orders and national regulatory (in)action in the shadows of EU law will only be legitimate if and to the extent that second generation principles are duly taken into account.

Second generation principles are nevertheless vague and only gain in specificity in concrete regulatory settings. It could therefore be submitted that second generation principles serve as instruments for the identification and structural development of a new – and thus *third* – generation of operational constitutional principles. Third generation principles translate second generation principles into concrete standards structuring the interactions between different levels of governance in the European Union and its Member States. As constitutional principles, they render concrete and structure the otherwise vague principles of subsidiarity,

[62] See B. De Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order', in P. Craig and G. de Búrca (eds), note 33, 177-213.
[63] See references in note 60 for this more substantive approach.

proportionality, sincere cooperation and national institutional autonomy into operational standards of European integration through law.

Third generation principles predominantly function as *classification* devices that outline how vague principles such as subsidiarity or institutional autonomy take shape in particular governance environments. In addition, these principles *justify and legitimise* a particular settlement taking shape between different levels of governance. As justificatory devices, third generation principles provide the tools to delineate legitimate interventions by one level into the operations of another in a specific multilevel governance setting. This dissertation and its particular research structure are tailored to identify and explain the nature of such principles in the realm of the institutionalization of market supervision at the EU level.

Chapter 3. Methodology

28. *Introduction* – Dedicated attention to methods of legal research is particularly relevant with a view to ascertain the doctrinal and scientific 'embeddedness' of one's research results.[64] This dissertation does not rely on one particular doctrinal or interdisciplinary methodology. It rather confirms the instrumental statement made by Bert Keirsbilck that '*ambitious legal research requires a combination of methods which lead most effectively and efficiently to the realization of its objectives*'.[65] On the one hand, as the objectives of this dissertation mainly encompass the explanation and reclassification of recent institutional evolutions at the EU level, it remains faithful to doctrinal analysis (1.). That doctrinal analysis is nevertheless unable to answer why a particularly structured constitutional framework is taking shape. In order to grasp that underlying explanation, this dissertation on the other hand seeks to explore to what extent the doctrinal framework incorporates a particular economic framework of 'regulatory competition'. This dissertation particularly adopts a *cyclical* perspective to understand the intertwinement between law and economics in this regard. It proposes *law and economics* framework to engage upon meaningful interaction between both disciplines (2.).

1. A functional-inductive doctrinal approach

29. *Doctrinal approach* – The approach adopted by this dissertation is functional since it does not presuppose an immanent dogmatic framework of market supervision, but rather explores the supervisory functions identified in the proxies and sub-questions. The approach adopted in this project also relies on an inductive inquiry into the legal structures of EU market supervision systems. On the basis of that inductive analysis, the legal foundations and constitutional operations of market supervision at the EU level can be outlined. The second part and sections of the third part of this dissertation will be structured in accordance with this approach.

30. *Functionalism* – The approach chosen is first of all functional since it relies on particular proxies of market supervision that study the operations of supervisory mechanisms from the vantage point of their institutional, vertical and transversal functions in providing answers to problems of European integration.

The notion of functionalism refers to a large number of varied and varying methods and models that basically strive to look at functions of law and legal rules in society.[66] Scholarly defined 'functions' constitute a 'tertium comparationis' that allows for legal data to be structured around a given set of predisposed non-legal claims.[67] As such, those functions are considered to constitute stable external benchmarks, whereupon a comparison of legal rules, court judgments and other institutional structures can be built. A functional method is therefore mainly applied with a view to find similarities among legal systems.[68] In this

[64] For that thesis, see R.A.J. van Gestel, J.B.M. Vranken, J.L.M. Gribnau en H.E.B. Tijssen, 'Rechtswetenschappelijke artikelen. Naar criteria voor methodologische verantwoording', *Nederlands Juristenblad* 2007, 1448 – 1461.

[65] B. Keirsbilck, *Foundations of Economic Law in Europe: a harmonised law of Unfair Commercial Practices and its Interaction with Competition Law after Modernisation*, Faculty of Law K.U. Leuven, doctoral dissertation, 2010, 24.

[66] R. Michaels, 'The Functional Method of Comparative Law' in M. Reimann (ed.), *The Oxford Handbook of Comparative Law* (Oxford, Oxford University Press, 2008), 342.

[67] R. Michaels, note 66, 342.

[68] R. Michaels, note 66, 380.

particular research set-up, I do search for similarities as well. However in so doing, I do not focus on different legal systems related to different legal orders or states. I rather focus on functions developed in different sectors of market regulation developed by a single legal order. As such, reliance on a functional method to focus on a single legal atmosphere counters the risk of being too driven by similarities and neglecting differences between legal systems. A single legal order, despite its functional differentiation[69], is at the very least grounded in similar ideas and focused on similar premises reflected in a single constitutional order. This project studies similarities among differentiated societal spheres subject to similar constitutional provisions. A functional inroad in that respect provides a tool to overcome the tunnel vision resulting from differentiated and specialized treatments without considering the broader (constitutional) grounding of the legal order in its entirety.

The functional categories identified operate along two lines: practical considerations (what functions have been attributed in practice to what actors?) and theoretical positions (how have functions of constitution-building come to be interpreted in the light of those changing practical conditions?). As such, they reflect two major elements of identification and change that comprise the main arguments of this dissertation. The functions inherent in both elements aim to detect and explain the common constitutional core underlying the institutional organization of market supervision in EU law.

31. *An inductive approach* – This project applies the functional criteria identified above in an inductive setting, at three different levels of intensity. First, it relies on the traditional empirical methods of legal scholarship, i.e. the employment of statutes, case law and 'doctrine' to determine the operations of institutional arrangements. Second, it commences by a case study approach, constituting the basis for the development of a general framework of understanding subsequently to be tested as a predicting device in other sectors. Third, it relies on an interactive comparative legal study in which particular national law provisions will be discussed in the light of EU constitutional evolutions.

Firstly, it should be clear at the outset that this project subscribes to the tools and methods of legal scholarship. It highlights, investigates and structures legal evolutions having taken place in the domains delineated above. In doing so, the project relies on particular methods and structures common to the legal scholarly enterprise. It thus takes legal documents – statutes, EU regulations and directives, CJEU and national judgments – as its starting point. Policy documents, i.e. documents produced by the Commission that did not have or were not granted direct binding legal force will nevertheless also feature in this project, as these documents have often come to be internalized in the EU's constitutional discourse. The most salient example of that internalization can be seen in the Lamfalussy method of regulation. This four-level approach to EU financial regulation resulted from a Final Report of a Committee of Wise Men.[70] Although the European Council endorsed the Report's conclusions, it never directly became part of the EU's constitutional framework. It nevertheless provoked a sea

[69] On functional differentiation in the legal order, see G. Teubner, 'A constitutional moment? The Logics of "Hitting the Bottom"' in P. Kjaer, G. Teubner and A. Febbrajo (ed.), *The financial crisis in constitutional perspective: the dark side of functional differentiation* (Oxford, Hart, 2011), 3-43. In that understanding, extra-legal principles provide the necessary background for the *bricolage* of legal principles and the framing of a rights language. On bricolage as a technique for constructing a particular whole, see C. Lévi-Strauss, *La Pensée Sauvage* (Paris, Plon, 1962), 395 pp., translated into *The Savage Mind* (London, Weidenfeld, 2nd Ed, 1968), 290 pp. See also Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Washington D.C., Beard Books, 2006), xv.

[70] The endorsement of the Lamfalussy approach can be found in the Stockholm European Council Conclusions No. 100/1/01, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.%20ann-r1.en1.html

change in EU regulatory approaches, the results of which are still reflected in today's constitutional framework. The European Council's endorsement therefore *de facto* transformed the constitutional outlook of EU integration. Policy documents receiving that kind of endorsement will therefore be equated with traditional sources of law.

Secondly, the research design of this dissertation employs a case study approach. A choice has been made for two systems of Treaty-mandated market supervision that had been subject to more intensive institutional arranging over the last years and in which the transformative dimension would thus more generally be visible. The example of competition law supervision proves highly relevant in that regard, as Regulation 1/2003 has been in operation for more than eight years, having resulted in new strands of case law and innovations that clearly provide insight into the constitutional operations of directly mandated supervision initiatives. The preference for more centralized supervisory arrangements in other sectors on the other hand results in the creation of agencies rather than centralizing powers within the Commission. These agencies function as specific Commission-like structures. The scope of decision-making entrusted to EU agencies has significantly expanded in the wake of the global financial crisis, dramatically demonstrating the way forward in cooperative regimes regarding indirectly mandated market supervision. The novelty of financial supervisory arrangements therefore justifies its treatment as a potential epigone for future cooperative agreements based on the generic Internal Market provisions and ensuing harmonization clauses. Both systems have thus been chosen to represent the most 'developed' institutional illustration of what the constitutional framework of EU integration is presently capable of. In so representing the EU's cooperative versatility, these regimes explore the boundaries of EU constitutional intervention.

A subsequent – albeit less developed – case study approach will build on the findings of the constitutional boundaries emerging from the abovementioned ones. The second set of case studies will focus on the feasibility and tenability of arguments extracted from the first set. In so doing, the format of argument shifts. Instead of building a system of constitutional boundaries, 'less institutionally developed' fields of law will be put into that framework with a view to test its viability as an explanatory model for EU legal evolutions. They effectively constitute a control group in that regard.

Thirdly, I will also engage in a comparison of laws and legal solutions at the national levels, especially in the organization of judicial review, where EU intervention has remained remarkably limited. National review structures nevertheless have an important role to play in upholding the rule of law in EU-structured fields of national market supervision. In addition to EU law, I will therefore analyse supervisory review structures in Belgian, Dutch, French, German and English law. The justification for those legal systems can be found in being a 'big member state', in being one's home country legal system and in the limits imposed by language and accessibility. It should however be clear that EU law remains the focus of this project. National differences are only relevant to the extent that they are directly or indirectly affected by EU law. From that perspective, national law arrangements will only briefly – and by all accounts in a secondary fashion – be discussed with a view to clarify the penetrative effects of EU law and the interactions shaped by the supranational cooperation mechanisms.

2. A descriptive law and economics perspective

32. *Limits of a purely doctrinal analysis* – A purely doctrinal analysis allows to outline the legal structures governing the institutionalization of market supervision mechanisms. It equally allows to extract the constitutional principles underlying its emergence. It is not however capable of *explaining* the existence of such principles and of predicting future

institutional evolutions. Constitutional principles do not lead an ephemeral existence completely detached from the underlying economic and political preferences structuring a legal system. They rather shape and build that system in accordance with such preferences. In doing so, constitutional principles come to incorporate, reflect or promote particular non-legal values. These values are in themselves enabled and restrained by their incorporation in a particular legal framework. A study of the interplay between these values and constitutional principles would significantly enrich a 'constitutional' study of market supervision arrangements and would allow to justify the particular legal structures having taken shape. A purely doctrinal analysis cannot contribute to such debates. The third part of this dissertation therefore does not remain confined to a purely doctrinal analysis.

33. *Law & economics* – A well-known perspective is offered by the law & economics movement.[71] Law & economics promotes the economic assessment of legal rules.[72] Relying on economic concepts and tools, it seeks to offer an *explanation* of particular legal rules and principles and of the effects they produce.[73] Two strands of law & economics approaches are generally distinguished.[74] First, an *economic analysis* perspective is often entertained by academic economists. Within that economic analysis perspective, a distinction between descriptive and normative economic analysis is made. *Descriptive* economic analysis seeks to identify the *effects* of legal rules.[75] Under that banner, the efficiency of particular sanctioning mechanisms or liability structures can be considered.[76] *Normative* economic analysis inquires whether a legal system is socially good and whether rules are socially desirable.[77] Economic analysis perspectives presuppose the existence of particular rules and seek to consider their effectiveness or the effects they produce on societal welfare.[78] Second, a *law and economics* perspective is frequently relied on by legal scholars. That perspective takes the existence of economic theory as a starting point. Law in that image does not merely reflect an example of human activity that can be analyzed by economic concepts. It is rather approached as an *instrument* which incorporates and effectuates particular economic effects.[79] A descriptive *law*

[71] For a general overview of that movement in the United States, see David Kennedy and W. Fisher, *The Canon of American Legal Thought* (Princeton, Princeton University Press, 2006), 353-442. For a different perspective, see T. Zywicki and A. Sanders, 'Posner, Hayek and the Economic Analysis of Law', 93 *Iowa Law Review* (2008), 559-603.

[72] See for a general overview and particular applications, R. Posner, *Economic Analysis of Law* (New York, Aspen Publishers, 8th edition, 2010), 928 pp.

[73] R. Cooter and T. Ulen, *Law and Economics* (Reading, Addison-Wesley, sixth edition, 2012), 3.

[74] For an argument along that line, see P. Schlag, 'Four conceptualizations of the relations of law to economics (tribulations of a positivist social science)', 33 *Cardozo Law Review* (2012), 2357-2371.

[75] S. Shavell, *Foundations of Economic Analysis of Law* (Cambridge, Harvard University Press, 2004), 1.

[76] See for an example in EU competition law, W. Wils, *Efficiency and Justice in European Antitrust Enforcement* (Oxford, Hart, 2008), v-vi, outlining that approach. On the importance of law & economics in supporting European unity, see R. Posner, 'The Future of the Law and Economics Movement in Europe', 17 *International Review of Law and Economics* (1997), 6.

[77] S. Shavell, note 75, 1. Posner refers to positive and normative economic analysis of law, see R. Posner, note 72, 24-26.

[78] On the discussion of goals to be protected by law incorporating economic insights, see extensively S. Shavell and L. Kaplow, 'Fairness versus Welfare', 114 *Harvard Law Review* (2000), 961-1388. An argument to develop a need for socio-economics in the understanding of law, W. Black, 'The Imperium Strikes Back: the need to teach socioeconomics to law students', 31 *San Diego Law Review* (2004), 231-256.

[79] Kati Cseres argues that 'when one approaches the law […] with an eye to discovering how much it does or can effect, economic theory offers in many respects amazing light', see K. Cseres, *Competition law and Consumer Protection* (Alphen a/d Rijn, Kluwer, 2005), 11. For an approach as to how the Court's case law reflects particular economic concepts, see P. Ibanez Colomo, 'Market failures, transaction costs and article 101(1) TFEU case law', 37 *European Law Review* 2012, 541-562, stating at 542 that the 'EU Courts have regulatory displayed a remarkably solid, if often intiuitive understanding of the transactions examined under Article 101(1) TFEU, and that the concepts used in mainstream economics can help systematise this understanding'.

and economics perspective seeks to outline to what extent particular rules or principles reflect or structure economic models of human interaction through the language of the law.[80] In doing so, economic theory provides an *ex ante* perspective that seeks to clarify particular features of an *ex post* legal doctrinal analysis.[81] A normative *law and economics* perspective would directly seek to design legal rules with a view to establish a more efficient or welfare-enhancing legal system.[82]

34. *A descriptive (and normative) law and economics approach* – This dissertation engages upon a descriptive law and economics approach. It does not seek to promote a more efficient regulatory framework on the basis of (quantitative) economics models. It rather aims to identify to what extent particular economic models of regulation are reflected in the EU's constitutional system of competence allocation applied to the institutionalization of market supervision regimes. In doing so, this dissertation outlines how EU constitutional law enables, structures and restrains a particular economic system of regulatory interaction in the realm of supranational market supervision. It particularly develops a set of *operational maxims* that have guided the EU institutions in designing and operationalizing particular institutional developments in EU competition and EU financial services regulation.

The descriptive analysis constitutes a basis for a normative endeavour in which the descriptive outcome will be built on. That normative endeavour outlines the extent to which the identified EU constitutional law principles enabling and restraining regulatory interaction can also serve to guide – and limit – institutional developments across different sectors. The operational maxims identified will in that regard be contrasted with or aligned to institutional developments taking place in these sectors.

35. *Regulatory competition theory as a species of law & economics scholarship* – Law & economics scholarship developed different theories of regulation. These theories first of all determined in what instances and to what extent public regulation should interfere with private market competition.[83] To the extent that regulation would be warranted, 'regulatory

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[80] See for that approach G. Calabresi, *The Cost of Accidents. A Legal and Economic Analysis* (New Haven, Yale University Press, 1970), 350 pp. See also H. Cousy, *Problemen van produktenaansprakelijkheid* (Brussels, Bruylant, 1978), 441 pp. adopting a similar approach.

[81] For a similar distinction, see also K. Cseres, note 79, 14. This perspective also distinguishes this dissertation from the earlier work of De Visser, note 23. In that dissertation, De Visser examined the emergence of networks of national supervisors structuring and determining supervisory arrangements in EU competition and telecommunications law. These arrangements have been studied *from the outside in*, i.e. from a societal – including law and economics – perspective, a firm's perspective and an institutional perspective with a view to assess the efficiency or effectiveness of particular legal solutions. The approach in this dissertation on the other hand reflects a perspective *from the inside out*. It inquires into the existing constitutional provisions shaping the legal framework and the underlying effectiveness or efficiency narratives that have been ingrained in such framework.

[82] For a well-known example of that approach, see G. Calabresi and A. Douglas Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral', 85 *Harvard Law Review* (1972), 1089-1128.

[83] This subfield of the 'theories of (economic and social) regulation' addresses whether and to what extent regulation is desirable. In a neoclassical economics perspective, regulation seeks to alleviate market failures, negative externalities and information problems. See J. Den Hertog, note 56 for an overview. From a Coasian point of view, regulation might in some instances increase transaction costs for both regulators and regulatees and result in new negative externalities. See R. Coase, 'The Problem of Social Cost', 3 *Journal of Law and Economics* (1960), 1-44. For a moderate critique and refinement, see D. Regan, 'The Problem of Social Cost Revisited', 15 *Journal of Law and Economics* (1972), 427-437. This dissertation does not address these theories. It presumes that the need for regulation has been established and seeks to assess how the current institutional framework allocates regulatory competences among the supranational and national levels in the realm of institutional organization of market supervision bodies. Particular arguments developed in this subfield nevertheless relate to the allocational dimensions of regulation theory. These elements include issues such as

competition' theories provided guidance on the most efficient levels of regulatory action.[84] This dissertation will focus on the extent to which the EU constitutional framework incorporates a preference for (particular variants of) regulatory competition.

Regulatory competition reflects a regime in which legislation is perceived as a competitive parameter which a legal order uses to create competitive advantages for itself in competing for inward investment or other benefits with fellow states.[85] Such competition can be structured within a federal framework.[86] A regulatory system should only require centralized action to the extent that optimal conditions for regulatory competition cannot be guaranteed at the decentralized levels.[87] A singular governing body would also more easily be captured by powerful private interests and could as a result refrain from governing in a well-defined public interest.[88] A plurality of and market-like interaction between governing bodies competing against one another in a (quasi-) federal system would therefore diminish concerns of regulatory capture.[89]

Theories of regulatory competition presume a market regime for the adoption and development of particular rule standards. Most known in the context of U.S. corporate law, states, operating within a single legal regime of market freedoms could support an individual's or legal person's choice to move and abide by the laws of their choice.[90] A competitive system among federated entities would edge out in search for the best possible alternative in terms of efficiency, in terms of advantageous development etc. Regulatory competition allows for a learning experience that could trigger the quest for an ideal regime.[91]

'public interest', 'public choice', 'regulatory capture' and 'accountability' issues. For basic references, see infra notes 88 and 89. These problems will be discussed to the extent that they are relevant in providing insight into the identified allocation of institutional competences.

[84] On that distinction, see also T. Heremans, *Professional Services in the EU Internal Market* (Oxford, Hart, 2012), 87.

[85] See H. Sondergaard Birkmose, 'Regulatory Competition and the European Harmonisation Process', 17 *European Business Law Review* (2006), 1076.

[86] On the interactions between regulatory competition and federalism, see M. De Visser, note 23, 463.

[87] E. Young, 'Protecting Member State Autonomy in the European Union: some cautionary tales from American Federalism', 77 *New York University Law Review* (2002), 1685.

[88] On regulatory capture and public choice, see the basic contributions of G. Stigler, 'The Theory of Economic Regulation', 2 *Bell Journal of Economics and Management Science* (1971) 3-21 and R. Posner, 'Theories of Economic Regulation', 5 *Bell Journal of Economics and Management Science* (1974), 335-358. For an analysis of public choice as private interest theory, see A. Ogus, note 1, 55-75 and J. Den Hertog, note 56, 235.

[89] M. Levine and J. Forrence, 'Regulatory Capture, Public Interest and the Public Agenda: Towards a Synthesis', 6 *Journal of Law, Economics & Organization* (1990), 170.

[90] On regulatory competition in U.S. corporate law, see M. Roe, 'Regulatory Competition in Making Corporate Law in the United States – and its Limits', 21 *Oxford Review of Economic Policy* (2005), 232-242 for an introductory overview and plentiful references to classics in the field. For an introduction at the EU level, see N. Reich, 'Competition between legal orders: a new paradigm of EC law?', 29 *Common Market Law Review* (1992), 861-896; M. Sun and J. Pelkmans, 'Regulatory competition in the single market', 33 *Journal of Common Market* Studies (1995), 67-89; S. Deakin, 'Legal Diversity and Regulatory Competition: Which Model for Europe?', 12 *European Law Journal* (2006), 440-454. See also, G. Hertig, 'Regulatory Competition in EU Financial Services', 3 *Journal of International Economic Law* (2000), 349-375; K. Nicolaïdis and G. Shaffer, 'Transnational Mutual Recognition Regimes: Governance without Global Government', 68 *Law and Contemporary Problems* (2005), 263-317; K. Nicolaïdis and S. Schmidt, 'Mutual Recognition on Trial: the long road to Services Liberalization', 14 *Journal of European Public Policy* (2007), 717- 734; C. Radaelli, 'The Puzzle of Regulatory Competition', 24 *Journal of Public Policy* (2004), 1-23; P. Schammo, *EU Prospectus Law. New Perspectives on Regulatory Competition in Securities Markets* (Cambridge, Cambridge University Press, 2011), 288-308.

[91] According to Van den Bergh and Camesasca, mutual learning is only one type of regulatory competition, see for an overview of four types, R. Van den Bergh and P. Camesacsa, *European Competition Law and Economics: A Comparativie Perspective* (London, 2nd Edition, Sweet & Maxwell, 2006), 405. For an example of a similar

Critics of that approach on the other hand invoked a race to the bottom argument: competing nation states would be captured in a prisoners' dilemma[92] that would result in an overall lowering of regulatory standards.[93]

36. *A thesis-antithesis-synthesis perspective* – This dissertation engages with 'regulatory competition' theories with a view to explain the emergence of a converging constitutional framework governing the institutionalization of supranationally structured market supervision. From that perspective, this dissertation relies on a particular model of argumentation a descriptive law and economics approach presupposes. That model is based on a thesis, antithesis and synthesis understanding.[94]

In such understanding, the thesis stage holds that legal principles can be understood as entirely detached from other spheres of understanding. It projects a legal detachment thesis in which legal principles exist for their own sake in their own sphere of interest.[95] The assessment of 'regulatory competition' theories nevertheless highlights that rules and legal institutions operate in a market environment that can be structured within a federal framework. It provides an antithesis to the well-established legal detachment thesis. The availability of a 'regulatory competition' framework allows to redefine and structure legal principles as reflecting and promoting particular regulatory competition values. As a result, a synthesis of 'regulatory competition'-grounded constitutional principles appears. That synthesis is influenced by and in return structures the interaction between law and economics. In that image, economic considerations are translated into constitutional principles which govern the legal infrastructure giving shape to EU market supervision arrangements.[96]

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competitive endeavour in the field of private international law, see T. Marzal Yetano, 'The Constitutionalisation of Party Autonomy in European Family Law', 6 *Journal of Private International Law* (2010), 155-193. M. De Visser, note 23, 471-472 refers to 'regulatory emulation' taking place in that regard.

[92] See also R. Van den Bergh and P. Camesasca, note 91, 413.

[93] Scholarship on the race to the bottom argument in U.S. corporate law is plentiful. For a comprehensive overview, see J. Coffee, 'The Future of Corporate Federalism: State Competition and the New Trend toward de facto Federal Minimum Standards', 8 *Cardozo Law Review* (1987), 759-778; L. Bebchuk, 'Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law', 105 *Harvard Law Review* (1992), 1435-1510; M. Kahan and E. Kamar, 'The Myth of State Competition in Corporate Law', 55 *Stanford Law Review* (2002-2003), 679-749. On the race to the top as a counterargument, see R. Winter, 'State law, Shareholder Protection and the Theory of the Corporation', 6 *Journal of Legal Studies* (1977), 251-292; R. Romano, 'The State Competition Debate in Corporate Law', 8 *Cardozo Law Review* (1987), 709-758.

[94] This dialectical discourse originates in German idealism and is often attributed to the work of the German philosopher J.G. Fichte, see R. Williams, *Recognition. Fichte and Hegel on the Other* (Albany, State University New York Press, 1992), 46. The dialectical model has inspired legal scholars to assess the scope of law and its critique, see for a good example E. Rubin, 'Institutional Analysis and the New Legal Process', *Wisconsin Law Review* (1995), 463.

[95] The perspective of legal detachment is subject to increasing criticism from a legal theory point of view. Such critiques rely on a particular view of the law as a reflexive argumentative societal sphere that is capable of reinventing itself and retain its specific characteristics in the wake of changing circumstances. Law in that vision serves as an autopoietic system, see G. Teubner, *Law as an Autopoietic System* (Oxford, Blackwell, 1993), 37 for a schematic overview. Building on that approach in search for a conception of reflexive law, Julia Black maintained that law 'has to regulate by observing and recognising the autopoiesis of other systems; by assessing their process of self-production and self-reference and adapting its intervention accordingly', see J. Black, 'Constitutionalising Self-Regulation', 59 *Modern Law Review* (1996), 45. She continued that reflexive law must recognise the normative closure of autopoietic systems – these systems operate by virtue of their own norms and standards – but should nevertheless consider the cognitive openness also reflected by these systems. As these systems are cognizable to lawyers, law 'has to orientate its own development to that of the particular system in question, analyse how it operates and intervene strategically', J. Black, *ibidem*, 46.

[96] It could be argued that this narrative only refers to the way in which new legal discourse or new EU quasi-federal rights emerged over time, rather than explicating why these transformations happened. In doing so, I

relate this work to the 'ontology'-thesis of rights and powers entertained by Duncan Kennedy. Kennedy argues that not explaining why particular right/power dimensions emerged can still provide new insights into the emergence of new rights and structures. This phenomenological intake could easily be applied to the emergence of European quasi-federal rights structures, as Kennedy himself admits, see Duncan Kennedy, note 69, xxii.

Part II. The constitutional architecture of supranationally structured market supervision

37. *Overview of this part* – This part explores the 'constitutional practice' of 'Europeanized' market supervision. It presents a case study of directly mandated competition law and indirectly mandated financial market supervision. Following a general overview of the division of competences among EU and national supervisors, the current legal framework will be analyzed in accordance with the proxies outlined in the introductory part. Particular attention will be devoted to the rise of EU-Member State cooperation mechanisms. That analysis will allow to identify to what extent the constitutional features of legal basis, supranational rights' functioning and judicial review have been interpreted in order to make the supranationally structured supervision scheme work.

The analysis proceeds as follows. The first chapter explores constitutionally directly mandated supervision and its institutional framework. The decentralization of competition law enforcement and the shifting constitutional role of the European Commission in that respect will be highlighted and refined. Treaty provisions regulating the Internal Market do not as such provide a direct constitutional basis for the establishment of market supervision regimes. The second chapter reads an indirectly mandated market supervision approach into the Treaty's Internal Market law provisions. It will subsequently illustrate the features of that framework in the realm of financial market supervision. In the wake of the global financial crisis, sweeping reforms have been processed and placed this sector well ahead of other Internal Market fields in the institutional development of market supervision arrangements. The third chapter compares the frameworks of directly and indirectly mandated market supervision. It identifies a converging narrative of institutional heteronomy guiding supranational developments in both systems. That narrative calls for the identification of common constitutional principles structuring such convergence.

Chapter 1. *Directly mandated* market supervision. A re-assessment of the institutional framework of EU – Member State cooperation in competition law supervision

1. Introduction

38. *Introductory overview* – This chapter argues that the modernization of EU competition law enforcement expresses a shift in the operationalization of the scope of directly mandated market supervision. It is well-known that EU competition law enforcement has been 'decentralized' by Regulation 1/2003. That Regulation replaced the former Regulation 17/62 and terminated the European Commission's monopoly to exempt potentially restrictive agreements from the prohibition outlined in Article 101 TFEU. The old Regulation left many gaps regarding the enforcement of EU competition law by national judges, and – even more so – by national authorities. Regulation 1/2003 is said to have solved these issues and to have created a new 'level playing field' for interactive market supervision among EU and national supervisors.

The chapter explores how the constitutional mandate of EU competition law supervision has been implemented in that regard. It proceeds in nine sections divided into two parts. This introductory overview comprises the first section. Part A provides a descriptive analysis of the genesis and operation of EU-Member State cooperation in EU competition law supervision. It proceeds in four sections. Section two recapitulates the scope and role of the Treaty provisions – the constitutional mandate to supervise markets – and their inherent flexibility. That flexibility is demonstrated through an analysis of Regulation 17/62 and its transformation into Regulation 1/2003. It subsequently outlines the mechanisms of EU-Member State cooperation inaugurated by its provisions. Section three qualifies the cooperation obligations in the wake of due process outcries at the supranational law. It argues that attention to due process and fundamental procedural rights at the EU level have sought to refine and institutionalise the constitutional mandate of competition law supervision in a particular fashion. Section four argues that these refining tendencies have provided a trigger for a *national operational support* reading of the constitutional provisions enabling EU competition law supervision. Section five provides a concluding overview and seeks to summarily answer the first set of research questions posited in the previous chapters.

Part B assesses the constitutional foundations of the system outlined and grounds the *national operational support narrative* in the EU's constitutional framework. It proposes a new understanding of the EU's constitutional mandate grounded in *institutional heteronomy*. Institutional heteronomy allows to categorize EU and national institutional adaptations in the service of due process as parts of a singularly structured framework. The analysis proceeds in four additional sections. Sections six to eight identify and structure constitutional categories of legal basis, institutional cooperation rights and judicial review. Section nine introduces and develops the concept of institutional heteronomy as an explanatory framework for the institutional evolutions assessed in part A and the constitutional benchmarking exercises engaged upon in the previous sections. It additionally compares the institutional mechanisms of Regulation 1/2003 with EU concentration control procedures. The European Commission entertains a more prominent role in those procedures, but at the same time the concentration control regime essentially confirms the heteronomous approach reflected in the EU's constitutional framework.

39. *No State Aid or public undertakings* – No comparison will be made with the supervisory system of State Aid or any specific regimes for public undertakings or undertakings providing

services of general economic interest.[97] Although the regulation of State Aid presents a market supervision regime per se[98], the modalities of supervision are different compared to other branches of EU competition law. State Aid rules are addressed to Member States themselves. Member States thus appear as regulatees rather than co-regulators or supervisors.[99] The same goes for publicly held undertakings or the regulation of services of general (economic) interest.[100] As a result, the regulatory dynamics are not conducive to establish a framework based on interactive market supervision, where private parties are directly being regulated and supervised by both national and supranational actors. These supervisory regimes do not therefore serve to structure a level playing field among private market operators. They rather aim to regulate the behaviour of Member States as market operators. As a result, they fall outside this dissertation's scope of inquiry.

[97] The provisions on State Aid can be found in Articles 107-109 TFEU; the regime of publicly held undertakings has been regulated in Article 106 TFEU. Article 14 TFEU refers to services of general economic interest and is supplemented by Protocol No. 26 on Services of General Interest, [2010] O.J. C83/308.

[98] In accordance with Article 108(1) TFEU, the Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. On the distinctive role of State Aid and the necessity for centralized State enforcement as a part of the constitutional regime governing the Internal Market, see F. de Cecco, *State Aid and the European Economic Constitution* (Oxford, Hart, 2012), 43-49.

[99] P. Adriaanse, 'Public and Private Enforcement of EU State Aid Law. Legal issues of dual vigilance by the Commission and national courts' in H. Blanke and S. Mangiameli (eds.) *The European Union after Lisbon - Constitutional basis, economic order and external action* (Heidelberg, Springer 2011), 443-470. For a recent overview, see M. Peeters, *Staatssteun in de Europese Unie* (Brugge, Die Keure, 2012), 732 pp.

[100] G. Davies, 'What Does Article 86 Actually Do' in M. Krajewski, U. Neergaard and J. van der Gronden (eds.), *The changing legal framework of services of general interest in Europe: between competition and solidarity* (The Hague, TMC Asser, 2009), 51-68; For an overview of supranational initiatives, S. Wernicke, 'Taking Stock: The EU Institutions and Services of General Economic Interest' in the same volume at 72-76. At the same time however, Article 106 also provided a basis for positive integration in liberalizing industries. In that perspective, it served to justify the Commission's direct intervention into and supervision of newly liberalized undertakings. That particular market regulation and supervision dimension reflected in Article 106 TFEU will be addressed in Chapter 3 of Part III as an independent case study, detached from the general competition law supervision framework.

A. From nothing to everything to everyone: the constitutional framework of EU competition law supervision

40. *Introduction to this part* – This part outlines the structural features and regulatory implementation of the EU's constitutional mandate to enforce competition law in the Internal Market. It provides an overview of the core features of that mandate – the Treaty provisions – and their interpretations in successive Regulations. It subsequently outlines to what extent nationally induced concerns over due process have refined and structured the constitutional mandate. Due process refinements in addition created the groundwork for a national operational support reading reflected in the Court of Justice's recent case law on Regulation 1/2003.

2. An *open-ended* constitutional mandate to supervise markets

41. *Introduction* – This section explores the extent to which the constitutional provisions on EU competition law enforcement have been translated into EU-Member State cooperation mechanisms. It distinguishes three stages. First, it identifies and outlines the emergence of supranational competition law provisions without any institutionalized supervision and enforcement mechanism (nothing) in the ECSC Treaty. Second, it revisits the establishment of a centralized supranational notification regime in Regulation 17/62 supported by the direct applicability and direct effect of supranational competition law prohibitions (everything). Third, it contextualizes a wide reform willingness during the 1990s, which resulted in the modernised enforcement structure underlying Regulation 1/2003 (everyone).

a. Treaty supervision mandates

42. *ECSC precursor* **–** Supranational prohibitions on anticompetitive practices were directly incorporated in the Treaty establishing the European Coal and Steel Community (ECSC Treaty). Anticompetitive agreements were to 'be automatically void' and could not 'be relied upon before any court or tribunal within the Member States'.[101]

That system contrasted with an 'abuse of control' system in swung in most of the Member States at the time. In that constellation, potentially restrictive practices remained legal until their unlawfulness had explicitly been determined by either an administrative or judicial authority.[102] The latter system favoured the existence of cartels or market dominance as these practices were considered legal unless a particular abusive practice has been established. The ECSC Treaty clearly parted ways with that approach. In the new system, agreements were deemed null and void, unless they could be and until they were validated by specific

[101] Article 65 Treaty establishing the European Coal and Steel Community of 18 April 1951, 261 *United Nations Treaty Series* 140. A draft English text is also available at http://eur-lex.europa.eu/en/treaties/index.htm (last consulted 26 January 2012). The Treaty entered into force on July 23 1952. In accordance with Article 97 ECSC Treaty, it expired after 50 years of operation, i.e. at July 23, 2002. The Court of Justice ruled in *Thyssen Krup* that the expiry of the ECSC Treaty resulted in the TFEU providing the regulative framework. Up to that date, the ECSC merely constituted a lex specialis to the EC Treaty, see Case C-359/09 P, *ThyssenKrupp Nirosta GmbH v Commission*, judgment of 29 March 2011, [2011] ECR I-269, para 73-74.

[102] G. Marenco, 'Does a legal exception system require an amendment of the Treaty' in C.-D. Ehlermann and I. Atanasiu (ed.), *European competition law annual 2000: The Modernization of EC Antitrust Policy* (Oxford, Hart, 2001), 145. Marenco refers to the Netherlands, Belgium and Germany as the three foremost examples throughout the 1950s. See also H. Ullrich, 'Harmonisation within the European Union', 17 *European Competition Law Review* (1996), 178.

administrative or judicial exemption procedures.[103] The ECSC Treaty in that regard opted for a model of administrative authorization by the High Authority.[104] The Treaty framework did not however provide details how such authorization should take place.

The Court of Justice's role in observing the law was mainly subsidiary to the High Authority's administrative authorization powers.[105] It amounted to determining whether and to what extent authorization decisions granted by the High Authority complied with the provisions of the ECSC Treaty. In so doing, the Court was able to determine the boundaries of the competences granted to the High Authority in competition matters.[106] A particular role for national courts in observing the illegality of restrictive agreements was not considered essential to the functioning of the Treaty.[107] In the 1992 *Banks* judgment, the Court of Justice even went as far as to deny the direct effect of the ECSC competition law provisions.[108]

43. *The Spaak Report* – Following up on the competition law beginnings in the ECSC Treaty, the preparatory *Spaak Report* – a precursor to the EEC Treaty – devoted particular attention to the role of competition law and a supranational supervisory system. It generally considered competition rules addressed to private enterprises necessary to avoid the reapportioning of markets.[109] In particular, the Report focused on discriminatory and abusive practices imposed by the undertakings that would threaten the market liberalization aspirations of economic integration. The Report clearly opted for particular institutional choices in that regard. On the one hand, the Report stated that the principles enshrined in a Treaty should be sufficiently precise *pour permettre la Commission européenne de prendre les réglements généraux d'execution, qui seront soumis au vote de l'Assemblée, et qui auront pour objet d'établir les règles détaillées.*[110] From that perspective, a system of competition law supervision would appear necessary to complete a centralized, supranational system of policymaking and

[103] G. Marenco, note 102, 146.

[104] Article 65(2) ECSC Treaty. ECSC scholars have indeed interpreted the Treaty as also incorporating a general power to authorize categories of agreements as a part of its Article 65 competence, see R. Kovar, *Le pouvoir réglémentaire de la Communauté européenne du charbon et de l'acier* (Paris, LGDJ, 1964), 113. Others contended that silence on behalf of the High Authority could in particular circumstances be interpreted as an *implicit authorization*, see C. Grasseti, 'La Communauté et les entreprises' in *Actes officiels du congress international d'études sur la communauté européenne du charbon et de l'acier. Volume IV* (Milan, Giuffré 1957), 23. That thesis has not been confirmed by the Court of Justice during the ECSC's lifetime.

[105] See Article 31 ECSC Treaty. G. Bebr, *Rule of Law within the European Communities* (Brussels, Institut d'études européennes, 1965), 2.

[106] Article 33 ECSC Treaty projected a legality review similar to the one provided in the current Article 263 TFEU. In the case of fines being imposed, Article 36 ECSC provided the Court with unlimited jurisdiction.

[107] According to Article 65, national courts could only refrain from relying on an agreement the illegality of which had already been determined. The Report by P. De Visscher, 'La Communauté européenne du charbon et de l'acier et les états membres' in *Actes officiels du congress international d'études sur la communauté européenne du charbon et de l'acier. Volume II* (Milan, Giuffré, 1957), 81 states that except for cases where the Treaty directly mandates national judges to interfere, no direct intervention could be required of them. Although Article 86 ECSC Treaty contained an obligation of sincere cooperation, that declaration was mainly considered of moral rather than of legal value. See also J. F. Verstrynge, 'The Relationship between National and Community Antitrust Law: An Overview After the Perfume Cases', 3 *Northwestern Journal of International Law & Business* (1981), 361.

[108] See Case C-128/92, *Banks*, [1994] ECR I-1209, para 17-19. Advocate General van Gerven issued an opinion that proposed the recognition of direct effect of these provisions. See also M. Friend, 'Enforcing the ECSC Treaty in National Courts', 20 *European Law Review* (1995), 58-65; P. Meunier, 'La Cour de justice des Communautés européennes et l'applicabilité directe des règles de concurrence du Traité CECA', *Revue trimestrielle de droit européen* (1996), 243-258 and T. Konstadinides, note 46, 14.

[109] Report to the Heads of Delegation to the Ministers of Foreign Affairs, Brussels, 21 April 1956, consulted at www.ena.lu (Spaak Report), 16.

[110] Spaak Report, 56

regulation.[111] On the other hand however, competition law *n'est pas là un domaine où les solutions puissant être fixées du premier jour et répondre à tous les cas qui peuvent se présenter*.[112] To that extent, the institutional framework and procedural options should reflect an 'evolving framework', capable of being adapted over time.[113] The institutional framework of competition law supervision did not therefore have to be set in stone in the Treaty itself, but should be the subject of secondary 'règles generales d'exécution'.

44. *The EEC Treaty mandate* – The EEC Treaty remained faithful to the Spaak Report's recommendations.[114] It did not represent a *verbatim* reproduction of the wording of the ECSC Treaty, but framed the competition law supervision system into the Treaty's particular common market ambit.

It is well-known that following intense political discussions[115], the future parties to the EEC Treaty agreed on a general prohibition on restrictive practices in Article 85 EEC Treaty, followed by a sanction – voidness[116] – and a provision conditioning the exceptional legality of such agreements. Article 85(3) stated that the provisions of paragraph 1 may be *declared* inapplicable in particular instances.[117] Article 86 prohibited abuses of dominant economic positions. No particular exception or authorization mechanisms had been included with regard to that provision.

The reference to *declared* could be read as imposing an administrative exemption system.[118] A formal declaration of legality would in that understanding be necessary to justify the legality of an agreement. Agreements were as a result deemed illegal until explicitly declared otherwise. From that point of view, the declaration system resembled the *authorization* system reflected in the ECSC Treaty. In that understanding, an administrative authority – the European Commission – or a judicial body would be better placed to declare particular agreements legal.[119] At the same time however, Article 85(3) could also be read not to exclude a more general *exception* system in which no constitutive authorization by an administrative or judicial body would be required.[120] References to declared would in that understanding not refer to an *ex ante* authorization system. Any public or private actor could

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[111] On the interplay between competition law and policy and market integration through the scope of the single market, see C. D. Ehlermann, 'The Contribution of EC Competition Policy to the Single Market', 29 *Common Market Law Review* (1992), 257-282. For additional perspectives, J. Baquero Cruz, *Between Competition and Free Movement. The Economic Constitutional Law of the European Community*, (Oxford, Hart, 2002) 176 pp.

[112] Spaak Report, 56

[113] Spaak Report, 57

[114] See Articles 85 -93 of the Treaty establishing the European Economic Community of 25 March 1957, 298 *United Nations Treaty System* 11.

[115] On the scope of these discussions, see G. Marenco, note 102, 177-184. See also I. Forrester, 'The Modernisation of EC antitrust policy: Compatibility, Efficiency, Legal Security' in C.-D. Ehlermann and I. Atanasiu (eds.), note 102, 85-90.

[116] For a recent elaboration on voidness in Article 85(2), see C. Cauffman, 'The impact of voidness for infringement of Article 101 TFEU on related contracts', 8 *European Competition Journal* (2012), 95-122.

[117] More specifically, the provisions of paragraph 1 may be declared inapplicable in the case of: any agreements or classes of agreements between enterprises, any decisions or classes of decisions by associations of enterprises, and any concerted practices or classes of concerted practices which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom, and which: (a) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives; (*b*) nor enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned.

[118] G. Marenco, note 102, 167.

[119] G. Marenco, note 102, 167-168.

[120] I. Forrester, note 115, 95.

rather be made competent to declare the prohibition of Article 85 inapplicable to a specific agreement.

The EEC Treaty also foresaw future regulatory action necessary to operationalize the authorization or exception procedure. Article 87 proposed, within three years of the entry into force of the EEC Treaty, the adoption of appropriate Regulations or Directives to give effect to the principles set out in Article 85.[121] These Regulations or Directives were to include the making of provisions regarding the imposition of fines and periodic penalty payments, 'to lay down detailed rules for the application of Article 85(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other'[122], and to delineate the roles of the Commission and the Court of Justice in that regard.[123]

Article 88 EEC Treaty additionally stated that '[u]ntil the entry into force of the provisions adopted in pursuance of Article 87, the *authorities* in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market in accordance with the law of their country and with the provisions of Article 85, in particular paragraph 3, and of Article 86'. The choice of words is surprising for two reasons. Firstly, the Treaty presupposed that national legal systems provided sufficient guidance to ensure the correct interpretation and application of EEC competition law.[124] Secondly, Article 88 only referred to authorities and not to national judges. As a result, it remained uncertain to what extent the national judiciary could be able to invoke and apply these norms. At that time however, national competition authorities were either inexistent in most Member States – the Federal Republic of Germany notwithstanding[125] or based on a particular system of abuse control.[126] Given the limited importance and stature of competition law in national legal orders at the time, that solution would not however have been a likely substitute for EU-wide intervention.[127]

Article 89 EEC Treaty confirmed the Commission's primary responsibility in ensuring the application of the principles in Articles 85 and 86. It stated that '[o]n application by a Member

[121] The provision stated that '[w]ithin a period of three years after the date of the entry into force of this Treaty, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall lay down any appropriate regulations or directives with a view to the application of the principles set out in Articles 85 and 86. If such provisions have not been adopted within the above mentioned time-limit, they shall be laid down by the Council acting by means of a qualified majority vote on a proposal of the Commission and after the Assembly has been consulted'.

[122] Article 87(2)(b) EEC Treaty. That paragraph still survives into Article 103(2) TFEU.

[123] Article 87(2)(d) EEC Treaty.

[124] A. Deringer, 'The Distribution of Power in the Enforcement of the Rules of Competition under the Rome Treaty', 1 *Common Market Law Review* (1963), 32.

[125] Particular competition law provisions had been imposed by the U.S. on the post-war recovering German legal order, but a preliminary competition law framework was already in operation long before that time, see D. Gerber, 'The Origins of the European Competition Law Tradition in Fin-de-Siècle Austria', 36 *American Journal of Legal History* (1992), 405-440. See also D. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford, Oxford University Press, 1998), 278 (Post-War Germany). On the different French approach, see D. Gerber, *Ibidem*, at 180-187.

[126] See G. Marenco, note 102, 146 for more references and A. Deringer, note 124, 38.

[127] The Court of Justice's judgment in *Bosch* did not help either, as the Court explicitly stated that national systems had to operate on a par with the supranational system requiring approval of restrictive agreements. See Case 13/61, *De Geus v Bosch* [1962] ECR 45 at 51. This judgment has since been interpreted as requiring a national competition system to incorporate approval by either authorities or courts. According to A. Deringer, note 124, 38, without such an approval mechanism, national authorities were unable to apply Articles 85 (1) and 86 should these provisions have direct effect in national orders. National legal adaptations had nevertheless been proposed in that regard. For an overview, see A. Deringer, note 124, 33.

State or on its own initiative, and *in cooperation with the competent authorities in the Member States*, who shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and *authorize Member States to take the measures*, the conditions and details of which it shall determine, needed to remedy the situation'. The Commission could involve Member States' authorities in its operations. It was felt that, in order to accomplish that aim, Member States had to devise and operate a full-fledged national competition system.[128]

45. *An open-ended constitutional mandate* – The constitutional framework thus granted the EU institutions significant leeway in determining a particular market supervision system. The Treaty provisions do not only explicitly require the Commission to act or to engage in market supervision. They also mandate the latter to superimpose itself on Member States called upon to take measures required to effectuate EU competition law. At the same time however, three textual arguments can be adduced in favour of national legal orders' involvement in the EU competition law supervision system. Firstly, the semantic choice for 'declaring' rather than 'authorizing' could be read to imply that the founding Member States' delegations were not per se willing to apply an authorization system to the operations of Article 85.[129] A declaration of inapplicability could refer to both *ex ante* and *ex post* assessments made by either an administrative or a judicial body with a view to establish the legality of an agreement and would in that regard not directly *require* an administrative fiat by the European Commission. Secondly, the constitutional mandate to organize competition law supervision preferred direct, top-down supranational input, but could equally leave matters in the hands of the Member States, as Article 88 demonstrates. Contrary to the ECSC Treaty[130], Member States were not by definition excluded from the enforcement and application of EEC competition law provisions *as a matter of primary law*. Thirdly, Article 87(2)(b) EEC Treaty explicitly presented effective supervision and simplified administration as conflicting constitutional goals of EU competition law supervision. These goals did not however directly express a choice for either centralized or decentralized supervision. They only mandated the Council and the Commission to develop an effective competition law supervisory regime. In so doing, the Union institutions have been granted the freedom to choose the instruments most effectively contributing to their fulfilment, given the need to establish strong and effective competition law provisions. At a time where competition law was hardly a part of the national legal conscience, national authorities remained virtually inexistent and national courts were intricately unfamiliar with a then potentially new legal order created at a supranational level, the establishment of a centralized regime of supervision and enforcement would not seem highly inappropriate. In those circumstances, the establishment of Regulation 17/62 could be read as an interpretation of the Treaty framework in the light of the felt necessities at the time.

b. Regulation 17/62 and the 'coming of age' of a supranationally governed cooperative regime

46. *Commission authorization principle* – Regulation 17/62 translated the constitutional mandate of competition law supervision into an operational centralized *authorization*

[128] See for an overview of the Belgian case in the early 1960s, L.P. Suetens, 'Belgian Antitrust Law "In Action"', 2 *Common Market Law Review* (1965), 325-339.
[129] G. Marenco, note 102, 151; I. Forrester, note 115, 95; A. Deringer, note 124, 34.
[130] At least as interpreted by P. De Visscher, note 107, 81.

system.[131] Based upon Article 87(2)(b) EEC Treaty, the regulation aimed to 'provide for balanced application of Articles 85 and 86 in a uniform manner in the Member States'[132] as a means to attain the constitutionally imposed requirements of effective supervision and simplified administration.[133] According to the Council, this necessarily implied the obligation for undertakings which seek application of Article 85(3) to notify to the Commission their agreements, decisions and concerted practices.[134] The notification system set up resulted in the Commission's exclusive competence to clear particular agreements from the Article 85(1) prohibition and accompanying voidness sanction.[135]

Article 9 granted the Commission the sole power to declare Article 85(1) inapplicable pursuant to Article 85(3).[136] The situation in accordance with this Regulation therefore completely resembled the ECSC situation. A restrictive agreement in violation of Article 85 (1) is presumed prohibited and void and exemptions could only be authorized by the Commission by means of decisions. These decisions included positive clearances, but also negative clearances stating that a particular agreement did not warrant Commission action under Article 85(1).[137] Both types of clearance decisions could be issued for a specific period of time and conditions or obligations could be attached thereto.[138] An Advisory Committee comprising national competition authorities' representatives was to be consulted before the decision's adoption.[139]

47. *Cooperative features* – In practice, the system of Regulation 17/62 established a *one stop shop clearance device* in the hands of the Commission.[140] At the same time, Regulation 17/62 also incorporated the basic features of a cooperative regime in which national competition authorities and even national courts could indeed play a (more or less) limited role.[141] Two levels of interaction could be defined in that regard. Firstly, the operations of the Regulation provided for the establishment of liaisons with the Member States' authorities. The importance of cooperation in Regulation 17/62 should not however be overestimated. Beyond the exchange of information, Member States' authorities role mainly focused on supporting the Commission in its investigative endeavors. Regulation 17/62 in that regard codified provisions on the duty of national authorities to undertake investigations on behalf of the Commission[142] and the ensuing obligation to provide for necessary authorizations allowing

[131] Council Regulation 17 implementing Articles 85 and 86 of the Treaty, [1962] O.J. L 13/204 (English Special Edition, Chapter 1959-1962, 87) (Hereafter referred to as Regulation 17/62). For a cursory overview, see G. Kelleher, 'The Common Market Antitrust Laws: the first ten years', 12 *Antitrust Bulletin* (1967), 1219-1259.
[132] Recital 1 Regulation 17/62.
[133] See Article 87(2)(b) EEC Treaty.
[134] Article 4 Regulation 17/62. Article 1 stated that agreements, decisions and concerted practices of the kind described in Article 85(1) of the Treaty and the abuse of a dominant position in the market, within the meaning of Article 86 of the Treaty, shall be prohibited, no prior decision to that effect being required.
[135] On the Commission's extensive role, see M. R. Mok, 'The procedure of the E.E.C.-Commission in Antitrust Cases', 1 *Common Market Law Review* (1963), 327-334.
[136] On the lack of direct effect of Article 85(3) and the advantages and disadvantages of that position, see S. Kon, 'Article 85, para 3: a Case for Application by National Courts', 19 *Common Market Law Review* (1982), 541-561 versus E. Steindorff, 'Article 85, para 3: No case for application by national courts', 20 *Common Market Law Review* (1983), 125-130.
[137] Article 2 Regulation 17/62. See also W. Alexander, 'The Domestic Courts and Article 85 of the Rome Treaty', 1 *Common Market Law Review* (1963), 434-436.
[138] Article 8(1) Regulation 17/62. See Case T-112/99, *M6 v Commission*, [2001] ECR II-1557, para 40-42.
[139] Article 10(3) Regulation 17/62.
[140] On the procedure before the Commission, see J. Temple Lang, 'The Procedure of the Commission in Competition Cases', 14 *Common Market Law Review* (1977), 155-173.
[141] See Recital 7 Regulation 17/62, referring to a necessary liaison between the Commission and national competition authorities.
[142] Article 13(2) Regulation 17/62.

national competent authorities to complete the investigative acts.[143] The Regulation did not seem to allow discretion on behalf of the Member States' authorities to refuse any assistance in that regard.

Secondly, the Court of Justice interpreted the Regulation and acted as a second line supervisor on the Commission's decision making practice. In doing so, the Court co-determined the boundaries of Member State intervention in a predominantly centralized supervision system.

The Court of Justice specifically enabled the emergence of a potential playing field among national competition authorities steered by EU law.[144] In its well-known 1968 *Walt Wilhelm* judgment, the Court of Justice held that 'one and the same agreement may, in principle, be the object of two sets of parallel proceedings, one before the Community authorities under Articles 85 and 86 of the EEC Treaty, the other before the national authorities under national law'.[145] Since Article 9(3) of Regulation 17/62 determined that national authorities could no longer apply EU competition law when the Commission took the matter in its own hands, the application of national competition law provided the only alternative for national competition authorities willing to disable a cartel agreement. The Court additionally determined the relationship between EU and national competition law. It held that 'should it prove that a decision of a national authority regarding an agreement would be incompatible with a decision by the Commission adopted at the culmination of the procedure initiated by it, the national authority is *required to take proper account of the effects of the latter decision*'.[146] The same goes for national proceedings during which it appears possible that the decision taken by the Commission may conflict with the effects of the decision of national authorities are about to take.[147] Although not explicitly saying as much, the Court presupposed a cooperative/hierarchical enforcement environment in which the Commission not only determined competition policy, but also retained the bulk of enforcement responsibilities, leaving Member States only to fill gaps and contribute to the enforcement beacons created by the Commission itself. As a result, national competition authorities played a merely supporting and subordinate role in the supervisory system of EEC competition law. A 1997 Commission Notice outlining the roles of national competition authorities essentially confirmed that position.[148]

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[143] Article 13(1) Regulation 17/62.

[144] That was not completely unproblematic, see K. Markert, 'Some Legal and Administrative Problems of the Co-Existence of Community and National Competition Law in the EEC', 11 *Common Market Law Review* (1974), 92-104.

[145] Case 14/68, *Walt Wilhelm*, [1969] ECR 1, para 3.

[146] Case 14/68, *Walt Wilhelm*, para 7. See also E.J. Mestmäcker, 'The Modernisation of EC Antitrust Policy: Constitutional Challenge or Administrative Convenience in C.-D. Ehlermann and I. Atanasiu (ed.), note 102, 238. See also his 'The EC Commission's Modernization of Competition Policy: a Challenge to the Community's Constitutional Order', 1 *European Business Organization Law Review* (2000), 401-444. That position has been confirmed in subsequent case law, see among others Joined Cases 253/78 and 1/79 to 3/79, *Procureur de la République v Giry and Guerlain* [1980] ECR 2327, para 15; Case C-67/91 *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada* [1992] ECR I-4785, para 11; Case C-7/97, *Bronner* [1998] ECR I-7791, para 19; Case C-137/00 *Milk Marque and National Farmers' Union* [2003] ECR I-7975, para 61; and Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, para 38.

[147] Case 14/68, *Walt Wilhelm*, para 8 and para 11. For the issues this position raises in relation to non bis in idem, see also J.F. Verstrynge, note 107, 367. For a recent example on non bis in idem, see Case C-17/10, *Toshiba*, judgment of 14 February 2012, nyr, para 81.

[148] Commission notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 and 86 of the EC Treaty, [1997] O.J. C313/3 (Hereafter referred to as 1997 National Authorities Notice). See also R. Wesseling, 'The Commission Notices on decentralisation of E.C. antitrust law: in for a penny, not for a pound', 18 *European Competition Law Review* (1997), 94-97; P. Marsden, 'Inducing Member State enforcement of European competition law: a competition policy approach to

48. *Problems and issues* – The vague provisions of Regulation 17/62 left particular issues unanswered. Firstly, the nature of the *obligation* for parties to notify their agreement was particularly limited. A notification obligation only captured parties willing to apply for an exemption.[149] The system presupposed compliant behaviour and focused supervision attempts on those willing to comply. It should therefore be no surprise that the system has later been criticized for limiting the Commission's attempts to focus on hard core cartels or restrictive practices that did not come to be notified, while the notification obligation resulted in legal formalism in the drafting of agreements and in considerable waiting periods before one's agreement could be exempted. The notification regime did not however exclude alternative means of discovery of restrictive competitive practices. According to Article 3, the Commission could, upon application by Member States or natural and legal persons who claim a legitimate interest or upon its own initiative, find Treaty infringements and could by decision require the end of that infringement.[150] That provision provided the only opportunity to initiate Article 86 abuse proceedings. The Commission was also enabled to conduct general inquiries into sectors of the economy.[151] Upon finding an infringement, it could impose fines, having regard to the gravity and duration of the infringement.[152]

Secondly, although a notification granted immunity from fines during the Commission's investigation, the status granted to agreements concluded but not yet notified remained unclear. Since the exemption system did not reflect an ex ante authorization system and an accompanying prohibition to give effect to agreements before their conclusion, it was uncertain whether any immunity would also cover the period between conclusion and notification. Regulation 17/62 did only directly provide guidance to agreements which had been entered into prior to March 13, 1962.[153]

Thirdly and related to the previous issue, the nature of the Commission decision exempting an agreement presented additional problems. It was unclear whether an exemption decision

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"antitrust federalism"' 18 *European Competition Law Review* (1997), 234-241. For an early reflection on cooperation, see M. Fernández Ordóñez, 'Enforcement by national authorities of European Community and Member States' Antitrust Law' in B. Hawk (ed.), *Antitrust in a Global Economy. Annual Proceedings of the Fordham Corporate Law Institute 1993* (The Hague, Kluwer, 1994), 634-635.

[149] See for a critique in that regard, C.D. Ehlermann, 'The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution', 37 *Common Market Law Review* (2000), 561.

[150] Procedures for the adoption of these decisions were regulated in more detail in implementing Regulation 99/63 of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17, [1963] O.J. L127/2268 (English Special Edition Series I Chapter 1963-1964, 47). Regulation 99/63 has later been replaced by Commission Regulation 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty, [1998] O.J. L 354/18.

[151] Article 12 Regulation 17/62.

[152] Article 15(2)b Regulation 17/62. The fines could range from 1000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement. In 1998, the Commission adopted more detailed guidelines concerning the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, [1998] O.J. C9/3. These guidelines outlined the calculation of fines and aggravating or attenuating circumstances in more detail. The Court held that these guidelines established legitimate expectations in the eyes of undertakings facing fines from the Commission. See for a case law example expounding on that position, Case C-561/06, *Archer Midland Daniels Co v Commission,* [2009] ECR I-1843, para 60.

[153] The Court interpreted the obligation to notify existing agreements before 1 August 1962 as incorporating a provisional validity for the agreements notified. To the extent that these existing agreements had been notified and were awaiting Commission approval, national courts could not nullify these agreements on the basis of Article 85(2) EEC Treaty; Case 48/72 *Brasserie De Haecht* [1973] ECR 77, para 9; and Case 59/77 *De Bloos v Bouyer* [1977] ECR 2359, para 8; see also Case C-234/89, *Delimitis*, [1991] ECR I-935, para 48. See for background, H. Wertheimer, 'The *Haecht II* judgment and its repercussions', 10 *Common Market Law Review* (1973), 386-424.

constituted either a constitutive decision, applicable from the moment of notification or conclusion, or a declaratory decision, providing only future exemptions from competition law sanctioning. According to the Regulation, an exemption could never commence earlier than the date of notification.[154] While that reading implied that non-notified agreements always remained illegal for the period in which their notification had been postponed, it also indirectly confirmed the constitutive nature of an exemption decision.[155]

Fourthly, the Regulation granted particular room for national authorities to apply EU competition law, with the exception of Article 85(3). Article 9(3) confirmed Article 88 EEC that 'as long as the Commission has not initiated any procedure […], the authorities of the Member States shall remain competent to apply Article 85(1) and Article 86 in accordance with Article 88 of the Treaty'. It thus confirmed an *a contrario* reading of Article 88, holding that national authorities could no longer apply EU competition law at large once the Commission initiated any procedure.[156] The submission of a request for exemption could be captured by the initiation of procedure requirements.[157]

49. *A subsidiary role for national courts?* – Regulation 17/62 did not explicitly address the role of national courts in the enforcement of EEC competition law.[158] Their role was purportedly limited to ruling on competition law issues in civil litigation between private parties and therefore escaped the realm of public enforcement proposed by the Commission.[159] National courts nevertheless played a crucial supporting role in the system of Regulation 17/62 in two respects.

Firstly, the Court of Justice argued in *BRT v Sabam* that national courts could fulfil a role attributed to national competition authorities.[160] A Member State could thus entrust national courts with either the task of applying domestic and – within the boundaries of Regulation 17/62 and *Walt Wilhelm* – supranational legislation on competition or that of ensuring the legality of that application by the administrative authorities.[161]

Secondly, the Court stated in the same judgment that 'as the prohibitions of Articles 85(1) and 86 tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard. To deny the national courts' jurisdiction to afford this safeguard, would mean

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[154] Article 6(1) Regulation 17/62.

[155] C. Jones and E. Sharpston, 'Beyond Delimitis: Pluralism, Illusions and Narrow Constructionism in Community Antitrust Litigation', 3 *Columbia Journal of European Law* (1997), 99.

[156] Case 10/69, *Portelange*, [1969] ECR 309, para 14 and Case 99/79, *Lancôme* [1980] ECR 2511, para 15.

[157] This resulted in the provisional validity of notified agreements. On the case law concept of provisional validity in general, see already W. Alexander, note 137, 449-452 and V. Korah, 'The Rise and Fall of Provisional Validity – The Need for a Rule of Reason in EEC Antitrust', 3 *Northwestern Journal of International Law & Business* (1981), 320-357.

[158] That did not however mean that these courts should not be granted a particular role, see W. Alexander, note 137, 443-453.

[159] I. Van Bael and J. F. Bellis, *Competition Law of the European Community* (Alphen a/d Rijn, Kluwer, 5th Ed. 2010), 1172.

[160] According to para 4 of the 1997 National Authorities' Notice, national competition authorities are *administrative authorities that act in the public interest in performing their general task of monitoring and enforcing the competition rules*.

[161] Case 127/73, *BRT v Sabam*, [1974] ECR 51, para 18-19: The fact that Article 9(3) refers to 'the authorities of the Member States' competent to apply the provisions of Articles 85(1) and 86 'in accordance with Article 88' indicates that it refers solely to those national authorities whose competence derives from Article 88. Under that Article the authorities of the Member States are also rendered competent to apply the provisions of Articles 85 and 86 of the Treaty. See I. Forrester, 'Complement or Overlap? Jurisdiction of National and Community Bodies in Competition Matters after SABAM', 11 *Common Market Law Review* (1974), 171-182.

depriving individuals of rights which they hold under the treaty itself'.[162] The prohibitions on restrictive practices and abuses of a dominant position could therefore be invoked in disputes between private parties conducted by national judges.[163] The Court did however make one *caveat*, holding that if 'the Commission initiates a procedure in application of Article 3 of Regulation 17 such a court may, if it considers it necessary for reasons of legal certainty, stay the proceedings before it while awaiting the outcome of the Commission's action'.[164] To that extent, although no formal obligation to stay proceedings could be derived, the national courts were strongly advised to either decide to stay proceedings or to seek guidance from the CJEU's preliminary ruling procedure.[165] The *Delimitis* judgment additionally confirmed that 'if the conditions for the application of Article 85(1) are clearly not satisfied and there is, consequently, scarcely any risk of the Commission taking a different decision, the national court may continue the proceedings and rule on the agreement in issue'.[166]

The role of national courts was both crucial and limited in that respect. Since the application of the prohibition in Article 85 results in the imposition of the voidness sanction of Article 85(2), a national court would have to apply that sanction to prohibited practices.[167] The national court could however only *apply* the prohibition.[168] It could not exempt an agreement, nor could it rule that the prohibition was inapplicable to the case at hand.[169] National courts could seek information from the Commission or refer the matter to the Court in a preliminary ruling for more information on how to proceed with EU competition law's application.[170] A 1993 National Courts Notice confirmed that position as the Commission's preferential position on national judicial involvement.[171]

50. *Supranational priorities, national cooperative subordination* – The system presented by Regulation 17/62 and interpreted by the Court projected a framework of national subordination. National actors played a role in the supranational market supervision

[162] Case 127/73, *BRT v Sabam*, para 16-17. It has been argued that the involvement of national courts in that way severely limited the scope of provisional validity. See D. Gijlstra and D. Murphy, 'EEC Competition Law after the Brasserie De Haecht II and SABAM Cases', 1 *Legal Issues of European Integration* (1974), 109.
[163] Case 127/73, *BRT v Sabam*, para 22.
[164] Case 127/73, *BRT v Sabam*, para 21.
[165] Case 127/73, *BRT v Sabam*, para 23. On the flipside however, the extent to which a national court should refrain from continuing its procedure once the Commission initiated an investigation was left unanswered in that regard, see I. Forrester, note 161, 181.
[166] Case C-234/89, *Delimitis*, para 50.
[167] D. Gijlstra and D. Murphy, note 162, 109.
[168] On the difficulties facing national courts in that respect, see R. Greaves, 'Concurrent jurisdiction in EEC Competition Law: when should a national court stay proceedings?', 8 *European Competition Law Review* (1987), 256-272.
[169] W. Alexander, note 137, 432. See also Case 12/73, *BRT v Sabam*, para 22 *a contrario*.
[170] Case C-234/89, *Delimitis*, para 52-54.
[171] Commission Notice on the cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, [1993] O.J. C39/6 (hereafter referred to as 1993 National Courts Notice). On the Notice see, S. Wylie and B. Rodger, 'Taking the Community interest line: decentralization and subsidiarity in EC competition law enforcement', 18 *European Competition Law Review* (1997), 486-487; See also R. Alford, 'Subsidiarity and Competition: Decentralized enforcement of EU Competition Laws', 27 *Cornell International Law Journal* (1994), 271; P. V. Bos, 'Towards a clear distribution of competence between EC and national competition authorities', 16 *European Competition Law Review* (1995), 410-416; J. Bourgeois, 'EC Competition law and Member States' Courts' in B. Hawk (ed.), note 148, 475-495; J. Goh, 'Enforcing EC Competition Law in Member States', 14 *European Competition Law Review* (1993), 114-117; L. Hiljemark, 'Enforcement of EC Competition Law in National Courts—The Perspective of Judicial Protection', 17 *Yearbook of European Law* (1997), 83-134; M. Levitt and M. Hutchings, 'Concurrent jurisdiction', 15 *European Competition Law Review* (1994), 119-126; A. Riley, 'More radicalism, please: the Notice on Co-operation between National Courts and the Commission in applying Articles 85 and 86 of the EEC Treaty', 14 *European Competition Law Review* (1993), 91-96; I. Van Bael, 'The role of national courts', 15 *European Competition Law Review* (1994), 3-7.

framework, but only to a limited extent. The balance between effective supervision and simplified administration was firmly struck in favour of a centralized notification and authorization system with the European Commission at its apex. The Commission was able to set its priorities[172] and it could legitimately close a case file on grounds of lack of Community interest as a priority criterion.[173] The General Court particularly argued that the ability of national courts to apply supranational competition law – based on precedents or earlier judgments in the same case and their familiarity with particular factual situations – could be deemed sufficient to exclude direct Community interference.[174]

In that system, national actors only came into play whenever the Commission decided not to intervene. National competition authorities could intervene and apply E(E)C competition law to the extent that the Commission did not initiate infringement or exemption proceedings or did not choose to do so. National courts could apply the directly effective provisions of Articles 85(1) and (2) and 86. In cases of doubt however, they were to seek guidance from the Commission and the Court of Justice. The open-ended constitutional mandate reflected in Articles 88-89 EEC was thus interpreted to justify a supranationally structured supervision framework in which national authorities and courts did not become full-fledged market supervision authorities. It could rather be submitted that national authorities and courts operated as *agents* of the Commission in instances where the latter chose not to intervene. In their capacity of *agents*, national authorities and courts were only to intervene to the extent that their principal – the Commission – allowed them to do so.

c. Regulation 1/2003 and the intensification of EU-Member State cooperation

51. *Introduction* – According to the Commission, the system inaugurated by Regulation 17/62 resulted in the introduction of a competition law culture in the various Member States. Member States' acquaintance with and interest in competition law enforcement as a result increased and created or improved national systems of cartel enforcement.[175] At the same time, the Commission's continued dominance in the authorization and exemption system imposed limits on the effective application of and reliance on E(E)C competition law.[176] From the 1980s onwards, the Commission developed particular mechanisms to overcome these limits.[177] In 1996 already, *Ortiz Blanco* noted that 'the Commission and the Member States' situations have evolved. The Commission is now recognized as the driving force of Community competition policy, while the Member States are generally seen as better

[172] Case T-24/90, *Automec v Commission (Automec II)*, [1992] ECR II-2223, para 75-76. On the scope of positive and negative priorities set by the Commission, see W. Wils, 'Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement', 34 *World Competition* (2011), 357-360. It has been argued that the Commission was not obliged to adopt a decision under Regulation 17/62, the nature of which would enable an action for annulment, see B. Vesterdorf, 'Complaints concerning Infringements of Competition Law within the Context of European Community Law', 31 *Common Market Law Review* (1994), 93.

[173] Case T-24/90, *Automec v Commission (Automec II)*, para 88.

[174] Case T-24/90, *Automec v Commission (Automec II)*, para 88 and para 94.

[175] Commission White Paper on the Modernisation of the Rules implementing Articles 85 and 86 of the EC Treaty, [1999] O.J. C132/1, para 4 (hereinafter referred to as Modernization White Paper). For an economic analysis of notification, see W. Wils, 'Notification, clearance and exemption in E.C. competition law: an economic analysis', 24 *European Law Review* (1999), 139-156.

[176] Modernization White Paper, para 40.

[177] See e.g. the use of comfort letters, I. Van Bael, 'The Antitrust Settlement Practice of the EC Ecommission', 23 *Common Market Law Review* (1986), 61-90. On the lack of legal effect of comfort letters see C. D. Ehlermann, note 149, 574. See also V. Korah, note 157, 334. For an additional perspective, see B. Wodz, 'Comfort letters and other informal letters in E.C. competition proceedings – why is the story not over?', 21 *European Competition Law Review* (2000), 159-169.

equipped to apply both their own national competition law and that of the Community. This development will, in the future, facilitate a clear definition of the respective roles of the Community administration and the national authorities in this field of Community law'.[178] These developments eventually culminated in a proposal to reshape the EU competition law supervisory framework in the White Paper on the Modernization of the rules implementing Articles 85 and 86 of the EC Treaty.[179] The White Paper constituted a basis for modernisation Regulation 1/2003, which modified the supervisory system of EU competition law by intensifying the role of national authorities and courts as *supporting agents* of the European Commission in the supervision and enforcement of EU competition law.

This section sketches the system of EU-Member State cooperation established by Regulation 1/2003. It briefly considers the Regulation's genesis in the wake of the White Paper (a). It subsequently emphasizes how the Regulation reshaped the balance between effective supervision and simplified administration (b) and the roles it attributes to national authorities and national courts (c). It will be submitted that the modernisation Regulation more directly includes national courts and authorities in an EU-determined enforcement framework. Such direct inclusivity creates particular incentives and opportunities for institutional and organisational convergence of national and supranational enforcement structures under EU constitutional law. The framework of and scope for such convergence will be the subjects of the following sections.

i. From Paper to practice: the genesis of Regulation 1/2003

52. *From policy discussions…* – The Commission White Paper proposed a fundamental reform in the system of EU competition law enforcement. Firstly, the White Paper considered the abolition of the system of notification and authorization and its replacement by a directly applicable exception system in which Article 81(3) EC Treaty would enjoy direct effect.[180] Secondly, it fostered the development of decentralized application of the competition rules. Thirdly, it outlined a plan for intensified ex post control by a multitude of supervisory actors.[181] The Commission relinquished its monopoly, but was said to be able to devote more resources to detection and prosecution of hard core cartels that would otherwise escape notification.[182]

The adoption of the White Paper allowed for the advantages and disadvantages of the then existing institutional framework to be outlined and structured.[183] Arguments favouring decentralization mainly focused on the efficiency gains a new institutional framework would

[178] L. Ortiz Blanco, *EC competition procedure* (Oxford, Clarendon, 1996), 11.
[179] Modernization White Paper, para 53-66.
[180] Modernization White paper, para 47.
[181] Modernization White paper, para 71.
[182] Modernization White paper, para 84.
[183] For an overview of 'big issues', see S. Brammer, note 28, 17-28 and R. Wesseling, *The Modernisation of EC Antitrust Law* (Oxford, Hart, 2000), 252 pp.; B. Krueger and A. Klimisch, 'Decentralised application of E.C. Competition law: current practice and future prospects' in 24 *European Law Review* (1999), 463-482; T. Wissmann, 'Decentralised Enforcement of EC Competition Law and the New Policy on Cartels. The Commission White Paper of 28th April 1999', 23 *World Competition* (2000), 123-154. See also M. Paulweber, 'The end of a Success Story? The European Commission's White Paper on the Modernisation of the European Competition Law. A Comparative Study about the Role of the Notification of Restrictive Practices within the European Competition and American Antitrust Law', 23 *World Competition* (2000), 3-44. For responses from businesses, see D. Cowan and J. Nazerali, 'Modernising the enforcement of E.U. competition rules - can the Commission claim to be preaching to the converted?', 20 *European Competition Law Review* (1999), 442-445.

bring about.[184] Sceptics predominantly lamented the potential lack of legal certainty that would result from the relinquishment of a Commission exemption monopoly.[185]

53. … *to regulatory proposals* – Rather than taking stock of all these arguments, the Commission already proposed a draft Regulation in 2000[186], translating its White Paper proposals into a concrete legal text. The draft Regulation directly extended the national competition authorities' roles in the enforcement of EU competition law. National authorities and national courts were obliged to apply EC competition law in cases affecting trade between Member States.[187] The proposal additionally stated that those cases should *exclusively* be dealt with under EC competition law.[188] In order to ensure a cohesive legal playing field for competition law supervision, a single set of supranational rules should be applied to behaviour affecting trade between Member States, either by the Commission or by national authorities.[189] As a result, Draft Article 3 stated that '[w]here an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article 81 of the Treaty or the abuse of a dominant position within the meaning of Article 82 may affect trade between Member States, Community competition law shall apply to the exclusion of national competition laws'. The creation of a network was necessary to ensure and maintain the clear allocation of cases to national and supranational authorities.[190] Article 16 of the draft Regulation additionally stated that national courts and competition authorities

[184] See A. Salord, 'Concurrent application, the April 1999 White Paper and the future of national laws', 21 *European Competition Law Review* (2000), 140; M. Todino, 'Modernisation from the perspective of national competition authorities: impact of the reform on decentralized application of E.C. competition law', 21 *European Competition Law Review* (2000), 348-358. For an overview of contra and pro arguments, see A. Komninos, 'Modernisation and Decentralisation: Retrospective and Prospective' in G. Amato and C.D. Ehlermann (eds.), *EC Competition Law. A Critical Assessment* (Oxford, Hart, 2007), 645-647.

[185] A. Deringer, 'Stellungnahme zum Weissbuch der Europaïschen Kommission über die Modernisierung der Vorschriften zur Anwendung der Art. 85 und 86 EG-Vertrag (Art. 81 und 82 EG)', 11 *Europaïsche Zeitschrift für Wirtschaftsrecht* (2000), 5-11; M. Gustaffson, 'Some Legal Implications Facing the Realisation of the Commission White Paper on Modernisation of EC Antitrust Procedure and the Role of National Courts in a Post-White Paper Era', 27 *Legal Issues of Economic Integration* (2000), 173; S. Kingston, 'A "new division of responsibilities" in the proposed regulation to modernise the rules implementing Articles 81 and 82 EC? A warning call', 22 *European Competition Law Review* (2001), 340-350; M. Siragusa, 'A Critical Review of the White Paper on the Reform of the EC Competition Law Enforcement Rules', 23 *Fordham International Law Journal* (1999), 1096.

[186] Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87, COM (2000) 582 Final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0582:FIN:EN:PDF (hereafter referred to as Draft Regulation Proposal). The Draft Regulation itself has become a topic of intense scholarly interest. See D. Geradin, 'Competition between Rules and Rules of Competition: a Legal and Economic Analysis of the proposed modernization of the enforcement of EC Competition law', 9 *Columbia Journal of European Law* (2002), 1-27; C. Humpe and J. Bourgeois, 'The Commission's draft "new Regulation 17"', 23 *European Competition Law Review* (2002), 43-51; R. Wesseling, 'The draft-regulation modernising the competition rules: the Commission is married to one idea', 26 *European Law Review* (2001), 357-378; W. Wils, 'The Modernization of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation No. 17', 24 *Fordham International Law Journal* (2001), 1655-1717.

[187] Draft Regulation Proposal, 13.

[188] Draft Regulation Proposal, 14.

[189] Draft Regulation Proposal, 15; See also Article 3 of the Draft Regulation.

[190] Draft Regulation Proposal, 15.

were to use every effort to avoid any decision that conflicts with decisions adopted by the Commission.[191]

The Draft Regulation directly confirmed the inclusion of national authorities and courts in the supranational system of competition law supervision and their roles as agents of the European Commission in applying and enforcing EU competition law. At the same time however, the Draft Regulation disconnected the national authorities and courts from their national enforcement roles. In the case of agreements or unilateral actions affecting trade between Member States, these authorities and courts were to apply EU competition law to the exclusion of national law. In so proposing, the Draft Regulation presumed a complete separation between both levels of competition law. Such complete separation is not always easy to maintain however, as EU and national legal orders grow effectively more integrated and interlocked and as full uniformity of competition law application is not posited by the EU legal framework.[192] National authorities and courts had rather specifically been set up to rule on national disputes and could not be considered mere agents in a supranational competition law system. As a result, the Draft Regulation was severely criticised by Member States for its blatant exclusion of national competition law as a matter of course.[193] Regulation 1/2003 sought to address this issue by introducing the concurrent application of EU and national competition laws.[194]

ii. A new balance between effective supervision and simplified administration

54. *Regulation 1/2003 and its legal basis* – The Council adopted a definitive Regulation on 16 December 2002. Just like its predecessor, Regulation 1/2003 was based on Article 103(2) TFEU (formerly Article 87(2) EEC Treaty and Article 83(2) EC Treaty). The scope of Article 103(2) TFEU as a legal basis did however lead to significant academic controversy, all the more since it was most sincerely questioned whether the legal basis should have been read in conjunction with Article 101(3) TFEU or not. The outcome of that reading would determine to what extent Article 103(2) TFEU could serve as a sufficient Treaty basis for the development of a cooperative supervisory regime. More generally, an (in)dependent reading of Article 103(2) TFEU determined the extent to which constitutional transformations are desirable within the constitutionally determined market supervision mandate.

55. *Two legal basis readings* – It is well-established that the Treaty provides a direct legal basis for the creation and development of a supranational market supervision system. As mentioned above, Article 103 (2) TFEU grants the Council, acting upon a proposal from the Commission and after *consulting* the European Parliament, the competence to lay down rules aimed at ensuring compliance with the prohibitions in Articles 101(1) and 102 TFEU, as well as to establish rules concerning the application of Article 101(3) TFEU. In the latter case,

[191] See also M. Van der Woude, 'National Courts and the Draft Regulation on the application of Articles 81 and 82 EC' in J. Stuyck and H. Gilliams (eds.), *Modernisation of European Competition Law. The Commission's proposal for a new regulation implementing Articles 81 and 82 EC* (Antwerp, Intersentia, 2002), 41-60. See also C. Bellamy, 'Modernisation of EU Competition Law. Impact of the proposed reform on national competition law and practice. Some points for discussion' in the same volume, 87-92.

[192] On the the questionable constitutionality of that approach, see R. Wesseling, note 186, 364-368.

[193] See for German critiques in that regard, A. Bartosch, 'Von der Freistellung zur Legalausnahme: Der Vorschlag der EG-Kommission für eine "neue Verordnung 17"', 12 *Europaïsche Zeitschrift für Wirtschaftsrecht* (2001), 104; R. Bechtold, 'Modernisierung des EG-Wettbewerbsrechts: Der Verordnungs-Entwurf der Kommission zur Umsetzung des Weißbuchs', *Betriebs-Berater* (2000), 2428.

[194] See S. Brammer, note 28, 69-76, outlining the system of concurrent application in Regulation 1/2003. See also E. De Smijter and L. Kjolbe, 'The Enforcement System under Regulation 1/2003' in J. Faull and A. Nikpay (eds.), *The EC Law of Competition* (Oxford, Oxford University Press, 2007), 103-105.

considerations of effective supervision and simplified administration remain guiding.[195] Two readings are possible in that regard.

A first reading detaches or decouples the institutional organization provisions from the substantive law provisions on prohibitive anticompetitive practices. Read in this way, the EU constitutional framework directly instructs or mandates the EU to establish a supervisory regime without however providing details on how to accomplish it, the conditions of effective supervision and simplified administration notwithstanding. A constitutionally deferent approach to market supervision therefore seems warranted, which would grant the EU institutions the option of completely redesigning the supervisory system. The evolution from an *authorization* system into a *directly applicable legal exception* system would thus be possible, as long as it can be demonstrated that the newly established system overall guarantees more effective supervision and simplified administration.

An alternative reading couples Article 103(2) with Article 101(3). Article 101(3) states that the prohibition in paragraph 1 – and the ensuing nullity sanction in paragraph 2 – may be *declared* inapplicable. Unlike the ECSC Treaty framework, the current constitutional elaboration no longer explicitly mentions the *authorization* role of the EU. At the same time however, the declaration of inapplicability would still appear to require positive action from an administrative or judicial authority in order to avoid an agreement being prohibited for its restrictive effects on competition. The *institutional* scope of market supervision alternatives would thus be limited to a system in which a direct decision on the non-applicability of the competition law prohibition would be required. Since Article 101 constitutes the substantive legal basis for the institutional and procedural options mandated in Article 103(2), the scope of Article 101(3)'s reference to a declaration would limit the creation of a system in which no preliminary decision is required to establish the legality of an otherwise illegal agreement. Such a supervision system would as a result be unconstitutional.

The general scope of the constitutional mandate for market supervision determines the actual range of constitutional reform initiatives. The constitutional interpretation one is therefore willing to attribute to the scope of provisions will determine the possibility of constitutional transformations over time and the scope of the constitutional equilibrium reflected therein. Both abovementioned approaches have been brought to the debates on market supervision reform. In the end however, the first, decoupled reading seems to have been adopted.

56. *A decoupled reading* – The Commission's draft Regulation clearly opted for an independent reading of Article 103(2) TFEU. It argued that the legal basis in Article 103 is not limited to the application of the competition rules by specific decision-makers, i.e. the Commission.[196] In addition, Article 101(3) does directly reflect limits on the procedure in accordance with which the prohibition in Article 101 (1) may be declared inapplicable, and by whom. The words 'may be declared inapplicable' in that provision do not therefore define a specific procedure for inapplicability.[197] According to the Commission, Article 101(3) can be directly applicable. That provision does not per se imply discretionary powers only to be exercised by a centralized administrative body.[198] This is confirmed in Article 103(2)(e) TFEU, stating that the Council is empowered to determine the relationship between national laws and EU competition law. This responsibility enables the EU to establish more responsibilities in the hands of national authorities and courts. In addition, the proposed

[195] See Article 103(2)(b) TFEU.
[196] Draft Regulation Proposal, 4.
[197] Draft Regulation Proposal, 4.
[198] Draft Regulation Proposal, 4.

Regulation was said better to reflect respect for the principles of subsidiarity and proportionality[199], without however providing detailed economic or empirical data as to why this was purportedly the case.[200]

That interpretation has been confirmed by scholars who delved into the scope of the 'may be declared inapplicable' provisions in the Treaty making period.[201] Their research showed that the 'founding fathers' of the EEC Treaty did not come to a single-headed opinion on how to organize the supervision of competition law and did not per se want to replicate the authorization system of the ECSC Treaty.[202] The Treaty provisions rather struck a balance between the French 'abuse of control' system – based on the legality of agreements until an abuse could be demonstrated – and the German preventive authorization system.[203] That compromise resulted in vague supervisory options inserted in the Treaty.[204] According to *Deringer*, only during negotiations of Regulation 17/62 did the compromise solution really come to the foreground.[205] Regulation 17/62 should therefore only be understood as one choice among many, mainly with a view to familiarize Member States' legal systems with the scope and role of competition law provisions, before attributing them a more specific role in the enforcement of these provisions.[206]

57. *The coupled reading as remaining ghost of the past?* – References to the early case law of the Court of Justice on the constitutionality of Regulation 17/62 were relied upon to call the abovementioned arguments into question. The conclusion of Advocate General *Lagrange* in the 1962 *Bosch* judgment, in which he argued that the text of Article 85(3) was best married to a constitutive authorization system[207] would seem to point to a constitutional reading in which the balance between effective supervision and simplified administration was reflected into an authorieation system. This resulted in the argument that Article 103(2) TFEU could only establish a supervisory system in which agreements could constitutively be declared valid. The institutional framework within which such declaration should take place has nevertheless generated considerable scholarly differences. Whilst Ehlermann argued that a judicial declaration could be relied on instead of an administrative Commission decision[208], Brammer maintained that a full-fledged administrative declaration presented a constitutional precondition of the EU competition law supervision regime.[209] At the same time, the provisions of Article 101(3) TFEU would be too vague to be directly effective in national legal orders.[210] Both arguments support the reading that the concept of 'declared' would necessarily refer to a positive or negative clearance or an infringement decision adopted by either an administrative or a judicial body.

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[199] Draft Regulation Proposal, 11-13.
[200] Some details can nevertheless be found in the White Paper and in particular statistics and information provided by DG Competition itself, see for examples Modernization White Paper, para 44.
[201] See I. Forrester, note 115; G. Marenco, note 102; A. Deringer, note 124.
[202] I. Forrester, note 115, 95. For a similar argument, see J. Appeldoorn, 'Are the Proposed Changes Compatible with Article 81(3) EC?', 22 *European Competition Law Review* (2001), 401. See also for extensive discussions, the contributions 'LE LIVRE BLANC DE LA COMMISSION SUR LA MODERNISATION DES RÈGLES DE CONCURRENCE. Actes de la Journée d'études organisée le 26 mai 2000 à l'occasion du 35e anniversaire des Cahiers de droit européen', 35 *Cahiers de droit européen* (2000), 103-236.
[203] G. Marenco, note 102, 153-155.
[204] Forrester – on the basis of archival research – unveiled an even more complex situation, in which a Dutch, Belgian-Dutch and similarly situated variants could be detected. See I. Forrester, note 115, 78.
[205] A. Deringer, note 124, 32-33; see also I. Forrester, note 115, 96.
[206] G. Marenco, note 102, 175
[207] See Case 13/61, *De Geus v Bosch* (Opinion of AG Lagrange) at 66-67.
[208] C. D. Ehlermann, note 149, 555
[209] S. Brammer, note 28, 18, finding support in the AG Lagrange opinion.
[210] E.J. Mestmäcker, note 150, 419. S. Brammer, note 28, 18, considers this argument less convincing.

In the *Bosch* and *Portelange* judgments however, the Court presumed the existence of an authorization system, without directly ruling on it being constitutionally mandated.[211] In hindsight, the case law could indeed also be read as merely confirming the existence of a supervisory regime without ruling on its constitutionality as such.[212] The Commission understood the precedents to reflect such reading and proceeded with the decoupled reading in its design of Regulation 1/2003.

58. *The Council's clear choice for a decoupled reading* – In its considerations to Regulation 1/2003, the Council confirmed the decoupled reading and focused exclusively on balancing effective supervision and simplified administration. The Council considered that 'the centralized scheme set up by Regulation No 17 no longer secures a balance between those two objectives. It hampers application of the Community competition rules by the courts and competition authorities of the Member States, and the system of notification it involves prevents the Commission from concentrating its resources on curbing the most serious infringements. It also imposes considerable costs on undertakings'.[213] The transformation of an authorization system into a directly applicable exception system therefore presented an option that remained within the confines of the constitutional supervision mandate.[214] The constitutionality of that choice has not explicitly been confirmed by the Court of Justice. At the same time however, the Court clearly ruled on the interpretation and operations of the system reflected in that Regulation.[215] That judicial posture could nevertheless be interpreted as an implicit acknowledgement that the decoupled reading falls within the constitutional market supervision mandate.

iii. Strengthening EU-Member State cooperation

59. *The system of Regulation 1/2003* – The main elements of reform have been the subject of elaborate analyses.[216] For the purposes of this dissertation, a mere summary of the Regulation's changes to the EU-Member State cooperation framework can suffice.[217] Four particular upgrades can be distinguished. All of these upgrades point towards intensified

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[211] Case 13/61, *De Geus v Bosch* at 51; Case 10/69, *Portelange*, para 16.
[212] I. Forrester, note 115, 99.
[213] Recital 3 Draft Regulation Proposal.
[214] I. Forrester, note 115, 93; G. Marenco, note 102, 174 states that only the prohibition principle enshrined in Article 101(1) TFEU has constitutional value in that regard. See also A. Komninos, note 184, 640-642.
[215] For an overview of cases, see section 4(a) of this chapter.
[216] See for a particularly insightful assessment, S. Brammer, note 28, 30-107; W. Wils, 'Regulation 1/2003: A Reminder of the Main Issues' in D. Geradin (ed.), *Modernisation and Enlargement: Two major challenges for EC competition law* (Antwerp, Intersentia, 2004), 9-81.See also K. Lenaerts, 'Modernisation of the Application and Enforcement of European Competition Law – An Introductory Overview' in J. Stuyck and H. Gilliams (eds.), note 191, 11-40.
[217] See among other analyses, A. Türk, 'Modernisation of EC antitrust enforcement' in H. Hofmann and A. Türk (eds.), *EU Administrative Governance* (Cheltenham, Edward Elgar, 2006), 215-243; D. Gerber and P. Cassinis, 'The "modernization" of European Community competition law: achieving consistency in enforcement', 27 *European Competition Law Review* (2006), 10-18 and 51-57; H. Gilliams, 'Modernisation: from policy to practice', 28 *European Law Review* (2003), 451-474; K. Lenaerts and D. Gerard, 'Decentralisation of EC Competition Law Enforcement: Judges in the Frontline', 27 *World Competition* (2004), 313-349; K. Pijetlovic, 'Reform of EC antitrust enforcement: criticism of the new system is highly exaggerated', 25 *European Competition Law Review* (2004), 356-369; A. Riley, 'EC antitrust modernisation: the Commission does very nicely - thank you! Part 1: Regulation 1 and the notification Burden', 24 *European Competition Law Review* (2003), 604-615; A. Riley, 'EC antitrust modernisation: the Commission does very nicely - thank you! Part 2: between the idea and the reality: decentralisation under Regulation 1', 24 *European Competition Law Review* (2003), 657-672; J. Venit, 'Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty', 40 *Common Market Law Review* (2003), 545-580.

cooperation between the European Commission, national competition authorities[218] and national courts. Regulation 1/2003 specifically enables these authorities and courts to function as nationally structured agents of EU competition law enforcement.

Firstly, Regulation 1/2003 confirms the direct applicability and direct effect of Article 101(3) TFEU. Notification of agreements to the Commission is no longer permitted. As a result, no prior authorization is required to establish the legality of a potentially anticompetitive agreement falling within the ambit of Article 101(1) TFEU.[219] Undertakings necessarily have to self-assess the legality of the agreement or practice under EU competition law without guidance from the Commission or temporary immunity from fines following notification. Due to its emphasis on self-assessment, the illegality of an agreement will always be considered from the moment of its conclusion without enjoying provisional immunity during particular investigations prior to the adoption of an exemption decision.[220] The abolition of the notification requirement also resulted in the prohibition for undertakings to request an authorization or Commission assessment.[221] The Commission can still adopt decisions finding the inapplicability of EU competition law to a given agreement on its own motion.[222] In addition, the Commission can formalize commitments made by the parties to the agreement upon finding an infringement.[223] The Commission is also still able to adopt infringement decisions and to impose fines on undertakings.[224] Coupled with initiatives related to promoting leniency and cartel whistleblowing[225], faster track settlement procedures[226] and the

[218] These authorities comprise national competition authorities proper and sector-specific authorities called upon to apply and interpret EU competition law to particular sectors such as electronic communications, electricity, natural gas, transport etc. According to Article 35 Regulation 1/2003, these authorities equally fall within the ambit of the national competition authority concept. See also M. Szydlo, 'National Parliaments as Regulators of Network Industries: In search for the dividing line between regulatory powers of national parliaments and national regulatory authorities', 10 *International Journal of Constitutional Law* (2012), 1163.

[219] Article 1 (1) and (2) Regulation 1/2003

[220] J. Venit, note 217, 555.

[221] K. Pijetlovic, note 217, 357.

[222] Article 10 Regulation 1/2003. One cannot however notify an agreement with a view to obtain a particular negative clearance projected by that provision.

[223] Article 9 Regulation 1/2003. On commitments, see S. Rab, D. Monnoyeur and A. Sukhtankar, 'Commitments in EU Competition Cases Article 9 of Regulation 1/2003, its application and the challenges ahead', 1 *Journal of European Competition Law & Practice* (2010), 171-188. See also W. Wils, 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003', 29 *World Competition* (2006), 345-366. On the combination of non-negotiated and negotiated enforcement techniques, see H. Hofmann, 'Negotiated and Non-Negotiated Administrative Rule-Making: the Example of EC Competition Policy', 43 *Common Market Law Review* (2006), 153-178.

[224] See Article 23(2) Regulation 1/2003. This provision has been accompanied by updated Commission fining guidelines, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, [2006] O.J. C210/2.

[225] See on that matter Commission Notice on Immunity from fines and reduction of fines in cartel cases, [2006] O.J. C298/17. See also S. Breatnach, 'Sweetening the Carrot: the role of leniency programmes in the fight aganst cartels', 34 *European Competition Law Review* (2013), 12-16.

[226] Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, [2008] O.J. L171/3. See U. Soltesz and C. Von Kockritz, 'EU Cartel Settlements in Practice – The Future of EU Cartel Enforcement', 32 *European Competition Law Review* (2011), 258-265. See also A. Stephan, 'The Direct Settlement of EC Cartel Cases', 58 *International and Comparative Law Quarterly* (2009), 627-654; A. Ortega Gonzalez, 'The cartel settlement procedure in practice', 32 *European Competition Law Review* (2011), 170-177; W. Wils, 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles', 31 *World Competition* (2008), 335-352. See more generally the contributions in C.D. Ehlermann and M. Marquis (eds.), *European Competition Law Annual 2008. Antitrust Settlements under EC Competition Law* (Oxford, Hart, 2010), 723 pp. See more recently, M.-T. Richter, 'The settlement procedure in the context of the enforcement tools of European competition law – a comparison and impact analysis', 33 *European Competition Law Review* (2012), 537-542.

promotion of private enforcement of EU competition law[227], Regulation 1/2003 provides a basic framework for both formal and less formal methods of EU competition law monitoring.

Secondly, the Regulation's emphasis on self-assessment is complemented by a duty for national competition law authorities to apply EU competition law to cases that affect trade between Member States.[228] Contrary to Article 3 of the draft Regulation, the Member States did not however agree with the Commission's proposal to have only one set of legal provisions – EU law – apply as a matter of course in a case affecting trade between Member States. In that regard, Article 3 of regulation 1/2003 projects the concurrent application of national and EU competition law. The application of national competition law may not however lead to the prohibition of agreements which may affect trade between Member States but which do not restrict competition within the meaning of Article 101(1) of the Treaty or which fulfil the conditions of Article 101(3), or which are covered by a block exemption regulation.[229] In addition, Article 5 provides for a clear and strict list of powers the national competition authorities obtain in that regard.[230] National competition authorities' powers to suspend or terminate proceedings have explicitly been regulated in Regulation 1/2003. Where competition authorities of two or more Member States are aware of the potential existence of restrictive agreements, the fact that one authority is dealing with the case shall be sufficient ground for the others to reject the complaint. The Commission may likewise do so in case a national authority has dealt with the case and is considered to be better placed in doing so.[231] The same goes for complaints received in relation to agreements already been dealt with by another competition authority.[232]

In any instance, Article 11(6) Regulation 1/2003 provides an instrument for the Commission to maintain control over the application of EU competition law.[233] It proclaims that the

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[227] See on the promotion of private enforcement, the Commission White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165, available at http://ec.europa.eu/competition/antitrust/actionsdamages/index.html. On the scope of national – EU interactions with a view to establish a right to damages, see E. Truli, 'White Paper on Damages Actions for the Breach of EC Antitrust Rules:The Binding Effect of Decisions Adopted By National Competition Authorities', 5 *European Competition Journal* (2009), 795-821; A. Andreangeli, 'From Complainant to 'Private Attorney General': The Modernisation of EU Competition Enforcement and Private Anti-Trust Actions Before National Courts' in M. Dougan and S. Currie (eds.), *50 years of the European Treaties. Looking back and thinking forward* (Oxford, Hart, 2009), 229-254.

[228] Article 3(1) Regulation 1/2003. On the scope of concurrence from a national law perspective, see G. Bruzzone and M. Boccaccio, 'Taking Care of Modernization after the Start-Up: A View from a Member State', 31 *World Competition* (2008), 89-111.

[229] Article 3(2) Regulation 1/2003. Member States shall not however be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings. See A. Klees, 'Breaking the Habits: The German Competition Law after the 7th Amendment to the Act against Restraints of Competition (GWB)', 7 *German Law Journal* (2006), 406 on the origins of that rule. Article 3(3) holds that the regime of parallel application does not preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.

[230] Article 5 Regulation 1/2003 holds that the competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions: requiring that an infringement be brought to an end, ordering interim measures, accepting commitments, imposing fines, periodic penalty payments or any other penalty provided for in their national law. That list is limitative, see Case C-375/09, *Prezes Urzedu Ochrony Konkurencji i Konsumentów* v. *Tele2 Polska sp. z o.o.* (now: *Netia SA*), [2011] ECR I-3055, para 29.

[231] Article 13 (1) Regulation 1/2003.

[232] Article 13(2) Regulation 1/2003.

[233] This provision does not consider the Commission's power or deference to national authorities' decisions once the national authority adopted a decision. A long standing question in that regard concerned whether or not a national authority's decision applying Articles 101 and 102 TFEU is binding on the European Commission. For an early argument in favour of that position, see J. Temple Lang, 'European Community Constitutional Law and

initiation by the Commission of supranational investigative procedures shall 'relieve the competition authorities of the Member States of their competence to apply Articles [101] and [102] of the Treaty'.[234] Theoretically, the Commission could therefore decide to take over a case from a national authority. Article 11(6) nevertheless requires that the national competition authority which will be relieved from duty shall be consulted by the Commission. In practice, the Commission considers Article 11(6) to be an ultimate remedy in cases where a national competition authority's position threatens to frustrate the coherent application of EU competition law. The Commission nevertheless undertakes to rely on more informal means of deliberation to ascertain coherence.[235] A Commission decision to initiate supranational proceedings on the basis of Article 11(6) Regulation 1/2003 in principle only comprises a preparatory decision in the process of adopting a formal infringement decision. As a result, it is not subject to judicial review before the Court of Justice.[236] It has nevertheless been argued that a decision to relieve national authorities from their duties also produces direct legal effects. An Article 11(6) decision results in suspected undertakings being deprived of procedural rights and guarantees they would have enjoyed in a particular national setting. The deprival of these rights has been argued to affect the legal position undertakings enjoy under the system of EU law. A Commission decision should therefore be amenable to judicial review according to some.[237] This hypothesis has not been tested before the Court.[238] The Court nevertheless made clear that Regulation 1/2003 does not establish that national competition authorities are *automatically* relieved of their competence if the Commission initiates its own proceedings.[239]

Article 11(6) notwithstanding, Regulation 1/2003 does not contain a clear provision on the allocation of cases.[240] It only envisages cooperation in this realm by means of a European Competition Network. According to Regulation 1/2003, 'the Commission and the competition

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the Enforcement of Community Antitrust Law' in B. Hawk (ed.), note 148, 584. The binding scope of national authorities' decisions nevertheless remains problematic and uncertain, again highlighting the Commission's remaining fundamental role as an EU competition law supervisor in that respect.

[234] K. Dekeyser and M. Jaspers, 'A New Era of ECN Cooperation. Achievements and Challenges with a Special Focus on Work in the Leniency Field', 30 *World Competition* (2007), 9 refer to this action as the de-seizing of a national authority.

[235] K. Dekeyser and M. Jaspers, note 234, 9.

[236] Case 60/81, *IBM v Commission,* [1981] ECR 2639.

[237] See A. Mikroulea, 'Case Allocation in Antitrust and Collaboration berween the National Competition Authorities and the European Commission' in I. Lianos and I. Kokkoris (eds.), *The Reform of EC Competition Law. New Challenges* (Alphen a/d Rijn, Kluwer, 2010), 67.

[238] Three practical problems could be identified should the Court accept jurisdiction to annul an Article 11(6) Commission decision. First, the Court would be asked to consider whether national procedural rights are indeed more protective than similar guarantees in Regulation 1/2003. It is questionable whether such considerations would fall within the Court's 'legality review' mandate reflected in Article 263 TFEU. Second, Article 11(6) particularly grants the Commission a significant amount of discretion in deciding whether or not to withdraw a case. As such, the Court's review of the legality of such choices would appear limited to instances of manifestly unreasonable withdrawal. Third, the consequences of the annulment of an Article 11(6) decision remain unclear. It is once again doubtful that the Court would be mandated to remit the case to the national authority that had been relieved by the Commission. Annulment of that decision would rather result in a new allocation decision to be adopted within the ECN.

[239] Recital 17 and Article 11(6) Regulation 1/2003. See also B. Van de Walle de Ghelcke, 'Modernisation: Will it increase litigation in the national courts and before national authorities?' in D. Geradin (ed.), note 216, 157. Recital 18 Regulation 1/2003 refers to a case being preferentially dealt with by a single authority. According to the Court in Case C-17/10, *Toshiba*, judgment of 14 February 2012, nyr, para 90, that recital does not imply that Member States definitively lose their enforcement powers once the Commission initiated proceedings leading to an infringement decision in accordance with Article 11(6). It rather provides a non-binding standard according to which case allocation should take place.

[240] J. Joshua, 'The European Cartel Enforcement Regime Post-Modernization: How is it Working?', 13 *George Mason Law Review* (2006), 1249.

authorities of the Member States should form together a network of public authorities applying the [Union] competition rules in close cooperation'.[241] The network constitutes an informal deliberative body in which the Commission and the national authorities could consult each other about the most appropriate allocation of cases.[242] A non-binding Joint Statement of the Council and the Commission on the functioning of the network of national competition authorities outlines the principles of allocation.[243] The Statement proposes an indicative time period of three months to decide on the allocation of a case[244] and posits the principle of preferential treatment by a single authority, best placed to correct competition disturbances in the market.[245] It has been complemented by a Commission notice addressed to national competition authorities.[246] The Notice mandated national authorities to file a form indicating their cooperative willingness to comply with the provisions enshrined in the notice.[247] An allocation decision does not therefore per se prohibit the Commission and the national authorities to take action in addition to the principal authority. Once a case has been allocated, national competition authorities and the Commission not principally dealing with the case, remain able to adopt decisions related to that same case.[248] To the extent that two national authorities have been allocated a case, only one will adopt a formal decision, the other taking on a secondary role. According to the Joint Statement, in those instances, the network consultation moments have to avoid that multiple – and potentially conflicting – formal decisions would be adopted.[249] These principles only remain in place to the extent that the Commission did not withdraw the case from national authorities with a view to adopt a supranational infringement decision.[250] In the regime developed by the Statement and the notice, the Commission remains in charge of the ultimate allocation decision.[251]

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[241] Recital 15 of Regulation 1/2003. On the nature of the European Competition Network, K. Dekeyser and M. Jaspers, note 234, 4.

[242] B. Perrin, 'Challenges facing the EU network of competition authorities: insights from a comparative criminal law perspective', 31 *European Law Review* (2006), 544.

[243] Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, http://ec.europa.eu/competition/ecn/joint_statement_en.pdf (hereafter referred to as Joint Statement). According to para 3, the Statement 'is political in nature and does therefore not create any legal rights or obligations. It is limited to setting out common political understanding shared by all Member States and the Commission on the principles of the functioning of the Network.

[244] Para 12 Joint Statement.

[245] Para 16 Joint Statement.

[246] Commission Notice on cooperation within the Network of Competition Authorities, [2004] O.J. C101/43 (Hereafter referred to as Network Notice).

[247] That information is publicly available at http://ec.europa.eu/competition/antitrust/legislation/list_of_authorities_joint_statement.pdf.

[248] Para 14 and 20 Joint Statement.

[249] See Para 21 Joint Statement.

[250] See Case C-17/10, *Toshiba*, para 70.

[251] From that perspective, the option in Article 13(1), stating that the Commission might reject a complaint on the ground that a national competition authority is dealing with the case, should be considered from the point of view of the Commission *deciding* to leave a case with the national authorities. Acting upon a complaint, it could equally withdraw the case from national competition authorities' attention. For allocation as concealed re-allocation, see S. Brammer, 'Concurrent jurisdiction under Regulation 1/2003 and the Issue of Case Allocation', 42 *Common Market Law Review* (2005), 1387. Re-allocation in itself also generates new problems. A re-allocation of authority will cause one national competition authority to close the investigations. The decision to close an investigation might be amenable to judicial review in accordance with national law. National judges will nevertheless have to rely on EU law, which states that a mere statement of objections is no final decision capable of being reviewed. A decision to allocate a case with a particular competition authority might indeed only reflect such statement of objections. On that issue – which remains unresolved since the inception of the ECN – see A. Weitbrecht, 'The Network of Competition Authorities – How will it work in practice: Remarks from a practitioner' in D. Geradin (ed.), note 216, 127.

Thirdly, the role of national courts is streamlined and extended. According to Article 6, national courts shall apply Articles 101 and 102 TFEU in their entirety. Courts can operate either as 'private law' courts in actions relating to contracts or damages[252] or as 'public law' courts, i.e. review courts of administrative authorities or as competition authorities themselves. To the extent that a national court acts as a national competition authority as well, the notice on the cooperation between authorities also applies.[253] The appropriation of courts as parts of the EU competition law enforcement posits particular problems. National judges' constitutional independence and impartiality significantly limits the Commission's intervention options in relation to court disputes. Unlike national competition authorities, judges cannot be obliged to – temporarily – withdraw from dealing with a case because a Commission investigation has been initiated. At the same time however, national judges also have to contribute to the effective application and enforcement of competition law and their involvement cannot frustrate EU competition law's main goals. To that extent, they must avoid giving decisions that would conflict with a decision contemplated by the Commission in proceedings it has initiated[254] Particular mechanisms have therefore been envisioned to allow for regulated interaction between the Commission and national judges. A non-binding 2004 National Courts Notice explicitly sets out how national courts should proceed in that regard.[255] Supporting and coordinating mechanisms essentially include the obligation for the Commission to provide information to national courts and the right for the Commission to intervene in national proceedings as an *amicus curiae*.[256] National courts additionally also provide legitimate safeguards against potentially intrusive investigation and inspection measures authorized or decided at the supranational level.[257] In any instance, national courts can also refer questions of interpretation or validity to the Court of Justice in a reference for a preliminary ruling.[258]

Fourthly, the Commission's investigative and penalty powers have been confirmed. Regulation 1/2003 outlines the Commission's power to initiate infringement investigations, to take statements, to conduct inspections, to adopt infringement decisions and to impose fines

[252] See in that regard, D. Waelbroeck, 'National Courts: What is Expected from them?' in D. Geradin (ed.), note 216, 185-207.

[253] See also F. Jenny, 'Implications of the EC Regulation 1/2003 in the Area of National Courts' in A. Mateus and T. Moreira (eds.), *Competition Law and Economics. Advances in Competition Policy and Antitrust Enforcement* (Alphen a/d Rijn, Kluwer, 2007), 78-83.

[254] National competition authorities on the other hand do not have to comply with a contemplated decision, only with decisions actually adopted, see Article 16(2) Regulation 1/2003. See also K. Wright, 'The European Commission's Own "Preliminary Reference Procedure" in Competition Cases', 16 *European Law Journal* (2010), 740.

[255] Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, [2004] O.J. C101/54 (hereafter referred to as 2004 Courts Notice).

[256] Article 15 Regulation 1/2003. On the amicus curiae role, Article 15(3) in particular. On information duties by the Commission, see Case C-275/00, *First NV and Franex NV*, [2002] ECR I-10943, para 49. On amicus curiae, see W. Devroe, 'De Europese commissie en nationale mededingingsautoriteiten als amicus curiae. Huidig en komend recht' in P. Van Orshoven and M. Storme (eds.), *Amice curiae, quo vadis? Het openbaar ministerie in privaatrechtelijke, administratieve en sociale zaken* (Antwerp, Kluwer, 2002), 211-233. The limited use of the procedure has been confirmed, see E. Raffaelli, 'National Judges and the Application of Regulation 1/2003: Remarks and Proposals' in B. Hawk (ed.), note 148, 246 and more transparency has been called for, see K. Wright, note 254, 746. See also Case C-429/07, *X. BV,*[2009] ECR I-4833, para 37-39.

[257] See Article 20(7) and (8) and Article 21(3) Regulation 1/2003.

[258] Competition authorities do not enjoy such prerogatives, see Case C-53/03, *Syfait,* [2005] ECR I-4609, para 29-37and G. Anagnostaras, 'Preliminary problems and jurisdiction uncertainties: the admissibility of questions referred by bodies performing quasi-judicial functions', 30 *European Law Review* (2005), 888-889.; H. Tagaras and M. Waelbroeck, 'Les autorités nationales de la concurrence et l'article 234 du traité un étrange arrêt de la cour de justice', 40 *Cahiers de droit européen* (2005), 465-492.

or periodic penalties.[259] The College of Commission Members adopts a binding decision finding and terminating an EU competition law infringement, ordering interim measures or imposing a fine or periodic penalty payment.[260] The investigative and preparatory decision-making processes leading to that decision remain in the hands of the Directorate-General for Competition, the activities of which are overseen by the Member of the Commission responsible for competition matters.

60. *National institutional autonomy as complementary and subordinate standard* – In all these situations, Article 35 of Regulation 1/2003 determines that Member States remain at liberty to designate the competition authority or authorities responsible for the application of Articles 101 and 102 of the Treaty in such a way that the provisions of the Regulation are effectively complied with. These designated authorities may include courts. A Member State thus remains free to rely on courts to ensure the supervision of EU competition law. The attribution of supervisory powers to courts is nevertheless subject to one caveat, in the light of the Commission's power to withdraw a case from a national competition authority. According to Article 35, the withdrawal regime provided in Article 11(6) shall also apply to courts that exercise functions regarding the preparation and the adoption of the types of decisions foreseen in Article 5. To the extent that a judicial authority is separate and different from a prosecuting authority, the effects of Article 11(6) shall be limited to the authority prosecuting the case which shall withdraw its claim before the judicial authority when the Commission opens proceedings. That withdrawal should result in the national proceedings effectively to end.[261] Article 35 thus provides an expression of national institutional autonomy. Member States may opt for a particular institutional template in accordance with which national competition authorities will be established. The chosen template may not however impede the effective application of EU competition law. Member States' institutional autonomy could therefore be restrained by EU-determined requirements of effectiveness.

61. *Associating national authorities within a supranational system* – Although national competition authorities and courts have gained renewed prominence in the enforcement system of EU competition law, Regulation 1/2003 continues to provide for strong guiding mechanisms by the European Commission. The Regulation's reference to a closer *association* of national competition authorities within the EU's enforcement system[262] reflects that subordination or dependence of national competition authorities to the European Commission as prime enforcer and overseer of EU competition rules. Member States' authorities are guided to facilitate and support the Commission's work, in addition to assuming some responsibilities of their own (applying and enforcing national competition law). The abovementioned associational metaphor led scholars to predict that decentralized enforcement actually amounts to centralized enforcement in a different guise.[263] Others have contended that the system is asymmetrical, leaving the national competition authorities some discretion in their decision-making practice – they do not have to take Commission instructions on how

[259] See Articles 23-24 Regulation 1/2003.
[260] See Articles 17-22 Regulation 1/2003.
[261] Article 35 (3) and (4) Regulation 1/2003.
[262] Recital 6 Regulation 1/2003.
[263] Article 3.1 Regulation 1/2003. See C. Lucey, 'Unforeseen consequences of Article 3 of EU Regulation 1/2003', 27 *European Competition Law Review* (2006), 558 – 563. See also M. Senn, 'Decentralisation of Economic Law – An Oxymoron?', 5 *Journal of Corporate Law Studies* (2005), 427-464; S. Wilks, 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?', 18 *Governance* (2005), 431-452.

to decide concrete cases – but still including them as subparts of a more general Commission enforcement framework.[264] In both instances, the Commission remains a primus *super* pares.

3. Refining the constitutional mandate in the service of due process

62. *From agents to supranationally structured supporting bodies* – The system projected by Regulation 1/2003 essentially includes national competition authorities and courts within a supranationally structured framework. That supranationally structured framework is not however immune from more general constitutional transformations underlying European Union law. It is submitted that one of the most prominent modifications in that regard can be found in the rise of fundamental procedural rights – *due process* requirements – structuring the decision-making processes and organizational structure of supranational market supervision bodies.[265] In the realm of EU competition law, attention to procedural rights for undertakings against which formal infringement investigations had been initiated resulted in changes in the institutional organization of the Commission as a supranational market supervision body and in the role of the Court of Justice as a reviewer of Commission decision-making practice. This section submits that organizational modifications responding to due process requirements refine and complement the constitutional market supervision mandate. Due process requirements determine how market supervision arrangements should be organized at the supranational level and these organizational principles affect the institutional organization of national competition supervision bodies included in the Regulation 1/2003 framework.

This section provides an overview of supranational due process modifications. It submits that these modifications essentially respond to Member States requiring procedural guarantees from the European Commission. As a result, particular procedural guarantees have been included in the Commission decision-making process (a.). These *ex ante* procedural guarantees are complemented by judicially developed *ex post* review standards that seek to maintain a due process-structured institutional framework (b.). Both *ex ante* guarantees and *ex post* review standards are also reflective of requirements imposed by the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR). Both *ex ante* and *ex post* organizational requirements instilled in the EU market supervision structures have subsequently developed into structural EU constitutional standards subsequently suggested or imposed on all Member States' legal orders, as the next section will argue.

a. Nationally-induced supranational *ex ante* due process adaptations

63. *Procedural rights in EU competition law* – The pervasive but frustratingly vague requirements that adherence to the 'rule of law'[266] imposes on those acting within its purview

[264] See recently, A. Mateus, 'Ensuring a more level playing field in competition enforcement throughout the European Union', 31 *European Competition Law Review* (2010), 516. On the asymmetrical relationship, see F. Rizzuto, 'Parallel Competence and the Power of the EC Commission under Regulation 1/2003 according to the Court of First Instance', 29 *European Competition Law Review* (2008), 297. Advocate General Mazák seems to have taken that perspective in recent opinions, see Opinion of Advocate General Mazák in Case C-375/09, *Tele 2 Polska*, para 44-45.

[265] On the increasing importance of *due process* as an instrument of federalism in EU constitutional law, see K. Lenaerts, note 14. See also S. Morano-Foadi and S. Andreadakis, 'Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights', 17 *European Law Journal* (2011), 595-610.

[266] Article 2 TEU states that the Union is founded on the value of rule of law. Article 19(1) TEU additionally holds that the Court of Justice ensures that the law will be applied. Both provisions reflect a long-standing constitutional taste for judicial review and procedural rights, see K. Lenaerts, note 45.

resulted in the identification of (fundamental) 'procedural rights' capable of ensuring a fair administrative decision-making process.[267] Procedural rights not only matter in national law, but have also become the hallmark of supranational administrative governance.[268] In the EU context, the importance of fundamental procedural rights has long been recognised by the Court of Justice, especially in situations where 'sanctions' could be imposed on individuals or firms.[269] EU institutions, most notably the European Commission, had to ensure that these individuals or firms were granted an opportunity to have to express their views on the matter.[270] The field of EU competition law was no exception in that regard. Newly established procedural rights subsequently promoted institutional adaptations at the Commission level. These adaptations gradually implemented a structural segregation between prosecutorial and decision-making functions.

i. The first stage: finding procedural rights

64. *Early procedural safeguards* – Some procedural safeguards have always accompanied the European Commission's sanctioning competences in the realm of competition law. The right to be heard and the accompanying right of access to parts of the Commission's file present the most notable example in that regard. Procedural Regulation 17/62 incorporated a right to be heard, which was later confirmed and refined in Regulation 99/63.[271] The right to be heard was not however presented as a fundamental procedural entitlement. It rather included an opportunity for the undertaking concerned to respond in writing to the objections made by the European Commission.[272] Regulation 99/63 framed the opportunity to respond in writing and orally as an important 'right of defence', but did not enable a regulative framework set to guarantee that right overall. According to that Regulation, a fine or periodic penalty could only be imposed on an undertaking if objections made against its practices or behaviour were made known to it[273] and if the latter was granted an opportunity to respond to these objections. The opportunity to respond to these objections did not however bring along a full-fledged access to the Commission file, nor did it include an oral hearing per se.[274] Quite to the contrary, an oral hearing specifically had to be requested for in the written comment responding to the objections[275] and the hearing would be conducted in a non-public setting by

[267] See on that matter in general, T. Bingham, *The Rule of Law*, (London, Penguin, 2011), 90-109. In the EU context, see E. Wennerström, *The Rule of Law and the European Union* (Upsalla, Iustus Forlag, 2007), 56-57.
[268] On procedural rights in an EU context, see P. Craig, *EU Administrative* Law, (Oxford, Oxford University Press, 2012), 320-355; C. Harlow, 'European Administrative Law and the Global Challenge', *European University Institute RSC Working Paper,* No 98/23, 1998, http://www.eui.eu/DepartmentsAndCentres/RobertSchumanCentre/Publications/WorkingPapers/9823 (last accessed May 12, 2012); on the importance of due process in a competition law context, see A. Riley, 'Editorial. Developing Due Process in EC Competition Law', 2 *Competition Law Review* (2005), 1-3.
[269] Case 17/74, *Transocean Marine Paint v Commission,* [1974] ECR 1063, para 15 and Case 85/76, *Hoffmann La Roche v Commission*, [1979] ECR 461, para 9.
[270] See for an instructive overview K. Lenaerts and J. Vanhamme, 'Procedural Rights of Private Parties in the Community Administrative Process', 34 *Common Market Law Review* (1997), 531-569.
[271] Regulation 99/63 of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17, [1963] O.J. L127/2268 (English Special Edition Series I Chapter 1963-1964, 47). Regulation 99/63 has later been replaced by Commission Regulation 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty, [1998] O.J. L 354/18.
[272] See J. Joshua, 'The Right to be Heard in EEC Competition Procedures', 15 *Fordham International Law Journal* (1991-1992), 17.
[273] Article 2(3) Regulation 99/63.
[274] This only gradually changed, see M. Levitt, 'Access to the File: The Commission's Administrative Procedures in Cases under Articles 85 and 86 EC', 34 *Common Market Law Review* (1997), 1416; A. Andreangeli, *EU Competition Enforcement and Human Rights*, (Cheltenham, Edward Elgar, 2008), 63.
[275] Article 7(1) Regulation 99/63.

Commission officials charged with the investigation.[276] The decision-making body itself, the College of Commissioners, was not involved in the actual hearing. The College did not therefore have an opportunity to hear different sides of a case like a judge would in an adversarial trial context.[277]

65. *Nationally induced extensions of procedural rights* – Focused attention to procedural rights only slowly and gradually emerged as a result of proclamations made by the European Court of Justice. In an important study on the emergence of European (procedural) rights, Francesca Bignami argued that the process of identifying and 'constitutionalising' these rights resulted from pressures imposed on the European Commission by the accession of the United Kingdom to the European Economic Community. It was feared that the UK's insistence on principles of 'natural justice' operating in the administrative realm, as well as the judicial review of these principles before the English courts could have resulted in the refusal of English judges to honour or recognise Commission decisions that infringed these principles. As a result, the Court of Justice and the Commission were said to have no other choice but to enhance procedural rights.[278]

66. *Limited institutional effects of early procedural rights* – The recognition of fundamental procedural rights did not immediately transform the institutional functioning of the European Commission. It should be remembered that the European Commission is basically a political body functioning in many ways like an executive agency with independent regulatory decision-making powers at the national level.[279] Officials in the Directorate-General are responsible for the investigation and prosecution of a particular case. The actual decision-making is subsequently relegated to the politically accountable Commission Members, who adopt a collegiate and binding decision.[280] Since the Commission is not a tribunal[281], its administrative decision-making procedure groups elements of investigation, prosecution and judgment.

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[276] A. Andreangeli, note 274, 47; M. Albers and J. Jourdan, 'The Role of Hearing Officers in EU Competition Proceedings: a Historical and Practical Perspective', 2 *Journal of European Competition Law & Practice* (2011), 186.

[277] J. Joshua, note 272, 63.

[278] F. Bignami, 'Creating European Rights: National Values and Supranational Interests', 11 *Columbia Journal of European Law* (2004), 258-292. See more generally R. D. Kelemen, *Eurolegalism. The Transformation of Law and Regulation in the European Union* (Cambridge, Harvard University Press, 2011), 52-56, framing the rise of procedural rights in a broader movement of legal adversarialism that is permeating the EU legal architecture.

[279] Literature on this matter is voluminous, see for more references, J. Joshua, note 272, 65; W. Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis', 27 *World Competition* (2004), 201; see also I. Forrester, 'Due process in EC competition cases: a distinguished institution with flawed procedures', 34 *European Law Review* (2009), 817-843.

[280] Article 17(6)(b) TEU, stating that the Commission acts as a collegiate body when adopting decisions. In competition law, an advisory committee of Member States authorities should be consulted before adopting a decision, see Article 14 Regulation 1/2003.

[281] J. Joshua and C. Harding, *Regulating Cartels in Europe* (Oxford, Oxford University Press, 2nd Edition, 2010), 200-202. See already Joined Cases 56/64 and 58/64, *Consten and Grundig*, [1966] ECR 299 in which the Court stated that the Commission was not a tribunal. See also Case 218/78 P, *van Landewyck SARL v Commission*, [1980] ECR 3125, para 81; Cases 100-103/80, *Musique de Diffusion Française v Commission,* [1983] ECR 1825 para 7; Joined Cases T-109/02, 118/02, 122/02, 125/02, 126/02, 128/02, 129/02, 132/02 and 136/02, *Bollorè and others v Commission*, [2007] ECR II- 947, para 86; Case T-54/03, *Lafarge v Commission,* [2008] ECR II-120, para 47. For more background, see N. Zingales, 'The Hearing Officer in EU Competition Law Proceedings: Ensuring Full Respect for the Right to be Heard?', 7 *Competition Law Review* (2010), 130.

Over time however, the Commission procedure has been modified in response to these nationally-induced procedural rights challenges. The investigation and prosecution stages have become engrained with the need to ensure that complainants or whistle-blowers obtain particular rights of access or rights to be informed.[282] The Court of Justice also emphasised the importance of legal professional privilege and outlined a detailed and nuanced procedure for Commission decisions on how to proceed with potentially privileged information.[283]

67. *Regulatory adaptations* – Regulation 1/2003 restructured the interaction between the Commission, national competition authorities and national courts, but did not adapt the internal procedural decision-making framework at the EU level. The Commission – a political body – is still responsible for policymaking, supervisory activity and the ultimate imposition of fines or periodic penalties. Commission decisions are still adopted by the College of Commissioners, comprising twenty-seven individuals with different portfolios.[284] In 2004, the Commission adopted Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 101 and 102 TFEU, which refined the procedural framework of Commission competition law enforcement.[285] The Regulation has been accompanied by Commission 'Best Practices' structuring the Commission's decision-making process from the filing of a complaint over investigations and procedures to the adoption of an infringement decision.[286]

Regulation 773/2004 confirmed that the Commission is responsible for competition law investigations and prosecutions.[287] It outlines the Commission decision-making process in detail. The Commission may decide to initiate proceedings with a view to adopting an infringement decision at any point in time, but no later than the date on which it issues a statement of objections.[288] The Commission statement of objections provides the starting point for a party's right to be heard.[289] Upon notifying the parties concerned of a statement of objections, the Commission shall set a time limit for parties to be heard in writing. These parties shall 'set out all the facts known to them which are relevant to their defence against the

[282] See J. Flattery, 'Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing', 7 *Competition Law Review* (2010), 54-56.
[283] See Case 155/79, *AM&S Europe Limited* v *Commission,* [1982] ECR 1575, para 18 and Case C-550/07, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, [2010] ECR I-8301. See also A. Andreangeli, 'The Protection of Legal Professional Privilege in EU Law and the Impact of the Rules on the Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: one step forward, two steps back?', 2 *Competition Law Review* (2005), 39.
[284] The Lisbon Treaty nevertheless envisaged adaptations to the number of Commission members. According to Article 17(5) TEU, as from 1 November 2014, the Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number. Article 244 TFEU refers to a rotation system employed in that regard.
[285] Commission Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, [2004] O.J. L123/18.
[286] The newest version dates from 2011, Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, [2011] O.J. C308/6 (hereinafter referred to as 2011 Best Practices). On the best practices, see A. MacGregor and B. Gecic, 'Due Process in EU Competition Cases Following the Introduction of the New Best Practices Guidelines on Antitrust Proceedings', 3 *Journal of European Competition Law & Practice* (2012), 425-438.
[287] Article 1 Regulation 773/2004.
[288] Article 1 Regulation 773/2004.
[289] Article 11 Regulation 773/2004. See also J. Flattery, note 282, 61. For an overview as to how that right emerged as a general principle of EU administrative law, see K. Lenaerts and J. Vanhamme, note 270, 538-551. For a more general oveview, A. Andreangeli, note 274, 31-61. See also E. Ameye, 'The interplay between human rights and competition law in the EU', 25 *European Competition Law Review* (2004), 332-341.

objections raised by the Commission'.[290] The Commission shall give the parties to whom it has addressed a statement of objections the opportunity to develop these arguments at an oral hearing, if they so request in their written submission.[291] Complainants may file a similar request and may also be entitled to an oral hearing.[292] The same goes for persons showing a sufficient interest[293] and other persons invited to do so by the Commission.[294] These hearings shall not be open to the public[295] and shall be conducted by an independent Hearing Officer.[296] Undertakings may be represented by their duly authorized staff members and may also be assisted by lawyers or other qualified persons.[297] A hearing presupposes the parties' access to the files, except in cases of confidential information or business secrets.[298]

A Commission Notice on Best Practices in Commission infringement procedures confirmed the importance of procedural rights in that regard.[299] Firstly, the Commission commits to organize state of play meetings in addition to formal hearings. State of Play meetings endeavour to give ample opportunity for open and frank discussions allowing parties involved and the Commission to make their views known.[300] Meetings are completely voluntary[301] and can take place at different stages throughout the procedure, i.e. shortly after the opening of the proceedings or at a sufficiently advanced stage when the Commission has developed its preliminary views on the status of the case.[302] An additional state of play meeting could follow the oral hearing stages as well.[303] Secondly, the notice confirms the right to be heard and establishes the Commission's willingness to expound on and respect the right to be heard.[304] Thirdly, the Best Practices continue to focus on transparency as a fundamental right. The Commission confirms the protection of legal professional privilege, the enhanced scope of access to files and confidentiality.[305]

ii. The second stage: institutional adaptations towards adversarialism

68. *Towards institutional 'due process' adaptations* – Recognition of procedural rights did not in itself trigger institutional adaptations. The nature of these procedural rights as fundamental rights did nevertheless serve as a basis for institutional modifications at the Commission level. The most poignant example of that evolution is the movement towards a more 'adversarial' procedure in which prosecuting bodies and investigated undertakings engage in an interlocutory process before an infringement decision is adopted. At the

[290] Article 10(2) Regulation 773/2004.
[291] Article 12(1) Regulation 773/2004.
[292] Article 6 (2) Regulation 773/2004.
[293] Article 13 (1) Regulation 773/2004.
[294] Article 13 (3) Regulation 773/2004.
[295] Article 14(6) Regulation 773/2004; on the non-public nature of a hearing, see I. Forrester, note 279, 823. See also W. Wils, 'The Oral Hearing in Competition Proceedings before the European Commission', 35 *World Competition* (2012), 397-430.
[296] Article 14(1) Regulation 773/2004.
[297] Article 14 (5) Regulation 773/2004.
[298] Article 15(2) Regulation 773/2004. See A. Andreangeli, note 274, 82 for a discussion of the Hearing Officer's role in that regard.
[299] For the most recent version, see reference in note 286. For an overview of current procedural rights, see D. Anderson and R. Cuff, 'Cartels in the EU: Procedural Fairness for Defendants and Claimants' in B. Hawk (ed.), *International Antitrust Law & Policy. Annual Proceedings of the Fordham Competition Law Institute* (Huntington, Juris, 2011), 197-235.
[300] 2011 Best Practices, para 60.
[301] 2011 Best Practices, 61.
[302] 2011 Best Practices, 63.
[303] 2011 Best Practices, 64 .
[304] That supplementary role also underlies Decision 2011/695/EU, see Article 3(7) of that Decision.
[305] 2011 Best Practices, para 51-59 and para 92-94.

Commission level, the incremental increase in powers of the Hearing Officer provide an important example of the Union's institutional preference for adversarialism.

69. *The ECHR* – As a starting point, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) plays a particularly important background role in the movement towards adversarialism. Article 6 ECHR states that *'[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'*. The EU is currently not a party to the ECHR[306], but all its Member States are and their national (administrative) law regimes are shaped in compliance with ECHR interpretations. The European Court of Human Rights confirmed that national competition law fines could be captured by the ECHR's reference to criminal charges and should therefore be subject to all guarantees included in Article 6 and the adversarial institutional framework it projects.[307] As a result, competition law fines should be imposed by an independent and impartial tribunal in the meaning of Article 6 ECHR following a hearing in which both prosecution and defendants argue their case before an impartial decision-maker. However, given the particularities of national administrative decision-procedures and for reasons of administrative efficiency, the ECtHR has long accepted that the involvement of an impartial tribunal should not always occur at the actual decision-making or fining stage in areas not covered by 'hard core' or 'real' criminal law provisions.[308] These cases most notably involve administrative or disciplinary sanctions.[309] In those instances, it suffices that judicial review is available following the decision taken by a non-adjudicative body.[310] Ex post judicial review requires the reviewing court to have *full jurisdiction* to re-investigate the merits of the matter[311], i.e. jurisdiction to consider whether the authority correctly classified the facts it opted to rely on, whether it did not transgress the margins of its discretion and whether it applied the law correctly.[312] Only in those cases would a national administrative law regime –

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[306] Although very concrete plans have recently materialised: Article 6 TEU mandates the European Union to accede to the ECHR and concrete steps have been taken in that regard, see T. Lock, 'EU accession to the ECHR: implications for the judicial review in Strasbourg', 35 *European Law Review* (2010), 777-798; See also T. Lock, 'Walking on a tightrope: the draft ECHR accession agreement and the autonomy of the EU legal order, 48 *Common Market Law Review* (2011), 1034. For the final draft agreement of 12 April 2013, see http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/47_1%282013%29008_final_report_EN.pdf.

[307] ECtHR, *A. Menarini Diagnotics S.R.L. v Italy*, judgment of 27 September 2011, para 59. At the EU level, a similar proclamation has been made by Advocate General Sharpston in her Opinion to Case C-272/09 P, *KME Germany v Commission*, judgment of 7 December 2011, nyr, para 64.

[308] For definitions of criminal sanctions, see ECtHR, *Engel v The Netherlands,* judgment of 8 June 1976, para 83 and *Bendenoun v France*, judgment of 24 February 1994. More recent examples include *Janosevic v* Sweden judgment of 23 July 2002, para 67 and *Jussila v Finland*, judgment of 23 November 2006, para 36. On the notion of hard core criminal sanctions, see ECtHR, *Jussila v Finland*, judgment of 23 November 2006, para 43. I. Forrester maintains that Commission fines are indeed hard core, see I. Forrester, 'A challenge for Europe's judges: the review of fines in competition cases', 36 *European Law Review* (2011), 202. Wils argues the contrary in W. Wils, 'The Increased Level of Antitrust Fines, Judicial Review and the ECHR', 33 *World Competition* (2010), 5-29. Advocate General Sharpston accepts Wils' position in her Opinion to C-272/09 P, *KME Germany v Commission*, judgment of 7 December 2011, nyr, para 67.

[309] See in the realm of non-criminal disciplinary sanctions, ECtHR, *Albert and Le Compte v Belgium*, judgment of 10 February 1983, para 29; in the realm of criminal sanctions, ECtHR, *Öztürk v Germany*, judgment of 21 February 1984, para 56.

[310] See D. Slater, S. Thomas and D. Waelbroeck, 'Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?', 5 *European Competition Journal* (2009), 125-126 for an overview in that regard.

[311] ECtHR, *Albert and Le Compte v Belgium*, para 29.

[312] ECtHR, *Menarini*, para 159.

such as a national competition authority able to impose fines – be compatible with the fundamental right to a fair trial.

The ECHR casts a shadow over the operations of the European Commission. Although it is commonly argued that the Commission's administrative sanctioning procedure could remain in existence as long as judicial review was open to those affected by its decisions[313], the Commission responded to ECHR-induced national law concerns to improve attention for procedural rights and to implement the adversarial requirements of Article 6 ECHR already during the administrative stage.

70. *The Hearing Officer* – The establishment of a Hearing Officer constitutes the most notable example in that regard.[314] Following a critical 1982 House of Lords Report focusing on the monolithic decision-making structure of the Commission, the latter charged a specific Director in the Directorate-General for Competition with conducting the hearings. That director would serve as a more independent arbiter between the investigating and prosecuting officials and the investigated undertakings.[315] The role of the Hearing Officer was explicitly recognised in a 1994 Commission decision.[316] In 2001, the Hearing Officer was formally detached from the Directorate-General for Competition and transferred to an independent unit directly reporting to the Member of the Commission responsible for competition.[317] In that capacity, an even more independent Hearing Officer was responsible to organise the hearing and thus to enable an independent internal check on DG Competition officials. The Hearing Officer reported on the status of the hearing and procedural rights discussions to the College of Commission Members, who would then be able to make an informed decision.[318]

The October 2011 reform of the terms of reference of the Hearing Officer constituted the pinnacle of institutional translation of the right to be heard and more generally of an adversarial decision-making system in the EU competition law realm. Decision 2011/695/EU upgraded the Hearing Officer's mandate and extended his competences deep into the investigation stage.[319] From the perspective of Article 6 ECHR, the European Commission's extension of the Hearing Officer's mandate effectively translates its commitment to procedural rights into a particular institutional structure. The Hearing Officer enables a meaningful debate between the officials investigating a case and the undertakings subject to that investigation. Rather than just organising a hearing, the Hearing Officer guides and orbits the investigations from the outset until the ultimate decision and thus serves as a quasi-referee

[313] Speech by A. Italianer, Director-General of the Directorate-General for Competition at the OECD Competition Committee Meeting, Paris, 18 October 2011, 3, http://ec.europa.eu/competition/speeches/text/sp2011_12_en.pdf.
[314] For an overview of the Hearing Officer's historical role before the enactment of the 2011 adaptations, see M. Albers and J. Jourdan, note 276, 185-200; J. Flattery, note 282, 60-71; N. Zingales, note 281, 137-156.
[315] *Twelfth Report on Competition Policy*, 1983, para 36-37 and the (informal) mandate in annex at 273.
[316] Commission Decision 94/810/ECSC-EC of 12 December 1994 on the terms of reference of Hearing Officers in competition procedures before the Commission, [1994] O.J. L 330/67.
[317] Article 2.2. of Commission Decision 2001/462/EC-ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, [2001] O.J. L 162/21.
[318] Article 15 Decision 2001/462/EC-ECSC.
[319] Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the Hearing Officer in certain competition proceedings, [2011] O.J. L 275/29. See W. Wils, 'The Role of the Hearing Officer in Competition Proceedings before the European Commission', 35 *World Competition* (2012), 431-456.

judge.[320] Doing so enables him to provide a review mechanism exclusively focused on procedural rights.

71. *Towards institutional segregation* – Any meaningful procedural control mechanism in the hands of a quasi-independent Hearing Officer would seem useless unless a segregation of functions could be detected between the investigating body called upon to rely on procedural rights and a decision-making body inferring consequences from the (dis)respect to these procedural rights. Although the Hearing Officer does not have particular competences to decide on substantive matters and merely draws up a report for the decision-making College of Commissioners, it effectively checks and balances the operations of DG Comp officials and aims to remedy any procedural defects before the case reaches the College of Commissioners. In so doing, the Hearing Officer provides a wedge between the political body adopting the actual decision and DG Comp making a case and defending it with the Commission. Although that system does not provide a full-fledged *separation* of functions – these all constitute departments or parts of one EU institution, the Commission- a clear *segregation* can be detected between the investigation/prosecution stage in which particular procedural rights remain guaranteed by an impartial arbiter and a final decision-making stage building upon the provisional outcome of the earlier stage. That segregation can graphically be structured as follows:

institutional segregation	segregated responsibilities attributed to	overall responsibility with
investigation/prosecution	DG competition/Legal Service	Competition Commissioner
interlocutory procedural safeguards	*Hearing Officer*	*Hearing Officer reporting to European Commission*
decision-making	College of Commissioners	European Commission

b. Judicial review of administrative cooperation as *ex post* due process guarantees

72. *ECHR-inspired ex post review standards* – Article 6 ECHR also determines the organisation and scope of judicial review against competition law decisions. As mentioned above, in cases of administrative or disciplinary sanctions that would fall within the ECHR's 'criminal' ambit, ex post judicial review with full jurisdiction may suffice for a market supervision regime to be compatible with Article 6.[321] Recent ECtHR case law clarified the scope of full jurisdiction by developing a 'sufficient jurisdiction' standard governing market supervision bodies' decisions. In that understanding, full jurisdiction does not *per se* amount to an *unlimited* jurisdiction over administrative authorities' decision-making practices. Unlimited jurisdiction refers to the ability of a court to cancel, modify and re-adopt an invalid or illegal administrative decision.[322]

The EU Treaty system provides for *ex post* review of Commission Decisions on the basis of Article 263 TFEU. That provision enables the Court to annul illegal Decisions. In addition, Article 261 TFEU allows the Court to be given unlimited jurisdiction to review penalties

[320] This was not the case prior to the 2011 reforms, see L. Ortiz Blanco, note 178,199; on the 2011 reform, P. Van Cleynenbreugel, 'The Hearing Officer's extended mandate. Whose special friend in the conduct of EU competition proceedings?', 36 *European Competition Law Review* (2012), 286-293.
[321] See nr. 69 of this dissertation.
[322] See for that understanding Article 31 Regulation 1/2003, which states that [t]he Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

imposed in accordance with particular Regulations adopted by the Council or by the Council and the European Parliament. Article 31 Regulation 1/2003 grants the Court unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. This section sketches to what extent the EU review system operates in the shadow of the ECHR's 'due process' review standards. It outlines the 'sufficient jurisdiction' standard prevailing in ECHR case law and the EU's *ex post review* standards. Whilst the ECHR is not yet formally binding on the EU, its sufficient jurisdiction standards nevertheless influence and confirm the need for more comprehensive judicial review standards. The supranational review system effectively functions in the shadows of the ECHtHR's sufficient jurisdiction standards.

i. An inspirational ECHR *sufficient jurisdiction* standard

73. *Full jurisdiction and legality review* – The scope of full jurisdiction in the field of market supervision has recently directly been addressed in the ECtHR's *Sigma Radio* and *Menarini* judgments. The *Sigma Radio* judgment considered how judicial review of administrative decisions in the realm of media regulation should be constructed to comply with the full jurisdiction requirements. In its judgment, the ECtHR stated that 'it is often the case in relation to administrative law appeals in the Member States of the Council of Europe, that the scope of judicial review over the facts of a case is limited and that it is the nature of review proceedings that the reviewing authority reviews the previous proceedings, rather than taking factual decisions. It can be derived from the relevant case-law that it is not the role of Article 6 of the Convention to give access to a level of jurisdiction which can substitute its opinion for that of the administrative authorities. In that regard, particular emphasis has been placed on the respect which must be accorded to decisions taken by the administrative authorities on grounds of "expediency" and which often involve specialised areas of law'.[323] In cases where a national court does not enjoy full jurisdiction, the particularities of a field of law could justify review that is merely 'sufficient'. Sufficient access to a court is present when, where upon judicial review the applicants' submissions on their merits or grounds of appeal were examined point by point, without the court having to decline jurisdiction in replying to them or in ascertaining various facts.[324] Sufficient jurisdiction will not be guaranteed where the domestic courts consider themselves bound by the prior findings of administrative bodies which were decisive for the outcome of the cases before them, without examining the issues independently.[325] Although the ECtHR remains cryptic in that regard, it could be argued that the ECtHR hints at the sufficiency of a classical legality review system. In that case however, the national court should be able to remit the case to a different *or the same* administrative body with a view to adopt a new decision in compliance with the court's outcome on the matter.[326] In the particular context of this case, the ECtHR stated that the national court could have annulled the decisions on a number of grounds, including whether the decision had been reached on the basis of a misconception of fact or law, whether there had been no proper enquiry or a lack of due reasoning, or on procedural grounds.[327] These grounds were considered sufficient of themselves to guarantee an independent and impartial treatment of one's case in conformity with Article 6.[328]

In *Menarini*, the ECtHR was directly confronted with the system of competition law enforcement. The Italian competition authority, the *Autorità Garante della Concorrenza e del*

[323] ECtHR, *Sigma Radio Television Ltd. v Cyprus*, judgment of 21 July 2011, para 153.
[324] *Sigma Radio*, para 152 and 154.
[325] *Sigma Radio*, para 156.
[326] *Sigma Radio*, para 157.
[327] *Sigma Radio*, para 159-160.
[328] *Sigma Radio*, para 169.

Mercato condemned an Italian corporation, Menarini for its participation to a prohibited cartel agreement and imposed a fine on the latter. In seeking to have the Autorità's decision repealed, Menarini appealed to the competent Italian administrative tribunal and argued that it did not participate in the agreement. The tribunal dismissed Menarini's action for lack of competence, since the administrative tribunal could only conduct a 'legality review' with regard to the qualification of particular facts into legal categories.[329] Arguing that the scope of review confined to a legality assessment does not correlate to the notion of 'full jurisdiction' in reviewing administrative decisions, Menarini questioned the compatibility of the Italian review structure in the light of Article 6 ECHR.[330] The ECtHR in that regard held that, despite the criminal nature of competition law sanctions[331], subsequent appeals to the administrative tribunal and the Council of State were sufficient once these organs had full jurisdiction to consider the Autorità's decision. In the Italian case, the ECtHR held that '*la compétence des juridictions administratives n'était pas limitée à un simple contrôle de légalité. Les juridictions administratives ont pu vérifier si, par rapport aux circonstances particulières de l'affaire, l'[Autorità] avait fait un usage approprié de ses pouvoirs. Elles ont pu examiner le bien-fondé et la proportionnalité des choix de l'[Autorità] et même vérifier ses évaluations d'ordre technique'*.[332] In addition, the administrative courts retain unlimited jurisdiction to vary the amount of fines imposed by the Autorità.[333] As a result, the availability of legality review as entertained in Italy and unlimited review related to fines sufficed to establish an Article 6-compatible supervision regime.

74. *Sufficient jurisdiction as guiding standard of review* – The particular interpretation granted to 'sufficient jurisdiction' in both judgments demonstrates that the ECHR does not equate 'full jurisdiction' to unlimited jurisdiction, as long as a judicial review mechanism has been inaugurated that at least to some extent ensures that the existence of particular facts can be reconsidered. The extent to which law, fact and appraisal should interact in the scope of review process nevertheless remains unclear. The concept of sufficient jurisdiction grants significant room for institutional choice to national legal orders, but at the same time outlines at least some basic guidelines. First, judicial review against administrative decisions should be organized. Second, the reviewing court should be able both to consider the issues of fact and of law. Although administrative authorities may enjoy a particular margin of appraisal that needs not necessarily form part of the reviewing court's jurisdiction, annulment jurisdiction may be sufficient in circumstances where no fines are imposed.[334] Third, in cases where a reviewing court is only competent to annul a particular administrative decision, it should be able to remit the case to that authority or another authority that can adopt a decision complying with the outcome of judicial review. In addition, fundamental procedural standards such as the equality of arms and the right for both the administration and the individuals concerned to be heard equally comprise essential elements for effectuating judicial review.[335]

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[329] *Menarini*, para 9.
[330] *Menarini*, para 13.
[331] *Menarini*, para 59.
[332] *Menarini*, para 64. A dissenting opinion in that regard has been provided by Judge Pinto de Albuquerque, para 1, referring to the stigmatic effects of sanctioning and the fact that administrative bodies should not be able to impose sanctions as a result.
[333] *Menarini*, para 65.
[334] See also the judgment by the EFTA Court in Case E-15/10, *Posten Norge AS v EFTA Surveillance* Authority, judgment of 18 April 2012, nyr, para 91.
[335] These arguments are incorporated in Article 6(1), which reads that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection

ii. EU legality review…

75. *From Article 6 ECHR to EU (competition) law* – Article 6 ECHR is still not formally binding on the European Union. The EU's prospected accession to the ECHR nevertheless ensures that its interpretation is seriously considered at the EU level as well.[336] Article 19(1) TEU states that in the application of the Treaties and of secondary Union law, the Union Courts ensure that the law is observed. That position is confirmed by the EU Charter of Fundamental Rights, which is binding upon the institutions and the Member States when operating in the field of EU law.[337] It is also established that the ECHR guarantees provide a minimum level of protection entertained at the EU level.[338] Combined with Article 6 ECHR[339], Article 47 of the Charter guarantees the right to a fair trial in an EU context. The Court of Justice is called upon to interpret the EU system of judicial review in the light of Article 47 of the Charter and Article 6 ECHR.[340]

76. *Legality review framework* – The EU Treaty framework does not contain particular provisions on the scope of review in EU competition law. The general provisions of the Treaty on the powers of the General Court and the European Court of Justice therefore remain guiding. The Court's ability to design an EU-made rule of law framework should not however detract attention from its rather limited role in *reviewing* Commission decisions. Review encompasses a control upon the legality of an adopted act in order to uphold this act or remove it wholly or partially from the legal order through its annulment *erga omnes*.[341] Judges act as supplementary administrative supervisors in that regard.

Article 263 TFEU limits the Court's intervention against Commission competition law decisions to such review. It states that the Union Courts shall review the *legality* of acts of Union institutions, bodies, offices or agencies intended to produce legal effects vis-à-vis third parties. Opinions and recommendations are excluded from that review.[342] To the extent that

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of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

[336] See A. Sanchez Graells, 'The EU's Accession to the ECHR and Due Process Rights in EU Competition Law Matters: Nothing New under the Sun?', *SSRN Working Paper*, available at http://ssrn.com/abstract=2156904 for an overview.

[337] See Article 6 TEU. Before the entry into force of the Lisbon Treaty, the Court of Justice already recognized the essential interpretive value of the Charter as a device to outline the Union's fundamental rights' actor, see among others See Case C-540/03, *European Parliament v Council* [2006] ECR I-5769, para 38; Case C-432/05, *Unibet*, [2007] ECR I-2271, para 37; Case C-341/05, *Laval un Partneri Ltd*., [2007] ECR 1-11767, para 90-91. In Case C-403/09 PPU, *Detiček*, [2009] ECR I-12193, para 55, the Court implicitly considered the binding nature of the Charter as a result of the entry into force of the Lisbon Treaty.

[338] See Article 52(3) Charter: In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

[339] On the interactions between the Court of Justice and the European Court of Human Rights, see S. Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing EU Human Rights *Acquis*', 43 *Common Market Law Review* (2006), 629-665; T. Corthaut and F. Vanneste, 'Waves between Strasbourg and Luxembourg: the Right of Access to a Court to Contest the Validity of Legislative and Administrative Measures', *Yearbook of European Law* (2006), 475-514; more recently W. Weiss, 'Human Rights in the EU: Rethinking the Role of the European Convention of Human Rights after Lisbon', 7 *European Constitutional Law Review* (2011), 64-95.

[340] See S. Morano-Foadi and S. Andreadakis, note 265, 600-601.

[341] A. Meij, 'Judicial Review in the EC Courts: *Tetra Laval* and Beyond' in O. Essens, A. Gerbrandy and S. Lavrijssen (eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Groningen, Europa Law Publishing, 2009), 9. Meij refers to a 'recours objectif' underlying this type of review.

[342] Article 263(1) TFEU.

the review stage results in the finding that the act is illegal, it will be void. The Courts will not however be able to adopt a new act. The rectification of a void act will indeed remain the responsibility of the institution, body, office or agency concerned.[343]

The objective recourse structure necessitates a limited set of objective review grounds. Article 263 TFEU categorizes these grounds into lack of competence, infringement of an essential procedural requirement[344], infringement of the Treaties or of any rule of law relating to their application and misuse of powers. Each of these grounds resulted in detailed case law on the scope of their application. Overall, their application virtually encloses any plea in law.[345] As a result, the Courts have been enabled to monitor whether or not the law is observed by the other institutions. In doing so, the Court has also been able to determine what should be comprehended by reviewable EU law standards.

Since review based upon Article 263 TFEU is limited to a legality inquiry, the Courts are not free to modify, re-adopt or alter the nature and scope of actions taken by the institutions.[346] So-called 'unlimited jurisdiction' does indeed remain an exception. According to Article 261 TFEU, only regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations. As a result, only an explicit conferral of unlimited jurisdiction in a general or sector-specific regulation would enable the Court to become a direct decision-taker of itself. Unlimited jurisdiction is constitutionally limited to decisions concerning the imposition of penalties.

77. *General applicability to competition law decisions* – Competition law review does not in any way deviate from these provisions. To the extent that a Commission inquiry results in the adoption of a Commission decision finding an infringement of Article 101 or 102 TFEU, the scope of judicial review against that decision will be considered on grounds reflected in Article 263 TFEU. For example, a Commission decision finding an infringement of Article 101 could be annulled to the extent that particular elements of that decision contravene the substantive scope of EU competition law as determined in the Treaties, implementing acts or earlier case law. The General Court will in that regard only be able to annul the Commission decision, partially annul it or leave it in place in its entirety. They cannot directly 'legalize' an illegal Commission decision by directly adopting a replacement judicial order.[347] As a result, the Court is not called upon to become a competition law supervision body itself. It can only

[343] See Article 266(1) TFEU. According to the case law, the Courts have no power to indicate what measures institutions should adopt. These institutions should nevertheless comply with the judgment and in so doing, the Courts could provide significant guidance in that regard. For an overview of case law and issues, see K. Lenaerts, D. Arts and I. Maselis, *Procedural Law of the European Union* (London, Sweet & Maxwell, 2nd Edition, 2006), 320-321.

[344] The Court can raise pleas, such as the failure to state reasons, of its own motion as a matter of EU public policy, see H. Schweitzer, 'Judicial Review in EU Competition Law' in D. Geradin and I. Lianos (eds.), *Research Handbook on EU Antitrust Law* (Cheltenham, Edward Elgar, 2013), forthcoming. See also T. Corthaut, *EU Ordre Public* (The Hague, Kluwer Law International, 2012), 512 pp. for a general overview.

[345] A. Meij, note 341, 10.

[346] See among many others, Case 34/86, *Council v European Parliament* [1986] ECR 2155, para 42, in which the Court stated that it may not intervene in the process of negotiation between the Council and the Parliament resulting in a general budget. In partially annulling a measure related to that budget, the Court would directly intervene and re-adopt its own view on the general budget as binding law.

[347] A. Meij, note 341, 13-14. The Courts recognized so themselves in among others Joined Cases T-68/89, T-77/89 and T-78/89, *SIV v Commission*, [1992] ECR II-1407, para 319: although a Community Court may, as part of the judicial review of the acts of the Community administration, partly annul a Commission decision in the field of competition, that does not mean that it has jurisdiction to remake the contested decision.

provide guidance to the Commission on how to proceed by annulling particular Decisions on particular legality grounds. The review of fines and periodic penalty payments constitutes an exception in that regard. In accordance with Article 31 Regulation 1/2003, the Union Courts shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. They may cancel, reduce or increase the fine or periodic penalty payment imposed. The Courts are thus called upon to assess the severity of the fine in the light of the factual and legal conclusions adopted by the Commission.

78. *Comprehensive and limited review options* – The application of the constitutional judicial review framework to competition law has proven complex, because of the intricate relationship between the application of the law, which falls in the mandate of judicial review, and the underlying factual and economic analysis, on which legal solutions necessarily have to be based.[348] Reliance on facts to establish the infringement of law allows particular leeway for appraisal to institutions called upon to supervise and enforce the legal framework. In addition, it has been argued that, due to the expert nature of supervisory bodies, they should be granted a significant amount of discretion in the appraisal of facts.[349] These tendencies have been summarized by Craig as requiring a balance between law, facts and discretion in the EU administrative law enforcement framework.[350]

The categories of law, fact and discretion determine the *intensity* of judicial review entertained by the Court. Craig argues that the law and fact stages are the Courts' speciality and warrant particularly detailed and extensive judicial review. According to Craig, the EU Courts have the final authority on legal categories and legal issues: the Courts can substitute judgment on these questions of law.[351] At the same time however, these questions of law have to be assessed within a framework of facts. The Courts will in that regard merely be called upon to determine whether all the facts on which a decision could be based have been taken into account. The Court's substitution powers do not however extend to this field. Regarding the finding of facts, the Court adopts a deferential position, allowing the Commission to establish the facts upon which it can base particular legal conclusions. The Courts will not directly be able to substitute the facts of the Commission for new facts. At the same time however, judicial review of the establishment process includes a full review whether or not all facts have been elaborated on and have been duly taken into account.[352] In so doing, the Court can modify or structure the factual basis upon which a decision will be taken.[353] The scope of judicial review is more limited when it comes to appraising these facts.[354] The appraisal of

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[348] F. Cengiz, 'Judicial Review and the Rule of Law in the EU Competition Law Regime after Alrosa', 7 *European Competition Journal* (2011), 128.

[349] On discretion in the overall regime of competition law enforcement, see W. Wils, note 172, 354. See also A. Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law', 47 *Common Market Law Review* (2010), 361-403, who outlines particular factors to justify more intense reliance on discretionary powers in particular instances. On the difference between discretion and a margin of appraisal encapsulating some *elements* of discretion, see D. Bailey, 'Scope of Judicial Review under Article 81 EC', 41 *Common Market Law Review* (2004), 1337-1338.

[350] P. Craig, *EU Administrative Law* (Oxford, Oxford University Press, 2nd Edition 2012), 400-445.

[351] P. Craig, note 350, 406.

[352] H. Schweitzer, 'The European Competition Law Enforcement System and the Evolution of Judicial Review' in C. D. Ehlermann and M. Marquis (eds.), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Oxford, Hart, 2011), 92.

[353] M. Schimmel and R. Widdershoven, *Judicial Review after Tetra Laval. Some Observations From a European Administrative Law Point of View* in O. Essens, A. Gerbrandy and S. Lavrijssen (eds.), note 341, 64.

[354] J. Ratliff, 'Judicial Review in EC competition cases before the European Courts: Avoiding double renvoi' in C. D. Ehlermann and M. Marquis (eds.), note 352, 461. See also F. Jenny, 'Improving judicial control of administrative decisions in competition enforcement' in A. Mateus and T. Moreira (eds.), *Competition law and*

facts requires a particular margin for an administrative body to assemble and structure them in the light of particular economic or technical circumstances.[355] That margin is rather extensive. An administrative body could choose any solution conceived within an area of reasonable alternatives at its disposal.[356] The Courts will only intervene when the solution opted for cannot reasonably be found within that area of solutions.[357]

In the realm of EU competition law, Bailey complemented Craig by positing a distinction between comprehensive and limited judicial review.[358] Comprehensive review encapsulates an exhaustive review of both the Commission's substantive findings of fact and its legal appraisal of those facts.[359] It comprises the maximum extent to which the Union Courts could stretch their Article 263 jurisdiction.[360] Limited review on the other hand implies that the judge will confine its review to whether the lawfulness of the decision is vitiated by an error of law or fact, procedural impropriety, defective reasoning or a manifest error of assessment.[361] In that perspective, the Courts merely police the boundaries of appraisal by the Commission and leave the latter a significant margin of assessment. To the extent that a Commission assessment is so patently unreasonable that no reasonable decision could adopt the position under scrutiny, the measure will be considered to violate the Commission's margin of appraisal and result in annulment.[362] According to Bailey, the EU courts have always combined a comprehensive and a limited review approach when reviewing EU competition law decisions. To the extent that the establishment of facts and their classification into legal concepts are concerned, the Courts have been relying on a comprehensive approach. A more limited review position nevertheless seems to have taken place in cases where the Commission could rule on the application of those facts in differentiated or nuanced ways. In particular, when complex economic assessments have proven necessary to establish the scope of appraisal of particular facts presumably classified in a legal concept, the Courts have granted more deference to the Commission.[363]

The frameworks of understanding proposed by Craig and Bailey are complementary, as the categories of fact and law require comprehensive review, whereas the realm in which the Commission purportedly enjoys a larger margin of appreciation mandates only limited review. To the extent that pleas in law clearly focus on the way in which the Commission classified facts or applied the law, comprehensive review would be triggered. If pleas in law do not directly classify as either contesting the legal classification of facts or the misapplication of the law, the Courts will more directly rely on the margin of appraisal vested in the Commission. The following table outlines the interaction between both frameworks.

Economics. Advances in Competition Policy Enforcement in the EU and North America (Cheltenham, Edward Elgar, 2010), 71-84.

[355] P. Craig, note 350, 442. H. Schweitzer, note 352, 106.

[356] P. Craig, note 350, 404; M. Schimmel and R. Widdershoven, note 353, 61.

[357] M. Schimmel and R. Widdershoven, note 353, 65.

[358] The Court itself directly referred to its two stages of review in among others case 42/84, *Remia v Commission,* [1985] ECR 2545, para 34.

[359] D. Bailey, note 349, 1332-1333.

[360] In Lasserre's terminology, comprehensive review equates full review. Pure legality review and unlimited review jurisdiction would constitute the exception to that rule, see B. Lasserre, 'The European Competition System in Context: Matching Old Constitutional Principles and New Policy Challenges' in C.D. Ehlermann and M. Marquis (eds.), note 352, 64. See also J. Ratliff, note 354, 455, linking limited and unlimited review together as 'thorough' review.

[361] D. Bailey, note 349, 1333.

[362] A. Meij, note 341, 14. Ratliff refers to maximum control over the legality (and not the opportunity) of an act, see J. Ratliff, note 354, 455.

[363] D. Bailey, note 349, 1355.

	fact	legal classification	appraisal
comprehensive	X	X	
limited			X

79. *Additional limits in appellate review* – The scope of review outlined here only refers to *first instance of review* and is further complicated at the appellate level. It should be remembered that the General Court acts as the review court against any decision of the European Commission in accordance with Article 256(1) TFEU.[364] The Court of Justice in those instances only intervenes as an appellate court. Appeals to the Court of Justice in those instances are limited to points of law only. This implies that the Court of Justice is capable of reviewing the legal characterization of facts established by the General Court and the legal conclusions it has drawn from them.[365] The Court of Justice on the other hand has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts.[366] Only where the clear sense of the evidence is distorted, that appraisal does not constitute a point of law which is subject as such to review.[367] As a result, the Court of Justice should leave additional margin of appreciation to the General Court to establish the relevant facts in a particular case and should more easily remain within the confines of limited judicial review. Only to the extent that these facts are distorted or classified erroneously should the Court of Justice intervene in these matters. It cannot reassess correctly established and classified facts.

80. *Integrating comprehensive and limited review* – Overall, the standard of judicial review in the realm of competition law has been said to be particularly 'light'.[368] This is mainly due to the simultaneous application of both comprehensive and limited review categories to competition law cases. The most problematic aspect of a division between comprehensive and limited judicial review at the outset of any division is that it presupposes particular subcategories to integrate comprehensive and limited review into. The picture Bailey presents merely provides a blurring line between comprehensive and limited review and basically

[364] The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialised court set up under Article 257 and those reserved in the Statute for the Court of Justice. Article 51 of the Statute of the Court of Justice reads that '[b]y way of derogation from the rule laid down in Article 256(1) of the Treaty on the Functioning of the European Union, jurisdiction shall be reserved to the Court of Justice in the actions referred to in Articles 263 and 265 of the Treaty on the Functioning of the European Union when they are brought by a Member State against: (a) an act of or failure to act by the European Parliament or the Council, or by those institutions acting jointly […] or (b) against an act of or failure to act by the Commission under the first paragraph of Article 331 of the Treaty on the Functioning of the European Union. That provision does not capture Commission decisions in the field of competition law.

[365] Case C-90/09 P, *General Quimica and others v Commission*, [2011] ECR I-1, para 71. See also J. Ratliff, note 360, 471.

[366] Thus advocating a correctness review standard, see R. Nazzini, 'Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition law: a Comparative Contextual-Functionalist Perspective', 49 *Common Market Law Review* (2012), 996.

[367] Case C-90/09 P, *General Quimica*, para 72.

[368] See I. Forrester, 'A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review' in C.D. Ehlermann and M. Marquis (eds.), note 352, 407-452. J. Ratliff on the other hand states that judicial review has overall been thorough, see J. Ratliff, note 354, 455 and 462. For a similar perspective, see M. Jaeger, 'The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?', 3 *Journal of European Competition Law & Practice* (2012), 295-314.

leaves the scope of that review in the Court's power of decision to be decided on a case-by-case basis.[369]

The Court of Justice confirmed these conceptual difficulties in review intensity in its case law in *Tetra Lava*l, *Alrosa*, *KME* and *Chalkor*. In *Tetra Laval*[370] – a case focused on the EU concentration control regime[371] – the CJEU held that 'whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the [Union] Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the [Union] Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it'.[372] In emphasizing the importance of the establishment of facts by the Commission, the Court was reported to have limited the scope for deferential judicial review but heightened the standard of proof by paying increasing attention to intensive review in the fact finding process underlying the investigation of concentrations.[373]

The Court's judgment in *Alrosa* specifically focused on the Commission's margin of appraisal in relation to Article 101 TFEU infringements. Article 9 Regulation 1/2003 allows the Commission to accept commitments from undertakings subject to competition law investigations and to make these binding on the undertakings concerned. In this case, the General Court examined and proposed alternative and less onerous solutions that would have resulted in the adoption of adapted commitment decisions.[374] In putting forward its own assessment of complex economic circumstances, the Court nevertheless maintained that the General Court unlawfully substituted its own assessment for that of the Commission.[375] The Court held that 'since the Commission is not required itself to seek out less onerous or more moderate solutions than the commitments offered to it'[376], 'the General Court could have held that the Commission had committed a manifest error of assessment only if it had found that the Commission's conclusion was obviously unfounded, having regard to the facts established by it'.[377] The *Alrosa* judgment has been read as a confirmation of the Court's deferential stance towards Commission action in times when the latter gets ever more powers of appraisal.[378] Since the General Court adopted a particular non-deferential, comprehensive review approach to this case, it has even been argued that a clash between the General Court

[369] D. Bailey, note 349, 1356. See for a contemporary, similar perspective, N. Wahl, 'Standard of Review – Comprehensive or Limited?' in C.D. Ehlermann and M. Marquis (eds.), note 352, 285-294.
[370] Case C-12/03, *Commission v Tetra Laval*, [2005] ECR I-987.
[371] On the specifics of the scope of review in that respect, see D. Bailey, 'Standard of Proof in EC Merger Proceedings: A Common Law Perspective', 40 *Common Market Law Review* (2003), 845-888; B. Vesterdorf, 'Standard of proof in merger cases: reflections in the light of recent case law of the Community courts', 1 *European Competition Journal* (2005), 3-33; M. Nicholson, S. Cardell and B. McKenna, 'The Scope of Review of Merger Decisions under Community Law', 1 *European Competition Journal* (2005), 123-152.
[372] Case C-12/03 P, *Commission v Tetra Laval,* note 370, para 39.
[373] A. Meij, note 341, 19.
[374] Case C-441/07 P *European Commission v Alrosa Company Ltd.* [2010] ECR I-5949*,* para 65.
[375] Case C-441/07 P, *Alrosa,* note 374, para 67.
[376] Case C-441/07 P, *Alrosa,* note 374, para 61. See on the prospects for commitment decisions following this case, R. GarcíaValdecasas and A. Montesa Lloreda, 'A New Life for Commtiment Decisions under Article 9 of Regulation 1/2003? The Aftermath of the ECJ Judgment of 29 June 2010 in Case C-441/07P, Commission v. Alrosa' in T. Baumé, E. Oude Elferink, P. Phoa and D. Thiaville (eds.), *Today's Multi-Layered Legal Order: Current Issues And Perspectives* (Zutphen, Paris, 2011), 97-114.
[377] Case C-441/07 P, *Alrosa,* note 374, para 63.
[378] See F. Cengiz, note 348, 150.

and the Court of Justice on the scope of review had materialized.[379] It could nevertheless also – and less dramatically – be argued that the choice whether or not to accept particular commitments as part of an ongoing Commission inquiry forms part of the margin of appraisal for the Commission. From that point of view, the law and facts would still be covered by comprehensive judicial review.

KME and *Chalkor* formally reject the overall deferential judicial review posture read into *Alrosa*. In the judgments, the Court confirmed that the Commission should carry out a thorough examination of the circumstances of the infringement.[380] The Court also stated that the Union Courts must carry out the review of legality incumbent upon them on the basis of the evidence adduced by the applicant in support of the pleas in law put forward. In carrying out such a review, the Courts cannot use the Commission's margin of discretion as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.[381] The margin of appraisal justifying judicial deference therefore only relates to a limited part of Commission decision making. The Court even went on to hold that 'although the General Court repeatedly refers to the 'discretion', the 'substantial margin of discretion' or the 'wide discretion' of the Commission, such references should not prevent the General Court from carrying out the full and unrestricted review, in law and in fact, required of it'.[382]

Differences in the *Alrosa* and *KME Germany/Chalkor* approaches mainly highlight that the creation of a coherent framework is notoriously difficult to achieve, for reasons attributed to the specificity of each case.[383] The Court appears both to promote comprehensive and limited judicial review, without clearly demarcating the boundaries between both. The extent to which competition law review subscribes to a full review or manifest error standard is unclear, not in the least because the standards upon which the margin of appraisal of the Commission is established themselves remain a subject of judicial interpretation. The scope of judicial review therefore only comes to being through the judicial identification of particular, more or less clear-cut obligations and standards determining the margin of appraisal the Commission enjoys.

The *KME* and *Chalkor* judgments confirm that stance and emphasize an important precondition for comprehensive judicial review. In order for the Court to be able to conduct meaningful review, appellants should develop nuanced and detailed claims in their review applications. As the Court held, 'it is for the applicant to formulate his pleas in law and not for

[379] F. Cengiz, note 348, 151.

[380] Case C-272/09 P, *KME Germany, KME France SAS and KME Italy SpA v Commission*, judgment of 8 December 2011, nyr, para 94; Case C-386/10 P, *Chalkor AE Epexergasias Metallon v Commission*, nyr, judgment of 8 December 2011, para 54; Case C-389/10 P, *KME Germany, KME France SAS and KME Italy SpA v Commission*, judgment of 8 December 2011, nyr, para 125. The cases presented a first, as the Court considered the constitutionality of the General Court's review procedures in the light of Article 47 of the Charter rather than Article 6 ECHR, see A.-L. Sibony, 'Annotation of Case C-272/09 P, *KME Germany, KME France SAS and KME Italy SpA v Commission*, judgment of 8 December 2011, nyr', 49 *Common Market Law Review* (2012), 1990. See also U. Soltesz, 'Due process and judicial review - mixed signals from Luxembourg in cartel cases', 33 *European Competition Law Review* (2012), 241-247; I. Nikolic, 'Full judicial review of antitrust cases after KME: a new formula of review?', 33 *European Competition Law Review* (2012), 583-588. See also A. Sanchez Graells, note 336.

[381] Case C-272/09 P, *KME Germany,* para 102; Case C-386/10 P, *Chalkor,* para 62; Case C-389/10 P, *KME Germany,* para 129.

[382] Case C-272/09 P, *KME Germany,* para 109; Case C-386/10 P, *Chalkor,* para 82; Case C-389/10 P, *KME Germany,* para 136.

[383] See also in that regard D. Gerard, 'EU cartel law and the shaking foundations of judicial review' in D. Gerard, P. Goffinet, T. Joris, P. Nihoul and P. Wytinck (ed.), *Consacré à la concurrence: in honorem Bernard van de Walle de Ghelcke* (Maklu, Antwerp 2011), 11 -23.

the General Court to review of its own motion the weighting of the factors taken into account by the Commission in order to determine the amount of the fine'.[384] The way in which these pleas in law will be formulated determines the extent to which the Court will be obliged to respond to them. More detailed pleas arguing that the Commission transgressed its margin of appreciation in particular circumstances would enable the Court more directly to review these arguments and to dig deeper into the factors that actually contributed to the Commission's position in that particular instance. Appealing parties are therefore able partially to guide and steer the thoroughness of legality review.

81. *Towards more comprehensive judicial review?* – Comprehensive review does not equate to full jurisdiction, but nevertheless more closely resembles that approach. Even though the Courts can indeed substitute their findings of law for the ones maintained by the Commission, the actual powers of the Courts in particular cases do not enable them to adopt new decisions and thus to become direct supervisory bodies in competition law matters in addition to and to the detriment of the Commission. On the contrary, their substituting approach regarding the law only grants the Courts the opportunity to annul the final decision and in so doing, to provide directions as to the correct legal approach to the Commission.[385] The annulment jurisdiction therefore provides the Courts with an indirect substituting framework. Although the Courts cannot as such directly replace the Commission's decision, they at least can provide strong incentives for its substitution in the light of the grounds identified. To the extent that the Courts are able – and willing – to exert comprehensive judicial review, the framework of substitution for the Commission when adopting a replacement for the annulled decision would become more clear. Since the Court would indeed do more than just determine the boundaries of reasonable Commission action, it would itself determine the scope of decisions to be adopted by the latter in response to the Court's judgments. From that perspective, the Court's preference for comprehensive judicial review could be explained by a desire more directly to engage in substitution of administrative decisions, albeit within the limits of the legality review framework.

iii. … complemented by limited *unlimited jurisdiction*

82. *Additional limited scope of unlimited jurisdiction*– The Court's jurisdiction in relation to fines and periodic penalties apparently contrasts with the general judicial review approach, because of the explicitly conferred 'unlimited jurisdiction' standard.[386] Unlimited jurisdiction allows the Courts to determine and adapt the amount of a fine or to repeal it altogether.[387] The Courts can have a fresh look at the factual circumstances and remain at liberty to appraise the imposition and extent of a fine. Elements to be taken into account include the duration of the

[384] Case C-272/09 P, *KME Germany,* para 56; Case C-386/10 P, *Chalkor,* para 49; Case C-389/10 P, *KME Germany,* para 63.

[385] These directions can however only be indicated by the operative grounds of the judgment and the grounds underlying the operative part, as the Court held on numerous occasions, see among others Joined Cases 97/86, 193/86, 99/86 and 215/86, *Asteris and others and Hellenic Republic v Commission* , [1988] ECR 2181, para 27: In order to comply with the judgment and to implement it fully, the institution is required to have regard not only to the operative part of the judgment but also to the grounds which led to the judgment and constitute its essential basis, in so far as they are necessary to determine the exact meaning of what is stated in the operative part. It is those grounds which, on the one hand, identify the precise provision held to be illegal and, on the other, indicate the specific reasons which underlie the finding of illegality contained in the operative part and which the institution concerned must take into account when replacing the annulled measure.

[386] See Article 31 Regulation 1/2003, which states that [t]he Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

[387] See also J. Ratliff, note 360, 465.

infringements and of all the factors capable of affecting the assessment of their gravity, such as the conduct of each of the undertakings, the role played by each of them in the establishment of the concerted practices, the profit which they were able to derive from those practices, their size, the value of the goods concerned and the threat that infringements of that type pose to the European Union.[388] The Courts can substitute their findings for those of the Commission.[389] Unlimited jurisdiction thus provides a supplementary supervisory mechanism to the Courts.[390] It empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to *substitute* their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed.[391]

The Courts' unlimited jurisdiction is nevertheless restricted by three evolutions that reflect potentially increased deference on the side of the EU courts. First, the Commission adopted a non-binding notice containing fining guidelines.[392] These guidelines merely express the Commission's position on the matter and do not provide formal binding legal rules. In practice however, the guidelines establish legitimate expectations in the eyes of undertakings that the Commission will base its calculation and determination of the fine on the basis of their provisions. As such, the guidelines create a legal instrument that *in principle* regulates and confines the scope of Commission action.[393] The Court has recognized the quasi-binding force of formally non-binding guidelines from a legitimate expectations point of view.[394] Second, in so recognizing however, the Court implicitly confined its 'unlimited' review to whether or not the Commission has indeed complied with the guidelines in the determination of the fine or periodic penalty.[395] In its own words, 'it is […] for the Court to verify, when reviewing the legality of the fines imposed by the contested decision, whether the Commission exercised its discretion in accordance with the method set out in the Guidelines and, should it be found to have departed from that method, to verify whether that departure is justified and supported by sufficient legal reasoning'.[396] According to the General Court, it should in that respect be noted that the Court of Justice has confirmed the validity, first, of the

[388] Case C-272/09 P, *KME Germany*, para 96; Case C-386/10 P, *Chalkor,* para 56; Case C-389/10 P, *KME Germany*, para 123.
[389] Case C-272/09 P, *KME Germany*, para 87; Case C-389/10 P, *KME Germany*, para 112.
[390] Case C-272/09 P, *KME Germany*, para 103; Case C-386/10 P, *Chalkor,* para 63; Case C-389/10 P, *KME Germany*, para 130.
[391] Case C-272/09 P, *KME Germany*, para 103; Case C-386/10 P, *Chalkor,* para 63; Case C-389/10 P, *KME Germany*, para 130.
[392] See Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003, [2006] O.J. C210/2. These guidelines replace the 1998 Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty fines, [1998] O.J. C9/3. For an empirical overview of the application of the 1998 Guidelines, see D. Geradin and D. Henry, 'The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts' judgments', 1 *European Competition Journal* (2005), 401-473.
[393] See para 37 2006 Fining Guidelines: Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology. According to the Court, guidelines ensure certainty to parties involved, see Case C-266/06 P *Evonik Degussa* v *Commission and Council*, [2008] ECR I-81, para 53.
[394] Among others Case C-561/06, *Archer Midland Daniels Co v Commission,* [2009] ECR I-1843, para 60. See also Opinion of Advocate General Sharpston to Case C-272/09 P, *KME Germany,* para 33. For an analysis of this standard as 'unlimited within borders', see M. Jaeger, 'Standard of Review in Competition Cases: Can the General Court Increase Coherence in the European Union Judicial System?' in T. Baumé, E. Oude Elferink, P. Phoa and D. Thiaville (eds.), note 376, 119-130.
[395] See D. Gerard, 'Breaking the EU antitrust enforcement deadlock: re-empowering the courts?', 36 *European Law Review* (2011), 461-462. For a critique in that regard, I. Forrester, note 308, 192-197.
[396] Opinion of Advocate General Sharpston Case C-272/09 P, *KME Germany,* para 41. See Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 252 to 255, 266, 267, 312 and 313.

very principle of the Guidelines, and, secondly, the method which is indicated there.[397] Although unlimited jurisdiction allows the Court to vary fines in accordance with its own position and rules on the matter, the availability of particular guidelines invited the Courts to withdraw from adopting a different and specific legal framework.[398] In so doing however, the Court basically adopts a legality review approach of fines.[399] Third, the varying of the amount of fines is not a matter of public policy. The Courts cannot vary the amount of fines on their own motion, but will have to assess the matter on the basis of pleas made by the parties involved.[400]

Despite these shortcomings, the constitutional availability of unlimited jurisdiction has been hailed as a panacea against the substitutability limits attached to Article 263 TFEU review.[401] *Gerard* recently advocated that the EU Courts have shown willingness even to extend the unlimited jurisdiction beyond the mere determination of the amount of fines. He argued that the Court's referral to unlimited jurisdiction when *reviewing* the decision imposing a fine could also amount to a full review of the legal and factual circumstances resulting in the imposition of a fine.[402] To the extent that a Commission decision imposing a fine would thus be contested before the Courts, the Courts would have to engage upon a factual and legal analysis, resulting in the variation, reduction or increase of the fine *as well as the legal and factual attributions and the appraisal of these facts as a matter of law.* Doing so would re-empower the Courts in an era where the Commission enjoys ever farther reaching discretion.[403] Gerard poses this semantic suggestion as a mere possibility. In referring to a similar situation under the ECSC regime, he argues that the Courts should consider themselves capable of intervening as such and therefore become direct market supervision bodies capable of adopting competition law decisions at variance with those adopted by the Commission.[404] The Court of Justice for its part does not read into the unlimited jurisdiction provision a general obligation to scrutinize all aspects of the decision. In both *KME Germany* and *Chalkor*, the Court clearly distinguished the classical legality review prong from the unlimited jurisdiction prong. It stated that the review of legality is only *supplemented* by the unlimited review of fines.[405] As a result, the Court does not appear willing to extend the scope of unlimited review to particular aspects of substance unrelated to the assessment of fines or periodic penalties.

An additional question arises in that regard. To the extent that unlimited review is merely supplementary, the Court would seem to read the scope of unlimited jurisdiction in a rather narrow fashion. In that reading, unlimited jurisdiction would only come into play once the illegality of a Commission infringement decision has been established following

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[397] Case T-127/04, *KME Germany AG, KME France SAS and KME Italy SpA v Commission,* [2009] ECR II-1167, para 34.

[398] For an argument that this position might shift in the wake of *KME* and *Chalkor*, see Case T-360/09, *E.ON Ruhrgas AG, E.ON AG v European Commission*, [2012] ECR I-0000 and A. Wiesbrock, 'E.ON/GDF: Revisiting the Standard of Judicial Review for Fines in Competition Cases', 4 *Journal of European Competition Law & Practice* (2013), 58-60.

[399] D. Gerard, note 395, 461.

[400] Opinion of Advocate General Sharpston Case C-272/09 P, *KME Germany,* para 74.

[401] I. Forrester note 308, 207 mainly posits this as a *potentialis* that the Court should consider but so far refuses to accomplish.

[402] At least by D. Gerard, note 395, 475.

[403] D. Gerard, note 395, 478.

[404] D. Gerard, note 395, 477.

[405] Case C-272/09 P, *KME Germany*, para 103; Case C-386/10 P, *Chalkor,* para 63; Case C-389/10 P, *KME Germany*, para 130.

comprehensive legality review.[406] Only when the setting of a fine in a Commission decision would thus be vitiated by an error of law, the Court could proceed and adopt a replacement fining decision. That reading did not support the understanding of unlimited jurisdiction the General Court adhered to in *Chalkor* and confirmed on appeal by the Court. In the GC judgment, a particular attenuating or aggravating circumstance that did not in itself affect the legality of the calculation of a fine was considered to remain within the realm of judicial adaptation.[407] The Court of Justice subsequently held that the General Court could indeed, while respecting the broad logic of a decision imposing a fine and the methods for calculating it, adjust the amount of the fine.[408] The supplementary understanding of the unlimited jurisdiction mandate should therefore be understood to cover at least situations of illegality and situations in which the Commission incorrectly or inaccurately *calculated* a fine as part of an otherwise legally determined fining basis. The Court does not however seem to propose a broad reading of unlimited jurisdiction, in which unlimited review comprises an independent review mechanism. It can therefore be submitted that unlimited jurisdiction is not perceived as providing a truly effective transformation in the intensity of judicial review over competition law decisions.

iv. Sufficient EU judicial review standards?

83. *Sufficient EU competition law review?* – The EU's combined reliance on legality review and unlimited jurisdiction resemble the Italian system of competition law review and jurisdiction addressed in *Menarini*. In the wake of the ECtHR's judgment, the EU's Director-General for Competition has been fast to point out the resemblances between the Italian system and the supranational Commission-based system of market supervision and judicial review. EU Commission decisions are also subject to legality review and unlimited penalty jurisdiction. He concluded that the TFEU system of review would as a matter of course also comply with the ECHR standards of sufficient jurisdiction in that regard.[409]

That posture is not however as clear as the Director-General's speech makes it appear. The Director-General argued that the ECtHR held that the courts in fact carried out a *full review* of the decision adopted by the Italian competition authority.[410] In that understanding, the Court would only entertain sufficient jurisdiction if it engaged in a full review of all pleas adduced by the parties. Whilst the Court confirmed that position as a matter of EU constitutional law in *KME* and *Chalkor*, it did not outline how such full review should proceed or what criteria could be relied on to monitor full judicial scrutiny of pleas adduced. It will therefore be necessary for the Court to clarify its position and to elaborate on how it implements and structures the sufficient jurisdiction standard developed by the ECtHR.

4. From supranational due process adaptations to institutionalized national operational support

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[406] See for that position, K. Lenaerts, D. Arts, I. Maselis, note 343, 450-451.

[407] Case T-21/05, C*halkor AE Epexergasias Metallon v Commission of the European Communities*, [2010] ECR II-1895, para 105.

[408] Case C-386/10 P, para 97. See also para 99: 'the General Court adjusted the fine while respecting the broad logic of the contested decision and the method used by the Commission to determine the amount of the fine.

[409] Speech by A. Italianer, Director-General of the Directorate-General for Competition at the OECD Competition Committee Meeting, Paris, 18 October 2011 (Hereinafter referred to as Speech, 18 October 2011), 3, http://ec.europa.eu/competition/speeches/text/sp2011_12_en.pdf. See also P. Oliver, ' "Diagnostics" – a Judgment Applying the Convention of Human Rights to the Field of Competition', 3 *Journal of European Competition Law & Practice* (2012), 163-165; M. Bronckers and A. Vallery, 'Fair and effective competition policy in the EU: which role for Authorities and which role for the courts after *Menarini*?', 8 *European Competition Journal* (2012), 283-299.

[410] Speech 18 October 2011, 3.

84. *Responsive institutional translation* – Both the recognition of procedural rights and the institutional adaptations at the EU level are captured by a framework of understanding of responsive institutional translation. Responsive institutional translation argues[411] that particular national legal regimes spurred the development of a body of procedural rights at the EU level in order for the latter to maintain operational legitimacy. As a result of that approach, particular institutional adaptations were coined in order to adapt to newfound supranational rights. The institutional responses developed in that regard present institutional transformation as a one-way bottom-up process triggered by Member State - EU interaction. That process eventually culminates into a supranational institutional regime reflective of national legal solutions that in itself projects a framework for convergence of national institutional solutions.[412] The common ECHR framework structuring EU and national institutional regimes contributes to such convergence to emerge as a matter of course.

It can also be submitted that a responsive institutional translation understanding does not merely incorporate voluntary or gradual supranational and national institutional adaptations to the image of ECHR due process concerns. Institutional adaptations can also more or less directly be imposed on national legal frameworks by supranational actors other than the ECtHR. The EU framework and its constitutional mandate to organise and structure market supervision arrangements proves important in that regard. This section will outline how the EU institutional framework's attention to due process indeed also enables the Court of Justice being at the forefront of imposing institutional adaptations across Member States' legal orders. In that understanding, the including of national authorities and courts into a supranational market supervision system under Regulation 1/2003 justifies their institutional reconfiguration to an image attuned to the role these bodies are expected to play in a supranational enforcement context. That image, coined *national operational support*, complements supranational due process adaptations and the constitutional mandate reflected in Regulation 1/2003.

a. Supranational due process adaptations and national institutional convergence

85. *National institutional convergence* – The scope of convergence offered by a classical narrative focused on due process foresees a *re-translation* of procedural rights at the supranational level into national legal systems that did not adopt or spur these adaptations. As a result, the process of transplantation of particular elements or structures – in this case, emphasis on procedural rights as fundamental requirements of fair competition law supervision – is reported to generate a similar outlook among different national systems operating in the shadows of the supranational arrangements.[413] The retranslation phase, i.e. the scope of convergence envisaged in the classical narrative should not however be overestimated. Convergence in and of itself implies a gradual alignment of national legal regimes. At the same time, these gradual alignment evolutions do not take place in a top-down mandated structure, but are rather triggered by a watch, learn and adopt model based on

[411] And as such aligns with a historical-institutionalist perspective, see I. Maher, 'Competition Law Modernization: An Evolutionary Tale?' in P. Craig and G. De Búrca, note 51, 722-723. For a similar perspective, see D. Gerber, 'The Transformation of European Community Competition Law?', 35 *Harvard International Law Journal* (1994), 97-148.

[412] See R. Nazzini, 'Some Reflections on the Dynamics of Due Process Discourse in EC Competition Law', 2 *Competition Law Review* (2005), 30; J. Flattery, note 282, 79-80.

[413] I. Maher, 'Alignment of Competition Laws in the European Community', 16 *Yearbook of European Law* (1996), 233-234; M. Drahos, *Convergence of competition laws and policies in the European Community: Germany, Austria and the Netherlands*, (The Hague, Kluwer, 2001), 387-418 referring to supranational pushes and national pulls.

mutual learning and networking as underlying governance approaches.[414] As a result, the mechanisms of convergence generated by responsive institutional translation present long term solutions and predictions about the actual scope of convergence remain highly uncertain.

86. *Nationally structured frameworks* – National competition authorities and courts mainly operate in accordance with requirements posited by Article 6 ECHR. The requirements of effective or sufficient judicial review of administrative decision-making allow for differential intensities of judicial intervention in different national legal systems and result in a patchwork of potentially diverging systems of administrative justice.[415] Such different intensities can indeed be detected throughout different Member States' legal systems.

Whilst the Dutch, French, German and United Kingdom legal orders entrusted EU competition law enforcement to one or more independent administrative agencies[416], the internal operations and decision-making procedures differ significantly. In all instances however, the agency adopts a decision on the infringement of EU competition law and allows for a hearing to be organized in the course of infringement proceedings.[417] In doing so, all agencies *de facto* segregate investigative and prosecutorial functions from adjudicative administrative decision-making functions.

At the review stage, the Dutch administrative courts are competent and have full jurisdiction to review or re-adopt the national competition authority's decisions.[418] In Germany and France, civil courts of general jurisdiction are competent to review competition authorities' decisions. The German *Oberlandesgericht* can review the legality of the *Bundeskartellamt*'s

[414] For the institutional framework enabling that development, see M. De Visser, note 23.

[415] For an economic assessment of how judicial review should proceed, see Y. Katsoulacos and D. Ulph, 'Optimal Enforcement Structures for Competition Policy: Implications of Judicial Reviews and of Internal Correction Mechanisms', 7 *European Competition Journal* (2011), 71-88.

[416] See para 42 2004 National Authorities Notice and the annex to that notice, requiring national competition authorities operating in the network to comply with these principles. These authorities are held competent to apply EU competition law. An annex contains the national bodies serving as competition authorities in that regard. According to that annex, the German *Bundeskartellamt*, the United Kingdom's *Office of Fair Trading* (to be replaced by the *Competition and Markets Authority*, see P. Freeman, 'The Competition and Markets Authority: can the whole be greater than the sum of its parts?', 1 *Journal of Antitrust Enforcement* (2013), 4-23) and sectoral regulators (*Office of Communications (Ofcom), Gas and Energy Markets Authority (Ofgem), Northern Ireland Authority of Energy Regulation (Ofreg NI), Office for Water Services (Ofwat), Office of Rail Regulation (ORR) and the Civil Aviation Authority (CAA)*) and the Dutch *Mededingingsautoriteit* are responsible for the enforcement of EU competition law in these respective legal orders.

[417] For *Germany*, §56 *Gesetz gegen Wettbewerbsbeschränkungen* of 15 July 2005 (amended by Art. 1 of the Act of 20 April 2009), *Bundesgesetzblatt* 2005 I, 2114. The *Bundeskartellamt* itself is also prone to functional segregation: cases are decided by decision-making chambers that are independent in their decision-making functions. Bundeskartellamt officials will prosecute the matter before these chambers, see H. Schweitzer, note 352, 111. In the *United Kingdom*, Competition Act 1998, 1998 c. 41, http://www.legislation.gov.uk/ukpga/1998/41/contents; Enterprise Act 2002, 2002 c. 40, http://www.legislation.gov.uk/ukpga/2002/40/contents. Mergers are (voluntarily, i.e. on voluntary application by the parties to the OFT, which opts to refer the matter) reviewed by the Competition Commission, see for background and on a proposal to integrate the Commission with the OFT, J. Aitken and A. Jones, 'Reforming a World Class Competition Regime: The Government's Proposal for the Creation of a Single Competition and Markets Authority', *Competition Law Journal* (2011), 99. On the system of OFT decision-making and on the responsibilities of a Senior Responsible Officer, see OFT Guidance, 'A guide to the OFT's investigation procedures in competition cases', October 2012, available at http://www.oft.gov.uk/shared_oft/policy/OFT1263rev (last consulted 27 February 2013). See also S. Wilks, 'Institutional Reform and the Enforcement of Competition Policy in the UK', 7 *European Competition Journal* (2011), 1-23. For *the Netherlands,* see See Article 54a Wet van 22 mei 1997, houdende nieuwe regels omtrent de economische mededinging (Dutch Competition Act), available at www.wetten.overheid.nl.

[418] Although a preliminary objections procedure has to be completed within the NMA, Articles 8:56-8:65 Wet van 4 juni 1992, houdende algemene regels van bestuursrecht (AWB), www.wetten.overheid.nl.

decisions, without however being able to re-adopt a new decision. It only retains full jurisdiction in relation to the amount of fines imposed.[419] The French *Cour d'Appel de Paris* – rather than its administrative law counterpart – enjoys unlimited jurisdiction to reconsider decisions adopted by the *Autorité de la Concurrence*.[420] It can adopt a *de novo* decision in the infringement proceedings at hand. The appeal could be initiated by either the addressees or by the Minister of Economic Affairs. The latter will not only be able to initiate an appellate procedure, but could also be called upon to represent the 'government' or the 'administration' having adopted the contested decision. The *Autorité* itself does not have a particular role to play in the appellate procedure and does not seem to be represented there.[421] It rather functions as a first instance judge, who, by reason of its judicial capacity, cannot be a party in a case decided by it in a first instance dispute. The operational independence of the *Autorité* and its detachment from the central administration seem to confirm that stance. In practice however, the *Cour d'Appel* accepted that the *Autorité* acted as co-defendant next to the Minister and even went as far as allowing the *Autorité* to become a sole defendant in a case lodged against its decision, without the Minister being represented in the proceedings.[422] In the United Kingdom, competition authority decisions have to be appealed to a specialized *Competition Appeal Tribunal* (CAT) with full jurisdiction and the ability to adopt *de novo* decisions.[423] CAT decisions can subsequently be reviewed on points of law by the *Court of Appeal*.[424]

The Belgian, Irish and Swedish systems on the other hand enable courts to adopt first instance infringement decisions. In Belgium, the General Directorate for Competition, a unit of the Belgian Federal Public Service, is responsible for conducting concrete inspections and to co-determine the scope of competition law policy.[425] The Directorate supports the operations of an independent Competition Council. The latter is a Belgian administrative court capable of adopting decisions establishing the infringement of Articles 101 and 102 TFEU, in addition to imposing fines.[426] The Competition Council is composed of a Council, a collegiate body adopting decisions, a registry and an independent college of competition prosecutors (Auditoraat).[427] The latter, although formally part of an administrative court, basically prepares and defends the government's position on the case, not unlike a public prosecution office. This institutional setup strongly resembles the French *Autorité de la Concurrence*, the only difference being that the Belgian Council is structured as an administrative jurisdiction.

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[419] See §71(4) and §83(1) GWB.

[420] This is the so-called *effet dévolutif.* See N. Petit and L. Rabeux, 'Judicial Review in French Competition Law and Economic Regulation. A Post *Commission v Tetra Laval* Assessment' in O. Essens, A. Gerbandy and S. Lavrijssen, note 341, 109-110.

[421] Article R 464-11 French Commercial Code.

[422] See N. Petit, 'The judgment of the European Court of Justice in VEBIC: Filling a Gap in Regulation 1/2003', 2 *Journal of European Competition Law & Practice* (2011), 344.

[423] Schedule 8, section 3(2) Competition Act 1998. The entire structure of competition law enforcement appears to be attuned to theories about (the intensity of) judicial review by UK judges. For an overview and application to the CAT, see D. Rose and T. Richards, 'Appeal and Review in the Competition Appeal Tribunal and High Court', www.blackstonechambers.com, 15.

[424] Section 49(1) Competition Act 1998. If the case however relates to Scotland or Northern Ireland, their respective appellate courts are competent to entertain the appeal, see Section 49(4).

[425] Article 34 Belgian Law of 15 September 2006 on the Protection of Economic Competition (LPEC), officially Loi sur la protection de la concurrence économique, coordonnée le 15 septembre 2006, *Belgian Official Journal* 29 September 2006, p. 50613 (hereafter referred to as LPEC).

[426] Article 11 §1 LPEC.

[427] Article 11 §2 LPEC. Before the 2006 Reform establishing the current regime, the Auditoraat (then called Corps des Rapporteurs) and the Council were distinct bodies, as the annex to para 42 2004 National Authorities Notice shows. See also F. Rizzuto, 'Competition Law Enforcement in Belgium: The System Remains Flawed and Uncertain Despite Recent Reform', 29 *European Competition Law Review* (2008), 367-375.

The Belgian system is on the brink of profound transformations. The judicial Council will be transformed into and administrative authority which will adopt infringement decisions. The newly created Authority will be supported by an independent prosecutorial service, which will integrate the Auditoraat and the General Directorate's investigators.[428] Whereas the reviewing Brussels *Cour d'Appel* currently enjoys unlimited jurisdiction to re-adopt competition law decisions, the proposed legislative amendments will distinguish between annulment jurisdiction and full jurisdiction depending on the types of decisions adopted.[429] The Irish legal order entrusts its High Court with final decision-making powers. If the Irish Competition Authority considers that EU competition law has been infringed, it can initiate legal proceedings before the High Court to compel parties to stop their activities.[430] The High Court adopts a decision on the infringement of EU competition law, whilst the Competition Authority functions as a prosecutorial body in that regard.[431] In the case of Sweden, the competition authority (*Konkurrensverket*) may adopt a decision requiring the (temporary) termination of anticompetitive practices.[432] It may not however impose fines. A decision on fines generally needs to be adopted by the *Stockholm District Court*. The Competition Authority has to allow the undertaking concerned to be heard on the draft summons application made by the Authority to the City Court.[433] In cases where the infringement is clear however, the *Konkurrensverket* can impose a fine order, with which the undertaking concerned has to consent.[434] The specialized Swedish *Market Court* oversees appeals against obligations imposed or decisions adopted by the *Konkurrensverket* or fining decisions imposed by the *District Court*. The *Konkurrensverket* acts as respondent party in appellate proceedings.[435] The *Market Court* is only empowered to annul the contested decisions or District Court judgments. It is not able to adopt a new decision, but only sets the first instance decision or judgment aside.[436]

b. From convergence to assimilation? Institutionalizing national operational support

87. *From mere gradual convergence…* – This succinct overview of national institutional diversity highlights that all Member States seek to structure their national competition authorities and review courts in accordance with the principles read into Article 6 ECHR. At the same time however, the vague principles read into that provision and elaborated upon in *Sigma Radio* and *Menarini* only allow to identify converging tendencies towards either segregated institutional operations or due process-compliant court procedures.

It can be submitted that the EU constitutional mandate to organize competition law supervision and its inclusion of national authorities and courts in a supranationally structured system provides an additional impetus for convergence across national legal orders. As

[428] See Article IV.16 Projet de Loi of 27 December 2012 portant insertion du Livre IV "Protection de la concurrence" et du Livre V "La concurrence et les évolutions de prix" dans le Code de droit économique et portant insertion des définitions propres au livre IV et au livre V et des dispositions d'application de la loi propres au livre IV et au livre V, dans les livres I et XV du Code de droit économique, available at http://www.dekamer.be/FLWB/PDF/53/2592/53K2592001.pdf (Hereinafter referred to as Belgian 2012 Projet de Loi).
[429] Article IV.79 Belgian 2012 Projet de Loi.
[430] Section 14(2) and Section 29 2002 Irish Competition Act, allowing the Authority to bring cases to civil court. See also See Sections 4 and 5 2002 Irish Competition Act, the infringement of which are criminal offences.
[431] See Section 4(3) and Section 15(1) 2002 Irish Competition Act.
[432] Chapter 3, Article 1 Konkurrenslag (2008:579).
[433] Chapter 3, Article 5 Konkurrenslag (2008:579).
[434] Chapter 3, Article 16 Konkurrenslag (2008:579).
[435] Chapter 7, Article 1 Konkurrenslag (2008:579).
[436] Chapter 8, Articles 2 and 3 Konkurrenslag (2008:579).

participants in an EU-structured system of market supervision, national competition authorities and courts have to ensure that the EU constitutional mandate is rendered operational in the national legal orders. Whilst Article 35 of Regulation 1/2003 acknowledges national institutional autonomy, it also emphasizes the need for the effective application of EU competition law in the national legal orders. The Court's case law indicated that such effective application predominantly encompasses the *uniform application* of EU law in the Member States. It is submitted that attention to uniform application highlights the need for national institutional organization frameworks capable of bringing about such uniformity. The Court of Justice's approach to national institutional autonomy could be said to reflect a preference for national institutional adaptations in the service of uniformity.

88. … *over uniform application…*– Despite the Regulation's emphasis on the role of national competition authorities and judges, the necessity of uniform application of EU competition rules has consistently been emphasized.[437] In 2009, Advocate General Kokott stated that 'it is of fundamental importance that the uniform application of competition rules in the Community be maintained. Not only the fundamental objective of equal conditions of competition for undertakings on the single market but also the concern for uniform protection of consumer interests in the entire Community would be undermined if in the enforcement of the competition rules of Articles [101 TFEU] and [102 TFEU] significant disparities occurred between the authorities and courts of the Member States. For that reason, the objective of a uniform application of Articles [101 TFEU] and [102 TFEU] is a central theme which runs throughout Regulation No 1/2003'.[438]

The General Court equally confirmed the need for uniform application of EU (competition) law. In *France Télécom*, it held that 'it must be observed that Regulation No 1/2003 puts an end to the previous centralized regime and, in accordance with the principle of subsidiarity, establishes a wider association of national competition authorities, authorising them to implement Community competition law for this purpose. However, the scheme of the regulation relies on the close cooperation to be built up between the Commission and the competition authorities of the Member States organised as a network, the Commission being given responsibility for determining the detailed rules for such cooperation'.[439] 'The Commission in effect has very wide powers of investigation under Regulation No 1/2003 and is in any event entitled to decide to initiate proceedings relating to an infringement, which entails removing the case from the Member States' competition authorities. The Commission thus retains a leading role in the investigation of infringements'.[440] Therefore, the Commission was authorized to carry out an inspection even if a national authority is already dealing with the matter.[441] In addition, it cannot be inferred from Regulation 1/2003 that the Commission would immediately be prevented from taking action in the case when a national competition authority already commenced its own investigation.[442]

[437] P. Oliver, 'Le Règlement 1/2003 et les principes d'efficacité et d'équivalence', 40 *Cahiers de droit européen.* (2005), 351-394.
[438] Opinion of Advocate General Kokott in Case C-8/08, *T-Mobile*, [2009] ECR I-4529, para 85.
[439] Case T-339/04, *France Télécom v Commission*, [2007] ECR II-521, para 79.
[440] Case T-339/04, *France Télécom v. Commission*, para 79.
[441] Case T-339/04, *France Télécom v. Commission*, para 81. See P. Berghe and A. Dawes, '"Little Pig, little pig, let me come in": an evaluation of the European Commission's power of inspection in competition cases', 30 *European Competition Law Review* (2009), 407-423.
[442] Case T-340/04, *France Télécom v. Commission*, [2007] ECR II-573, para 129.

Recent Court of Justice judgments interpreting Regulation 1/2003 also refer to the uniform and effective EU law application to the detriment of national procedural autonomy.[443] As mentioned above, in *X. BV*, the Court held that the European Commission could intervene in national proceedings that do not directly pertain to issues relating to the application of Article 101 or 102 TFEU.[444] The only requirement imposed is that the coherent application of Article 101 or 102 so requires.[445] The European Commission would thus be allowed to submit on its own initiative written observations to a national court of a Member State in proceedings relating to the deductibility from taxable profits of the amount of a fine or a part thereof imposed by the Commission from infringement of Articles 101 and 102 TFEU.[446] In *T-Mobile*, the CJEU maintained that national courts were required to apply a presumption of causal connection between undertakings' behaviour and anticompetitive practices as developed in CJEU case law.[447] It considered these presumptions to be a part of substantive EU competition law and therefore imposed them on national courts.[448] These cases demonstrate the importance of uniform and effective application of EU competition rules.

In his opinion in *Tele 2 Polska*, Advocate General Mazák explicated that a national competition authority cannot take a decision stating that a practice does not restrict competition within the meaning of Article 102 TFEU in a case in which it has found, after conducting proceedings, that the undertaking did not engage in abusive behaviour.[449] Only the Commission can take a decision finding there has been no infringement of Article 102.[450] The Court confirmed that position. In doing so, it emphasized the European Commission's continued specific role in clarifying the law and ensuring its consistent application throughout the European Union.[451] In *Pfleiderer*, the Court stated that the competition authorities of the Member States and their courts or tribunals applying Articles 101 and 102 TFEU have to

[443] It could be argued that Regulation 1/2003 constitutes a 'harmonized' set of EU procedural rules in relation to competition law enforcement, contrary to different sectors of law that do not know any procedural harmonization at all, see M. Böse, 'Annotation of Case C-45/08, Spector Photo Group NV, Chris Van Raemdonck v. Commissie voor het Bank-, Financie- en Assurantiewezen, Judgement of the European Court of Justice of 23 December 2009, nyr', 48 *Common Market Law Review* (2011), 199. According to Regulation 1/2003, Member States are not precluded from adopting national legislation, as long as that legislation respects fundamental principles of EU law (see among others consideration 9). In so doing, the Regulation recognizes the procedural autonomy of Member States to the extent no specific EU procedural rules have been established.

[444] Case C-429/07, *X. BV,* para 30. See K. Wright, 'European Commission interventions as amicus curiae in national competition cases: the preliminary reference in X BV', 30 *European Competition Law Review* (2009), 509-513.

[445] Case C-429/07, *X. BV*, para 32.

[446] Case C-429/07, *X. BV*, para 16 and 40.

[447] For comments on this case, see A. Gerbrandy, 'Annotation of Case C-8/08, T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV, Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit, Judgment of the Court (Third Chamber) of 4 June 2009', 47 *Common Market Law Review* (2010), 1199-1220.

[448] Case C-8/08, *T-Mobile*, para 52.

[449] Opinion of Advocate General Mazák in Case C-375/09, *Tele 2 Polska,* para 52.

[450] Opinion of Advocate General Mazák in Case C-375/09, *Tele 2 Polska*, para 47.

[451] Case C-375/09, *Tele 2 Polska*, para 29-30. See F. Rizzuto, 'Article 5 of Regulation 1/2003: the limits to national procedural autonomy', 32 *European Competition Law Review* (2011), 564-572; B. Van de Walle de Ghelcke, 'Limits to the Power of National Authorities in the Application of EU Competition Law', 2 *Journal of European Competition Law & Practice* (2011), 477-479; M. Amorese, 'The Primacy of the European Commission in the European Competition Network as a Safeguard against national competition policies and the rejection of the '*primus inter pares'* doctrine, 18 *Columbia Journal of European Law* (2011), 177-196; S. Brammer, 'Comment on Case C-375/09, *Prezes Urzedu Ochrony Konkurencji i Konsumentów* v. *Tele2 Polska sp. z o.o.* (now: *Netia SA*), Judgment of the Court of Justice (Grand Chamber) of 3May 2011, nyr', 49 *Common Market Law Review* (2012), 1163-1178; A. MacGregor and B. Gecic, 'EU antitrust proceedings and national competition authorities: a leap in the wrong direction', 18 *International Trade Law & Regulation* (2012), 1-9.

ensure that those articles are applied in the general interest.[452] The Court considered itself competent to guide national courts in defining this general interest.[453] Somewhat paradoxically however, the Court explicitly refrained from doing so in *Pfleiderer*.[454]

89. *…and reconfigured national institutional autonomy…* – The abovementioned selections of judgments and opinions reflect a traditional perspective on national institutional autonomy. They deal with the locus of authority to investigate, proceed, conduct and terminate potential competition law infringements. Member States remain free to some extent to determine the composition, nature and enforcement capacities of their competition authorities, the procedural framework in which national and EU competition law are enforced and the extent to which undertakings can remedy procedural shortcomings.[455] National institutional and procedural autonomy cannot however impede the full effectiveness of competition law enforcement. The ultimate responsibility therefore remains with the European Commission. Member States can be *obliged* to set aside the application of a procedural rule impeding effective realization and uniform application of EU competition law. In so doing, the abovementioned cases and opinions propose ever more intrusive EU intervention into national legal orders.

90. *… towards institutional assimilation?* – As a result of attention to due process, a shift from classical 'inquisitorial' administrative regimes to more adversarial conceptions can be identified.[456] According to Rizzuto, 'the absence in Regulation 1/2003 of explicit provisions regarding appeal proceedings does not mean that national procedural rules in place in the Member States governing the effective application of the EU substantive competition rules are beyond the reach of the requirements of EU law'.[457] National legal systems are no longer autonomous, but see their choices limited in the light of institutional oreganisation principles reflecting such adversarial due process requirements. From that perspective, institutional principles constitute a precondition for institutions reflecting due process concerns. The Court of Justice's clear expression that national courts are to be included into the EU market supervision framework justifies judge-steered intrusion into the national institutional frameworks across the Member States. The Court's 2010 judgment in *Vebic* presents the most recent installment of the due process adaptation evolutions guiding the institutional organization of EU competition law supervision in that regard.

c. The Court of Justice's role in creating an institutional framework of national operational support

91. *Vebic: the Court of Justice actively participates in the assimilation debate* – The Court of Justice's institutional design role in fine-tuning national competition supervisors in accordance with supranational due process adaptations occurred in the 2010 *Vebic*

[452] Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, [2011] ECR I-5161, para 19.
[453] Case C-360/09, *Pfleiderer*, para 24.
[454] Case C-360/09, *Pfleiderer*, para 30-31, demanding that national courts do so on a case-by-case basis and in accordance with guidance provided by the Court's national procedural autonomy case law. See also Opinion of Advocate General Jääskinen to Case C-536/11, *Donau Chemie*, nyr, para 70, stating that principle of effective judicial protection, as applied in the light of Article 19(1) TEU, precludes a provision of national competition law like Paragraph 39(2) of the [national competition act] which prohibits access to the files of the Cartel Court to third parties wishing to bring civil damages claims against the cartel participants, absent the consent of the latter.
[455] As exemplified in P. Berghe and A. Dawes, note 441, 410.
[456] M. Asimow and L. Dunlop, 'The Many Faces of Administrative Adjudication in the European Union', 61 *Administrative Law Review* (2009), 141.
[457] F. Rizzuto, 'The procedural implications of VEBIC', 32 *European Competition Law Review* (2011), 293.

judgment.[458] At stake in that case was the confusing organisation of the Belgian national competition authority. The authority comprises two parts, an administrative Competition Service attached to the Belgian Federal Public Service and an independent administrative court, the Competition Council. The Competition Council itself is composed of a general assembly of councillors, a college of competition prosecutors and a registry.[459] In practice, a member of the college of competition prosecutors instructs the members of the Competition Service to conduct inspections or assemble materials in order to compose a file that is to be brought before the Council's general assembly.[460] The general assembly will subsequently hear both the competition prosecutor and the parties subject to the investigation before rendering an administrative judgment.[461] Appeals against the Council's decision are organised before the Brussels Court of Appeal.[462] An appellate procedure can only be initiated by the parties involved in the decision or by the Federal Minister of Economic Affairs.[463] The Minister can also intervene in appellate proceedings initiated by the parties involved. Since the college of competition prosecutors comprises an inherent part of the judicial Council, it does not qualify as a party involved and could not possibly initiate or intervene in appellate proceedings.[464] If the Competition Council – even if represented by the college of competition prosecutors – were to intervene or appear in appellate proceedings, a first instance court would become a party to a dispute in which it already acted as a judge. Such a situation would run counter to the principle of unbiased decision-making (*nemo iudex in sua causa*).[465]

This Belgian procedure resulted in a quirky institutional outcome in the *Vebic* case. Vebic, a Belgian bakery federation found itself the sole party in appellate proceedings against a Competition Council decision imposing a fine on it.[466] As the Minister had chosen not to intervene, no governmental representative acted as a defendant in the appellate procedure, leaving Vebic as the sole party to the appellate dispute. Although Vebic did not object to that situation, the Court of Appeal questioned the compatibility of the national regime with the requirements of EU law.[467]

In its judgment, the Court of Justice held that this organisational system violated EU law. The Court reasoned that '[a]lthough Article 35(1) of the Regulation leaves it to the domestic legal order of each Member State to determine the detailed procedural rules for legal proceedings brought against decisions of the competition authorities designated thereunder, such rules must not jeopardise the attainment of the objective of the regulation, which is to ensure that Articles 101 TFEU and 102 TFEU are applied effectively by those authorities'.[468] In cases where a national competition authority would not be afforded rights as a party to proceedings, a risk remains that the court before which the proceedings have been brought might be wholly

[458] Case C-439/08, *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW*, [2010] ECR I-12471.
[459] See Article 1 §4 Belgian Law on the Protection of Economic Competition (LPEC), Loi sur la protection de la concurrence économique, coordonnée le 15 septembre 2006, *Belgian Official Journal* 29 September 2006, 50613.
[460] Article 11 §2 LPEC; see also Article 25 LPEC.
[461] Article 44 LPEC.
[462] Article 48 §3 LPEC.
[463] Article 75 LPEC.
[464] Article 76 §2 LPEC. Opinion of Advocate General Mengozzi in Case C-439/08, *Vebic,* para 25. That was at least the interpretation of the Brussels Court of Appeal in this case, see F. Louis, 'L'arrêt de la Cour de Justice dans l'affaire VEBIC: une opportunité de parfaire l'organisation de l'autorité belge de concurrence', *Tijdschrift voor Belgische Mededinging – Revue de la Concurrence Belge* (2011), 14; F. Rizzuto, note 457, 287.
[465] Opinion of Advocate General Mengozzi in Case C-439/08, *Vebic,* para 61 and para 80-82.
[466] C-439/08, *Vebic,* para 37.
[467] C-439/08, *Vebic,* para 39.
[468] C-439/08, *Vebic,* para 57.

captive to the pleas in law and arguments put forward by the undertaking(s) bringing the proceedings.[469] Article 35 Regulation 1/2003 should therefore be read to preclude national rules which do not allow a national competition authority to participate, as a defendant or respondent, in judicial proceedings brought against a decision that the authority itself has taken.[470]

92. *The limited scope of Vebic* – At the same time, the Court did not posit an absolute intervention obligation for national authorities. National competition authorities were to gauge the extent to which their intervention is truly necessary in a particular case. Should the authority systematically refuse to appear in appellate proceedings, the effectiveness of EU law would be brought in jeopardy.[471] The Court subsequently left it to the Member States to designate the body or bodies of the national competition authority which may participate, as a defendant or respondent, in proceedings brought before a national court against a decision which the authority itself has taken, while at the same time ensuring that fundamental rights are observed and that European Union competition law is fully effective.[472]

The Court's approach in *Vebic* is twofold. On the one hand, the Court directly mandates institutional overhaul of the Belgian competition law supervision system by requiring it to enable the Competition Council to intervene in appellate proceedings. Although the Court of Justice referred to Article 35 Regulation 1/2003 as the legal basis for its judgment, that provision merely obliges Member States to designate authorities and courts competent to apply EU competition law and enables them to allocate different powers and functions to national authorities and courts. The Court nevertheless read into Article 35 a mandate to organise the institutional operations of national competition authorities in compliance with the observance of fundamental rights.[473] More spectacularly even, the Court specifically required that an appellate procedure against a national competition authority's decision should always (potentially) allow for the participation of national competition authorities, even to the extent that a national authority is a court itself. This implies that national law limitations on a national authority's participation should be discarded and replaced with a more fitting institutional alternative reflective of the Court's ideal-typical image of competition law enforcement.[474]

On the other, the Court immediately limited the intervention of national competition authorities in appellate proceedings by allowing a national authority to gauge the necessity of an intervention and by merely prohibiting it from *systematically* refusing to appear as a defendant or respondent in those proceedings. At the same time, the Court did not directly address the scope of appellate review, nor did it mandate unlimited jurisdiction to be an EU standard of national appellate review.[475] In doing so, the Court seemed to retract from its bold statement that participative review is necessary in all instances as a matter of EU law. That retraction did not however save national institutional arrangements like the Belgian system,

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[469] C-439/08, *Vebic,* para 58. The Court subsequently stated that '[i]n a field such as that of establishing infringements of the competition rules and imposing fines, which involves complex legal and economic assessments, the very existence of such a risk is likely to compromise the exercise of the specific obligation on national competition authorities under the Regulation to ensure the effective application of Articles 101 TFEU and 102 TFEU'.

[470] C-439/08, *Vebic,* para 59.

[471] C-439/08, *Vebic,* para 60.

[472] C-439/08, *Vebic,* para 61.

[473] C-439/08, *Vebic,* para 63 requires national authorities to provide procedural frameworks that enable respect for fundamental rights.

[474] See F. Rizzuto, note 457, 286.

[475] The Court only refers to this as a matter of fact, see C-439/08, *Vebic*, para 44.

which did not at all accommodate participative judicial review as envisaged by the Court. The bottom-line of the judgment, i.e. the participation requested from national authorities in appellate procedures against their own decisions, has indeed firmly been posited.

93. *From convergence to Court-induced assimilation* – It is submitted that *Vebic* reflects a shift in the understanding of convergence identified in the wake of Regulation 1/2003. Despite reservations the Court makes in that judgment as to the extent of a national authority's participation in appellate procedures, it posits a national competition authority's participation in appellate review procedures as an institutional principle of EU competition law. In doing so, the Court of Justice takes convergence among national legal systems in the wake of Regulation 1/2003 to a new level. It presents itself as a supranational standard-setter determining the institutional organisation of national competition appellate procedures. More specifically, it imposes a particular institutional blueprint of a procedurally viable system on the Belgian – and by extension all national[476] - legal order(s).[477] Rather than enabling spontaneous convergence among diverging national regimes, the Court directly mandates national legal orders to assimilate around principles of institutional organisation it determines necessary for the effective enforcement of EU competition law in a national setting. As a result, the Court provides national legal orders with 'institutional guidance' on how to implement and comply with an EU-proof system of decentralised competition law enforcement.

The scope of institutional guidance reflected in *Vebic* appears only to include the obligation for national authorities to participate in appellate proceedings against their own decisions. However, that obligation additionally and more fundamentally presupposes a particular institutional framework enabling such participation. Although the Court of Justice does not provide particular guidance on the best approach in that regard, its concrete application in the institutional realm of Belgian competition law hints at a preference for functionally segregated competition authorities at the national level. The Belgian competition council comprises an independent administrative court. The college of competition prosecutors, although now formally a part of the Competition Council administrative court structure, used to be an independent prosecuting department before its integration into the Council.[478] By integrating the college into the administrative court structure, it became an essential part of the Competition Council – a court – and was therefore unable to intervene in the appellate proceedings.[479] The equation between the college of competition prosecutors and the decision-making general assembly of the Competition Council in that respect nevertheless appears overrated. The college of competition prosecutors *de facto* remains independent from the general assembly. It brings the case to the assembly, makes its case to which the defendant undertakings respond before the assembly goes into recess to adopt a decision.[480] The competition prosecutor is not involved in that decision-making stage and will have to accept the outcome of that decision. The prosecution and decision-making departments of the

[476] On the impact of the judgment on other legal orders, see N. Petit, note 422, 343 and F. Rizzuto, note 464, 286.
[477] In so doing, the Court acts as a catalyst in promoting new governance mechanisms at the national levels. For more examples of the judicial role in that regard, see J. Scott and S. Sturm, 'Courts as Catalysts: Re-thinking the judicial role in new governance', 13 *Columbia Journal of European Law* (2007), 565-594.
[478] See also F. Rizzuto, note 427.
[479] That structure could be referred to as an integrated agency model, the 'agency' in this case being a national administrative court structure. See M. Trebilcock and E. Iacobucci, 'Designing Competition Law Institutions: Values, Structure, and Mandate', 41 *Loyola University of Chicago Law Journal* (2010), 459-464 for a classification attempt of public enforcement structures.
[480] Article 45 LPEC.

Competition Council are therefore functionally segregated parts of a single institutional whole.

Vebic could therefore be read as requiring this segregation to be sanctioned by EU law. In his opinion to the *Vebic* judgment, the Advocate General indeed referred to functional segregation as a potential solution for the obligation imposed on the national court to allow 'competition authority' participation at the appellate stage. He argued that as a matter of EU law, the participation of the prosecuting part of the competition authority would not be *per se* incompatible with the Belgian institutional framework.[481] A similar solution could also be read into Article 35(4) Regulation 1/2003, which states that when a national authority brings an action before a judicial authority that is separate and different from the prosecuting authority, the effects of the Commission withdrawing a case on the basis of Article 11(6) shall be limited to the authority prosecuting the case which shall withdraw its claim before the judicial authority. Although Regulation 1/2003 does not as such mandate a functional segregation between prosecution and decision-making stages whenever a national regime opts for a judicial authority adopting competition law infringement decisions, it most definitely envisages such segregation. That obligation would be justified by demands for compliance with the fundamental procedural rights supporting the application of EU competition law.[482] The organisational principle of segregated prosecution and decision-making functions in competition law procedures could thus be said to be reflected in the 'system' of Regulation 1/2003, which mandates its institutionalisation at the national level. As a result, national competition authorities preferentially have to operate as bifurcated enforcement structures.[483]

The Court subsequently extended the obligatory effects of functional segregation into the appellate review stage and confirmed the adversarial nature of appellate review procedures. The judgment could be read as presenting a two-stage argument in that respect. First, the system of decentralised competition law enforcement envisages national authorities to be either competent directly to adopt infringement decisions or to bring these decisions before a (specific) national court. Member States remain free to opt for one of these institutional solutions. Second, to the extent that the prosecuting and judicial authority constitute a single institutional whole – as the Belgian case demonstrates – the functional independence of both parts of that entity should be recognised, in order to allow the administrative-prosecuting part of the entity to intervene in appellate proceedings and to defend the national authority's decision. In order for participative judicial review to be rendered meaningful, the authority involved in 'prosecuting' the case should also be able to participate in appellate proceedings against the final decision adopted by the judicial part of the authority. The prosecuting part of the authority is not obliged to defend its own position adopted prior to a judicial decision or to initiate an appeal against a judicial decision that did not follow is position. As a matter of EU law, it only has to be granted standing to defend the public interest in appellate review proceedings initiated by undertakings against the national authority's judicial decision.

94. *Impact on national legal orders* – The effects of *Vebic* on national legal orders are both direct and futile. First, *Vebic* directly requires national legal systems to reflect a distinction

[481] Opinion of Advocate General Mengozzi in C-439/08, *Vebic*, para 100.
[482] C-439/08, *Vebic*, para 63.
[483] These bifurcated enforcement structures could either be administrative agencies or courts, see M. Trebilcock and E. Iacobucci, note 479, 461-462. See also Chapter IX of the United Nations Conference on Trade and Development (UNCTAD) Model Law on Competition (2010), which distinguishes between bifurcated agency and bifurcated judicial models in addition to integrated agency structures such as the European Commission, see document TD/B/C.I/CLP/L.2 of 9 May 2011, available at http://unctad.org/en/docs/ciclpL2_en.pdf (last consulted 27 November 2012).

between prosecution and decision-making functions to the extent that a single authority is not capable of intervening in appellate review procedures. The distinction imposed nevertheless remains futile, as it should not necessarily materialise into two completely distinct enforcement bodies. Within the confines of the organisational principles of participative review and functional segregation, Member States remain free to determine the institutional organisation of their national competition authorities responsible for the application of EU law. National authorities can therefore continue to rely on an integrated administrative agency[484] to prosecute and adopt competition law infringement decisions. The prosecuting part of the authority should nevertheless be able to appear as a defendant or respondent in appellate review proceedings.

It could nevertheless be submitted that *Vebic* 'crystallized' a method of judicial rule-shaping that includes national institutions within a supranationally structured whole. Building upon decades-long institutional adaptations in the service of due process at both supranational and national levels, the Court directly and structurally shaped the scope of Member States' institutional autonomy in the interest of effective supervision. In doing so, it promoted institutional convergence across the Member States towards supranationally determined standards. The Court thus interpreted its constitutional mandate to uphold the rule of law in the European Union as a means to ensure national institutional involvement in a decentralized EU competition law enforcement system. In doing so however, the Court blatantly ignores the impact its proclamations may have on democratically legitimized national market supervision choices and on the independence of national judges in deciding EU competition law cases.[485]

5. Conclusion to part A of this chapter

95. *Institutional proxies of supervision summary* – The overview of the genesis and operations of the Regulation 1/2003 market supervision system allows to respond to the research sub-questions that guided this part. These sub-questions sought to identify the locus, object, institutional cooperation and review features of a supranationally structured market supervision system.

The *locus* of EU competition law supervision can be placed at both the supranational and national levels. The European Commission – supported by its Directorate General for Competition officials – enjoys extensive powers of investigation, prosecution and sanctioning. It acts as a first-line supervisor and can adopt binding infringement decisions and impose fines on undertakings for the infringement of Articles 101 and 102 TFEU. National courts enjoyed limited powers to apply the prohibition and voidness sanction in Article 101 TFEU. Regulation 1/2003 significantly extended the powers of national actors and of the Commission. On the one hand, national authorities and courts were obliged to apply EU competition law as first-line supervisors as well. In doing so, they were not to deviate from Commission positions and decisions. On the other, the Commission retained extended decision-making powers. It can now withdraw cases from national competition authorities by opening supranational infringement proceedings. The Commission is equally able to intervene in national courts' disputes related to EU competition law with a view to ensure the coherent application of supranational competition standards. In that understanding, national authorities and courts effectively function as agents of EU competition law enforcement. They have been *integrated* in the Commission's enforcement structure. The Court of Justice particularly

[484] M. Trebilcock and E. Iacobucci, note 479, 463-464.
[485] See M. Szydlo, 'Independent Discretion or Democratic Legitimisation? The Relations between National Regulatory Authorities and National Parliaments under EU Regulatory Framework for Network-Bound sectors', 18 *European Law Journal* (2012), 796, extrapolating that argument.

confirmed and refined that position by imposing specific obligations on national courts and authorities operating within the EU competition law enforcement system.

The *object* of EU competition law supervision justifies the institutionally integrated approach outlined in this part of the chapter. The system underlying Article 101 and 102 TFEU enforcement projects *ex post* detection and remediation of anticompetitive *market behaviour*. The integrated market consists of different national legal regimes and structures. These regimes and structures are each closely tied to a particular territory of that market and are best capable of collecting information about anticompetitive practices within that territory. The European Commission would be able to assemble all information and to oversee situations that cannot effectively be dealt with by a territorially limited enforcement structure. These instances should be dealt with by the Commission. The latter should have tools available to withdraw such cases from the national level. In that image, a division of labour between the Commission and the national authorities with a view to ensure the effective enforcement of EU competition law allows for meaningful *ex post* consideration and remediation of anticompetitive practices.

The *institutional cooperation* features identified demonstrate that the institutionally integrated market supervision regime relies on an essentially hierarchical outlook. In that outlook, the Commission retains the final authority to decide upon general and particular problems of EU competition law. National authorities and courts are subordinated to the Commission and mainly support the operations of the latter. At the same time, enhanced attention to fundamental procedural rights at the EU level seeks to structure Commission enforcement powers within a 'due process' framework. That framework also reflects on the national enforcement systems, which equally need to incorporate similar guarantees. The top-down Commission structure has explicitly been confirmed by the Court and has even further been promoted in *Vebic*. In doing so, the Court promotes the institutional convergence of national regimes in accordance with supranational standards, to the detriment of national institutional autonomy and the democratic legitimisation processes reflected in national legal orders.

The availability and structures of judicial *review* at both the supranational and national levels particularly reflect a converging institutional review framework taking shape. Although supranational and national frameworks operate in accordance with different standards of review governed by either the TFEU or the ECHR framework, both systems tend to converge around the notion of 'sufficient jurisdiction'. The impending accession of the EU to the ECHR framework will further contribute to this aim. In addition, the Court of Justice is able to structure the availability and operations of national judicial review to the image of an integrated EU-wide enforcement structure.

96. *Operationalization of a directly mandated market supervision framework* – The research sub-questions outline a framework on the basis of which the second set of questions can be answered. The institutional set-up of the EU competition law enforcement system highlighted *integrated features* of supranational and national market supervisors. The integration between both levels is essentially structured at the supranational level. As a result, it could be maintained that the *supranational constitutional framework* enables and restrains particular institutional cooperation efforts. The second part of this Chapter will outline to what extent structural EU constitutional categories of legal basis, supranational rights and judicial review have served to structure and limit institutional cooperation. The structural constitutional features particularly allow to identify *elements* of *institutional heteronomy* as an organizational framework of directly mandated market supervision.

B. Constitutional shifts in directly mandated market supervision: towards institutional heteronomy

97. *Introduction to Part B* – The institutional innovations and adaptations outlined in part A presuppose the availability of a particular constitutional framework that coordinates EU-Member State interaction. This part of the Chapter will outline how particular constitutional markers have been interpreted to accommodate for such institutional adaptations. The following sections identify three evolving constitutional structures that determine the institutional operations of EU competition law supervision. In doing so, this section seeks to respond to the second set of research sub-questions. These questions seek to understand how EU constitutional categories of legal basis, supranational cooperation rights and judicial protection have come to shape the supranationally structured market supervision regime underlying Regulation 1/2003.

6. Treaty legal basis: from static competence *division* to dynamic *national operational support*

98. *The unproblematic legal basis* – It is clear from the analysis in Part A of this Chapter that the EU's competence to establish a supranationally structured framework of market supervision has never been profoundly questioned as a matter of EU-Member States' division of competences. At the same time, different readings of the Treaty legal bases have been adduced to justify transformations in the EU's market supervision system. This section characterizes the transformative potential of the legal bases establishing EU competition law supervision. It argues that – despite the exclusive competence nature structuring EU competition law – the supervision and enforcement powers are shared among the EU and its Member States. The TFEU and the Charter of Fundamental Rights have been interpreted to justify a national *operational support* framework taking shape in that regard. The constitutional basis of supranational competition law supervision has essentially served to accommodate these operational support features.

This section outlines how Regulation 1/2003 relies on a blurring exclusive competences mandate in Article 103 TFEU. Following an overview of different readings reflected in that provision (a.), this section proceeds to determine how Regulation 1/2003 relies on a mandate of national operational support to confirm and structure the inclusiveness of national authorities and courts in a supranationally arranged market supervision system (b.). Attention to fundamental procedural rights comprises an additional and supporting legal basis for effectuating the operational support mandate (c.).

a. The blurring exclusivity dimension

99. *Exclusive competence* – According to Article 3(1) TFEU, the establishment of competition rules necessary for the functioning of the Internal Market comprises an exclusive competence of the European Union.[486] As a result, only the European Union institutions can establish and determine a European competition policy and the ensuing legal provisions enabling it.[487] The 'exclusivity' of EU competition competences could also include the primary competence to supervise, apply and enforce the EU competition law provisions

[486] See Article 3(1)(b) TFEU.

[487] As this lies within the EU's 'area of exclusivity', see R. van Ooik, 'The European Court of Justice and the Division of Competence in the European Union' in D. Obradovic and N. Lavranos (eds.), *Interface between EU Law and National Law* (Groningen, Europa Law Publishing 2007), 15.

guided and supported by its Commission Directorate-General for Competition.[488] National competition authorities and courts only operate by virtue of the EU institutions mandating them to do so when applying EU competition law. As a result, the mandate granted to national competition authorities to apply and enforce EU competition law provisions does not restrain the European Union to alter its system of supervision and to exclude national competition authorities from engaging in any meaningful EU competition law supervisory activity.

100. *Nuancing exclusivity* – The scope of exclusivity attributed to the Union in Article 3 TFEU only comes to being through more specific legal bases outlying the area of exclusive and shared competences governing this field. Three different readings of Article 3 TFEU in relation to more specific legal bases could be envisaged in that regard.

Firstly, the exclusive competence of establishing competition rules necessary for the functioning of the Internal Market could be understood as incorporating every Treaty provision forming part of the 'area' of competition law provisions, i.e. Articles 101-109 TFEU and Protocol No 27 on the Internal Market and Competition. Article 101(3) and Article 103 TFEU could be understood as containing both substantive and procedural elements.[489] As a result, Article 103 TFEU, containing the competences to regulate and enforce supervisory practices would be captured entirely by the exclusive competence area. Member States therefore do not retain any particular competence in EU competition law supervision unless explicitly granted by the EU Institutions. The principle of subsidiarity would not apply in determining the exact divisional scope of supervisory competences between the national and supranational levels. National legal orders only remain competent to determine national competition laws. The latter could only apply outside the area of exclusive competence unless otherwise provided for in supranational rules.

Secondly, the area of exclusivity could only be limited to the *substantive* competition rules necessary for the Internal Market, but would leave the procedural and institutional rules unaffected. These rules would would therefore fall within the regime of shared competences. In that reading, the national legal orders remain competent to appoint courts or authorities capable of supervising EU competition law rules. Their powers should be determined in accordance with the principles of subsidiarity and proportionality. That approach would also imply that substantive and procedural/institutional provisions can clearly be separated. This is nevertheless difficult to retain in practice. Nothing in the Treaty posits such separation, unless one is willing to accept the principle of national institutional autonomy as a general principle of EU law guiding Treaty interpretations.[490] At the same time however, institutional provisions in Articles 101(3) and 103 TFEU have indeed been included into the 'core' of EU competition law provisions.

Thirdly, a mixed reading could be projected. Although competition policy has indeed been considered an exclusive competence, which would result in the inclusion of supervisory arrangements within the area of exclusivity, the self-imposed vagueness and nuance presently available within the exclusive realm would rather reflect a *de facto* shared competence sphere. A *de facto* shared supervisory competence sphere presupposes a settled framework of substantive legal rules, an exclusive supranational competence to determine and outline

[488] See Article 105(1) TFEU.

[489] The reference to *may be declared* in Article 101(3) TFEU can be comprehended as an institutional or procedural provision. See nr. 45 for authors suggesting that approach. In the era of Regulation 1/2003 however, such reading does not seem to be adhered to, see nr. 67-68 of this dissertation.

[490] See for a different opinion in the realm of procedural law, M. Bobek, 'Why there is no principle of "procedural autonomy" of the Member States' in H. W. Micklitz and B. De Witte (eds.), *The Court of Justice and the Autonomy of the Member States* (Antwerp, Intersentia, 2012), 305-323.

policies that provides the basis for concrete regulatory initiatives, a supranational willingness to complement a substantive rule system with supervisory arrangements, a division of responsibilities related to these supervisory arrangements and a granting of a *margin of appraisal* for national authorities when instituting, implementing and operating the supervisory framework. Although national authorities would not make general policies, they have a secondary role in applying these rules to enable their operation and in providing for institutions of their choice supporting their enforcement obligations.[491] In so doing, they contribute to the realization of policymaking and thus operate within a curbed autonomy framework. Although the scope of national supervisory competences is not technically regulated by the principle of subsidiarity, the interaction between supranational and national actors will be governed by a subsidiarity-oriented analysis, guaranteeing the operational functioning of the legal framework and the inclusivity of national legal orders into the supranational market supervision framework envisaged by the Treaty.

b. Refining the constitutional mandate: operational support and institutional convergence

101. *A preference for the third reading?* – It is submitted that the prevailing interpretation of EU competition law supervision powers reflected in Regulation 1/2003 and based upon Article 103 TFEU best reflects this third reading. Article 103 states that the Council shall adopt Regulations or Directives to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments, to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other, to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102, to define the respective functions of the Commission and of the Court of Justice of the European Union in applying EU competition law and to determine the relationship between national laws and the primary and secondary EU competition law provisions.

Article 103 TFEU thus contains references to a balanced (simplified administration versus effective supervision) approach which would allow a role for national legal orders in the administration and supervision of EU competition law. It also explicitly envisages the determination of the relationship between the supranational and national levels. That interrelationship is not phrased as one of mutual exclusiveness. It could indeed also be read to accommodate the inclusion of national competition authorities into supranationally structured market supervision operations.[492] In that understanding – and as reflected in Regulation 1/2003 – national authorities and courts are directly included in the institutional organization realm of market supervision. Whilst supranational and national supervisory powers are shared in that constellation, the power to determine and constrain the scope of substantive competition law remains with the EU and with the Member States in their respective spheres of exclusivity. That constellation justifies the emergence of more intensive national coordination mechanisms and of the system adopted in Regulation 1/2003.

[491] As a result, this system is different from a subsidiarity-oriented system, which is connected solely with practicality and efficiency. Decentralization implies a potential revocation of delegated powers to national authorities and courts, see A. Komninos, note 184, 637.

[492] In that reading, the constitutionality of Regulation 1/2003 is fully presumed, which could explain why the Council made no effort at all to ground the system in Article 103 TFEU. Since the competences fell within the 'area of exclusivity' outlined in Article 3(1)(b) TFEU, no subsidiarity justification proved necessary. This justification system markedly differs from Regulation 139/2004 relating to concentration control. That Regulation, based on both Articles 103 and 352 TFEU outlines a specific subsidiarity justification in Recital 6, since it does more than establishing competition rules necessary for the functioning of the Internal Market.

102. *Constitutional principles structuring Article 103 TFEU* – A *de facto* shared supervisory framework read into Article 103 TFEU would have to be governed by a combination of stable constitutional and flexible operational legal basis conditions. Stable conditions outline the scope of exclusive EU competence. In that understanding, they allow the EU to establish the competition rules *necessary* for the internal market. The EU principles of primacy, direct applicability and direct effect ensure the application of these rules in the national legal orders.[493] The necessity requirement in that provision nevertheless hints at a constitutional limit on EU exclusive action. To the extent that such action powers are unnecessary, the EU should refrain from acting. A set of additional principles should therefore establish the boundaries of exclusive supranational action. Complementary dynamic operational principles in that image serve to determine the scope of shared action within the exclusive realm. Those principles could grant national legal orders leeway to adopt diverse substantive rules, to entertain separately structured institutions or procedural frameworks and to establish specific judicial review mechanisms. At the same time however, these principles remain subject to potential supranational scrutiny and action, with a view to ensure that supranational exclusive competences are not substantially or structurally impeded. The Court of Justice could play a significant rol in that respect.[494] This system moves beyond the constitutional division between exclusive and shared competences and incorporates it into a more dynamic operational framework of EU-national cooperation.

The current structure of the Article 103 TFEU legal basis should thus be comprehended as facilitating a cooperative framework, centred around effectiveness and simplicity of EU-wide supervision and administration. The role of the Member States in ensuring efficient supervision and contributing to simplified administration can best be captured by an *operational support* metaphor. To the extent that a Member State is allowed to apply Article 101 TFEU in its entirety, it is only allowed to do so within the boundaries set by EU law and on the conditions that the Commission does not decide to consider the case itself. The institutional scope of application of EU law based on Article 103 TFEU is therefore particularly narrow. The national authorities support the system of EU competition law supervision, acting as supervisors themselves and allowing the Commission to maintain an overview of the diversity of cases coming within the scope of EU competition law. The supporting role of Member States in that image cannot be limited to a substantive implementation role. Member States effectively provide national institutional structures (authorities and courts) called upon to interpret and apply a supranational substantive legal framework. In doing so, national institutions serve as direct exponents of EU law enforcement. These institutions will have to be organized to ensure a balance between effective supervision and simplified administration to take shape.

It should therefore be no surprise that Article 103 TFEU could also be read to enable a dynamic regime of *institutional convergence.* Although national authorities and courts are structured through national law, their EU-specific operations legitimize the imposition of EU-established institutional or procedural modifications. Article 103 TFEU provides a direct legal

[493] See Case 127/73, *BRT v Sabam*, in which this direct effect of Article 101(2) TFEU has been established. On these principles as triggers (but in a different context), see M. Dougan, 'When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy', 44 *Common Market Law Review* (2007), 933-935. For a contrasting view, see K. Lenaerts and T. Corthaut, 'Of Birds and Hedges: The Role of Primacy in invoking norms of EU law', 31 *European Law Review* (2006), 287.

[494] Just like in all issues relating to legal basis, see on that Case C-376/98, *Germany v Parliament and Council* [2000] ECR I-8419 (*Tobacco Advertising I),* para 59, holding that the choice of the legal basis for a measure must be guided by objective factors which are amenable to judicial review, including, in particular, the aim and content of the measure.

basis for doing so. In addition, the Court's interpretation of that legal basis or secondary legislation relying on it could equally enhance such institutional convergence. The framework of institutional convergence provides a major incentive for spontaneous convergence towards the EU competition law regime[495] and requires Member States pro-actively to reflect on the institutional structures in force as exponents of EU law enforcement. EU law would effectively be able to steer such reflections.

103. *A constitutional framework for institutional convergence?* – The legal basis of Article 103 TFEU enables the establishment of a *de facto* shared market supervision system. The regime created by Regulation 1/2003 therefore justifiably resulted in the emergence of a particular supranationally coordinated regulatory framework. That framework enables institutional convergence among supranational and national legal orders. As a result, national authorities' and courts' institutional and procedural frameworks could increasingly be monitored at the supranational level. The operational support mandate read into Article 103 TFEU and the limited institutional convergence enabled by Regulation 1/2003 granted particular leeway to the EU judiciary to identify and structure the institutional convergence necessary for effective supranationally structured cooperation in EU competition law supervision. The mandate particularly allows the Court to be involved in the institutional organization of national competition authorities and courts.

The Court did not however explicitly refer to such mandate read into Article 103 TFEU in its case law on Regulation 1/2003. It rather focused on the need for uniform and effective application of EU competition law in the national legal orders. The judgment in *Vebic* imposed institutional obligations and reflected national institutional templates without directly identifying a concrete Regulation provision. A mere reference to Article 35 Regulation 1/2003, holding that Member States designate the competent authorities and courts[496], would hardly seem sufficient in providing a legal basis for a major adaptation to the system of judicial review or administrative organization at the Member State level. Whilst it could be presumed that the Court interpreted Article 35 in conformity with Article 103(2) TFEU, it did not explicitly refer to the Treaty legal basis in doing so.

c. The Charter of Fundamental Rights as additional alternative justification for operational support?

104. *EU fundamental rights as alternative* – The lack of explicit judicial recognition of an constitutional operational support mandate throughout the case law does not however imply that the Court operates without attention to finding an appropriate legal basis for its actions. EU fundamental rights appear to have provided a welcome complement in that regard. In his Opinion to *Pfleiderer*, the Advocate General on multiple occasions referred to fundamental rights instruments, and in particular, to Article 6 ECHR guaranteeing a right to a fair trial as an instrument requiring interpretation. In addition, the newly binding EU Charter of Fundamental Rights has come into the spotlight of the Advocate General. [497] The role of the Charter in ensuring regulatory interaction is at present unclear, but the case law clearly hints at the Charter's potentially important role as a legal basis operationalizing EU competition law supervision and the institutional convergence mandate structuring it.

[495] On spontaneous convergence, see H. Vedder, 'Spontaneous Harmonisation of (National) Competition Laws in the wake of the Modernisation of EC Competition Law', 1 *Competition Law Review* (2004), 5-21.
[496] Case C-439/08, *Vebic*, para 56.
[497] Opinion of Advocate General Mazàk in Case C-360/09, *Pfleiderer*, para 3 and 37.

105. *Toshiba: the Charter of Fundamental Rights as a legal basis* – The Charter of Fundamental Rights proves essentially relevant in that respect, since it provides a direct constitutional basis for expansive intervention into national systems.[498] The Charter's fundamental role as a legal basis in ensuring the interaction between national and EU competition law supervision has been identified in Advocate General Kokott's opinion in *Toshiba*.[499] That case concerned the application and extent of the principle of *ne bis in idem* as a matter of EU law in general and EU competition law in particular. Questions revolved around whether or not a national competition authority was able to prosecute and fine an undertaking on the basis of its national competition law, even though the same behaviour had already been the subject of a Commission inquiry.[500] The case was all the more relevant since the Czech national competition authority in that case relied on its national competition law to prosecute behaviour antecedent to the accession of the Czech Republic to the European Union.[501] In arguing whether or not the principle of *ne bis in idem* should be interpreted differently in EU competition law or should be the subject of a single, EU-wide principle, the Advocate General referred to the Charter's provisions on that matter.[502] She then concluded in favour of a singular interpretation applicable to all fields of EU law.[503]

The Advocate General in so proposing related the role of the Charter in competition law supervision matters to a more general discussion on the scope of the Charter and its effects on national legal orders.[504] She aimed to establish how and to what extent the Charter could apply to national authorities and national courts. The Charter is applicable to 'institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing EU law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers'.[505] In addition, the Charter proclaims that it 'does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties'.[506] The Charter explanations nonsensically state that 'it follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in a Union context is only binding on the Member States when they act in the context of Union law'.[507] The

[498] On the complementary role of the Charter, see already K. Lenaerts, 'Fundamental Rights in the European Union', 25 *European Law Review* (2000), 575-600; on the need for an EU human rights policy, see extensively, P. Alston and J.H.H. Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy', 9 *European Journal of International Law* (1998), 658-723.

[499] Opinion of Advocate General Kokott in Case C-17/10, *Toshiba Corporation and Others,* 8 September 2011, www.curia.eu.

[500] Opinion of Advocate General Kokott in Case C-17/10, *Toshiba Corporation and Others*, para 1.

[501] Opinion of Advocate General Kokott in Case C-17/10, *Toshiba Corporation and Others*, para 3.

[502] Opinion of Advocate General Kokott in Case C-17/10, *Toshiba Corporation and Others,* para 99.

[503] Opinion of Advocate General Kokott in Case C-17/10, *Toshiba Corporation and Others*, para 147.

[504] P. Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question', 39 *Common Market Law Review* (2002), 945-994. See also B. De Witte, 'The Legal Status of the Charter: Vital Question or Non-Issue?', 7 *Maastricht Journal of European and Comparative Law (*2001), 81-89.

[505] Article 51 (1) Charter of Fundamental Rights, [2010] O.J. C 83/02.

[506] Article 51 (2) Charter. See also A. Von Bogdandy, M. Kottmann, C. Antpöhler, J. Dikschen, S. Hentrei and M. Smrkolj, 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States', 49 *Common Market Law Review* (2012), 500 on the problems of scope related to Article 51.

[507] Text of the explanations of the Charter of Fundamental Rights of the European Union, available at http://www.europarl.europa.eu/charter/pdf/04473_en.pdf, 46. The Council refers to the Court's judgment in Case C-260/89, *ERT*, [1991] ECR I-2925 as the generally accepted position. Prechal nevertheless argues that this case does not fall within an uncontested category of cases where a Member State merely implemented a directive or directly applied EU law, see S. Prechal, 'Competence Creep and General Principles of Law', 3 *Review of European Administrative Law* (2010), 9 and 20. References to *ERT* could therefore point towards a broader interpretation than a mere implementation approach would reflect. On the argument that the Charter does not vest any new powers or tasks in the Union, see Case C-400/10 PPU, *McB.* [2010] ECR I-8965, para 51; Case C-

'implementing EU law' requirement could be applied either broadly or narrowly. A narrow interpretation of implementation would merely imply that the Charter is applicable whenever a Member State is directly acting as a Union agent, i.e. whenever it is applying EU law provisions as mandated or delegated in the light of the constitutional framework.[508] A broad interpretation of 'implementing EU law' would capture an array of situations in which the Charter would apply. The basic standard to assess the applicability of EU law in that context would amount to whether or not the internal market would be affected by national action, or even broader, whenever a material link with EU law can be found.[509] If that were the case, the Charter should apply as a constitutional standard setting mechanism, and following the introduction of the Lisbon Treaty, would directly require compliance from the national authorities operating in the realm of EU law.

According to Advocate General Kokott, a broad interpretation of the Charter should be adhered to. In considering whether or not Article 50 of the Charter, containing the ne bis in idem principle, would be applicable in the Czech case, the Advocate General argued that any objection against the application of the principle in relation to the application of Czech competition law 'does not hold water. It is indeed true that Article 51(1) of the Charter of Fundamental Rights states that the Charter applies 'to the Member States only when they are implementing Union law. The mere fact that national competition law is applicable *ratione materiae* in the present case does not mean, however, that there are no requirements of EU law as to how the case should be dealt with'.[510] The fact that Regulation 1/2003 provides for a single procedural framework for the application and enforcement of competition law in the Member States appears to be sufficient in that regard. Since Regulation 1/2003 includes rules on the delimitation of competences within the network of European competition authorities, these rules determine the scope of action left to national authorities.[511] At the same time however, these rules and principles must be interpreted and applied in accordance with EU primary law, including the fundamental rights of the EU.[512] Fundamental rights as a result determine the margin for manoeuvre left to national competition law.[513] National competition authorities are in that image always 'implementing EU law'.

106. *The Court appears to confirm a broad reading in other fields of supervision*– The Court confirmed a broad understanding of the Charter's application in its December 2011 *N.S.* judgment.[514] Relating the Charter to the EU-established Common European Asylum System, the Court held that '[a] discretionary power conferred on the Member States by Article 3(2) of Regulation No 343/2003 forms part of the mechanisms for determining the Member State responsible for an asylum application provided for under that Regulation and, therefore,

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256/11, *Dereci*, judgment of 15 November 2011, nyr, para 71 and Case C-370/12, *Pringle*, judgment of 25 November 2012, nyr, para 179. For a position that the Charter creates more confusion in the EU fundamental rights' landscape, see S. Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon', 11 *Human Rights Law Review* (2011), 682 and L. Pech, 'Between judicial minimalism and avoidance: the Court of Justice's sidestepping of fundamental constitutional issues in *Römer* and *Dominiguez*', 49 *Common Market Law Review* (2012), 1863.

[508] K. Lenaerts and J. Guttierez-Fons, note 14, 1657.

[509] P. Eeckhout, note 504, 993.

[510] Opinion of Advocate General Kokott in Case C-17/10, *Toshiba Corporation and Others*, para 103.

[511] Opinion of Advocate General Kokott in Case C-17/10, *Toshiba Corporation and Others*, para 105.

[512] Opinion of Advocate General Kokott in Case C-17/10, *Toshiba Corporation and Others*, para 104.

[513] Opinion of Advocate General Kokott in Case C-17/10, *Toshiba Corporation and Others*, para 106.

[514] Joined Cases C-411/10 and C-493/10, *N.S.*, judgment of 21 December 2011, nyr. For background and analysis, see G. De Baere, 'N.S. v. Secretary of State for the Home Department', 106 *American Journal of International Law* (2012), 616-624. See also S. Iglesias Sanchez, 'The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights', 49 *Common Market Law Review* (2012), 1586-1587.

merely an element of the Common European Asylum System. Thus, a Member State which exercises that discretionary power must be considered as implementing European Union law within the meaning of Article 51(1) of the Charter'.[515] This case concerned an equally institutionalized common European 'supervisory' regime, in which the Member States are called upon to apply and enforce EU law.[516] Similarly broad interpretations have seeped into the case law in other subfields.[517] It could therefore be argued that a this position would equally apply in the realm of EU competition law supervision.

107. *Charter as complementary basis to Article 103(2) TFEU* – If this extensive interpretiaton would be applied to the field of competition law, the Charter of Fundamental Rights adds to that framework and presents a powerful tool to establish and structure an interactive supervision regime, in which Member States' authorities and courts have to incorporate the dynamic conditions imposed by supranational law in their operations structured under EU law. A judicially-sanctioned broad interpretation of the Charter's scope significantly facilitates that approach. In that image, the Charter serves to provide an additional constitutional basis that allows the Court to establish general principles of national institutional organization based upon these fundamental rights. The provisions of the Charter would serve as benchmarks for the identification of particular obligations imposed on national competition authorities operating in the realm of Regulation 1/2003. Providing additional benchmarks to give shape to the operational support mandate underlying Article 103(2) TFEU, these obligations can result in the adaptation of national institutional structures or court procedures guided by EU law.

7. Supranational cooperative rights as a precondition for integrated market supervision

108. *Introduction* – A Treaty legal basis mainly – or merely – provides the starting point for the supervisory system to come into being. Following its establishment on the basis of and operations in conjunction with a particular Treaty provision, additional constitutional building blocks provide for the operations to continue along a certain pattern. In the realm of EU competition law supervision, a particular role has been provided to due process requirements to shape the system into a legitimate cooperative structure. Due process requirements are translated into fundamental procedural rights. These rights serve directly to shape and influence the institutional operations of a supervisory system. Whilst procedural in scope, due process requirements also and additionally project modifications in the institutional organization of competition law enforcement frameworks. These institutional effects of due process co-determine the make-up of a system based on EU – national authorities cooperation where the latter act as subordinate first line supervisors. They provide an institutional architecture that is reflective of these fundamental procedural rights. Supranationally structured cooperative accountability and institutional adaptation rights contribute to that system's emergence.

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[515] Joined Cases C-411/10 and C-493/10, para 68.

[516] Article 67 TFEU states that the Union shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. The direct legal basis for the common European asylum system can be found in Art 78 TFEU (ex Art 63 EC Treaty), see S. Peers, *EU Justice and Home Affairs Law* (Oxford, Oxford University Press, 3rd edition, 2011), 295-314; see also P. Boeles, M. Den Heijer, G. Lodder and K. Wouters, *European Migration Law* (Antwerp, Intersentia, 2009), 347-350.

[517] For recent confirmations of a broad application, see Case C-617/10, *Fransson*, [2013] ECR I-0000, para 21 (administrative and criminal procedures); Case C-399/11, *Melloni*, [2013] ECR I-0000, para 64 (arrest warrant procedures).

a. Institutional arrangements as legitimizing design instruments and the categorization of supranational cooperative rights

109. *The constitutive role of institutional cooperation tools* – Institutional cooperation rules do not only regulate a system, they also contribute to its design. Constitutional design presents a quintessential tool to understand the institutional functioning of particular legal regimes. According to U.S. constitutional law scholar Lawrence Lessig in relation to regulating cyberspace, 'we can build, or architect, or code cyberspace to protect values that we believe are fundamental, or we can build, or architect or code cyberspace to allow those values to disappear. There is no middle ground. There is no choice that does not include some kind of *building'*.[518] A constitutional framework entrenches or embeds values into a particular design. Only by altering the constitution's design can these values be changed themselves.[519] From that perspective, reflections on the nature of constitutional design, aimed at supplementing and guaranteeing particular substantive choices are essential. Architecture, Lessig argues, is a kind of law: it determines what people can and cannot do.[520] As a result, institutional arrangements not only reflect a willingness to accommodate particular substantive choices, the openness towards such choices also enhances the legitimate functioning of these very institutions.

Architectural design is a tool to engage the structural integrity of an operating system[521] and to reconcile concerns of effectiveness of a system (output) with justice and parties' input in that regard.[522] It provides the primary assessment structure to determine that integrity. According to Colin Scott, design choices comprise important and non-notorious elements of control. In designing particular technological features (e.g. requiring an access code or key to enter a particular premise or file), a self-executing regime imposing an absolute constraint is imposed on those subject to its rules.[523] By directly controlling the operations as a matter of design, the regulatee is faced with no other choice but to comply with the system's design. As a result, the designed system itself becomes the bearer of a legitimate structure since other structures have been excluded from it.

Although design arguments have mainly been relied on as justification aspects for direct operating systems in technology, they can also be transposed into law and legal design itself. A legal system can theoretically foreclose the application of alternative legal positions and – at the same time – could also structure or enhance the legitimacy of existing operations by designing institutions that best match the substantive values the system inhabits.[524] As a result of that position, the legitimacy of an institutional system could be framed in terms of its operational functioning – or engineering – as a means to enable particular substantive values.[525] Values and institutional arrangements operate along a moving continuum, requiring institutional arrangements to provide for a legitimate enforcement context of substantive

[518] L. Lessig, *Code and other laws of Cyberspace* (New York, Basic Books, 1999), 6.
[519] L. Lessig, note 518, 7.
[520] L. Lessig, note 518, 59.
[521] D. Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford, Oxford University Press 2011), xiii.
[522] N. Forwood, 'Effective Enforcement and Legal Protection – Friends or Enemies?' in C.D. Ehlermann and I. Atanasiu (ed.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Oxford, Hart, 2007), 663-664; see also W. Wils, note 76, v.
[523] C. Scott, 'The Governance of the European Union: The Potential for Multi-Level Control', 8 *European Law Journal* (2002), 65.
[524] C. Scott, note 523, 65.
[525] D. Crane, note 521, xiii. For a more general institutional design perspective, see V. Power, 'The Relative Merits of Courts and Agencies in Competition Law – Institutional Design: Administrative Models; Judicial Models; And Mixed Models', 6 *European Competition Journal* (2010), 91-127.

values and vice versa. From that perspective, institutional structures and their operations function as tools to legitimize the operations of a substantive legal framework.[526]

110. *The legitimizing architecture of EU law* – EU law relies on particular constitutional techniques in an effort to legitimize its market supervision operations in competition law and the involvement of national authorities and courts in that system. Building on the well-established constitutional techniques of primacy, direct applicability and direct effect[527], EU institutions proceeded to devise more nuanced institutional cooperation tools that serve to legitimize and justify EU intrusion into national legal orders and national legal orders' willing succumbing to such intrusion. The constitutional architecture of EU law in that respect provides for techniques that seek to justify the operational support mandate to take shape in the realm of EU competition law supervision. These techniques allow for a regime in which institutional convergence initiatives as outlined above can continue to take shape.

It is submitted that these legitimizing techniques can be captured by the notion of supranational cooperative rights. Supranational cooperative rights present a metaphor for a set of supranationally determined *entitlements* that grant *both supranational and national* institutional actors an opportunity to play a particular role in an the design of a supranationally structured market supervision regime. Two kinds of cooperative entitlements can be distinguished in that regard: cooperative *accountability* and *institutional adaptation* entitlements.

Firstly, cooperative *accountability* rights structure a set of rules and principles that allow for the supranational resolution of actual or potential conflicts between national and supranational supervisory authorities. As supranationally structured principles, these rights determine by whom, how and within what framework conflicts among supervisory bodies should be resolved. In some instances, the application of these rights could result in a supranational authority withdrawing a case from the national level or vice versa or in the sharing of particular supervisory powers in a specific case. Accountability rights additionally establish who controls whom in an interactive supranational system. In particular, these rights serve to hold different actors accountable in operating the system. In ensuring accountability, these rights effectively enable national and supranational bodies to be called upon and justify their actions.

The system of integrated EU competition law supervision can be structured along such accountability rights. Accountability entitlements are incorporated into a set of cooperation techniques that legitimize the operations of EU-national cooperation through the lenses of due process and fundamental procedural rights. Attention to due process in that image serves as a tool to structure and allocate accountability responsibility with both the national and supranational governance levels. In addition, due process requirements serve as a tool for market operators directly to hold the operations of supranational and national authorities or courts to account. Supranational accountability rights in that understanding do not comprise a particular codex of concrete entitlements that allow either the national or supranational levels

[526] See for an argument from a network management perspective in that regard, F. Cengiz, 'Management of Networks between the Competition Authorities in the EC and the US: different polities, different designs', 3 *European Competition Journal* (2007), 413-436. For an argument that institutions, independent of rights, also comprise new markers for legitimacy in a decentralised environment, see P. Van Cleynenbreugel, 'Institutional assimilation in the wake of EU competition law decentralisation', 8 *Competition Law Review* (2012), 285-312.

[527] See among others, B. De Witte, 'Institutional Principles: A Special Category of General Principles of EC Law' in U. Bernitz and J. Nergelius (eds.), *General Principles of European Community Law* (The Hague, Kluwer 2000), 146-150. See also L. Rossi, 'How Fundamental are Fundamental Principles? Primacy and Fundamental Rights after Lisbon', 29 *Yearbook of European Law* (2010), 65-87.

to demand institutional adaptations or fine-tuning at any stage. These rights rather reflect a technique of constitutional governance relied on by the EU Institutions to justify the convergence of procedural stages and institutional frameworks in a supranationally structured framework of market supervision. That technique relies on cooperative entitlements guaranteed as part of the EU market supervision mandate that allow Member States to be involved in the operations of market supervision on the condition of cooperating and attuninng their institutional organization format to the image projected by EU law.

Secondly, a supranationally structured market supervision regime also includes *institutional adaptation rights*. These rights entitle the supranational level to demand for the adaptation of national institutional organizations or procedures in order to contribute to the effective operations of the supranationally structured enforcement system. The institutional convergence reading in Article 103 TFEU and the Court's judgment in *Vebic* testify to that approach. At the same time, institutional adaptation entitlements also allow national legal orders to impose particular institutional modifications on the supranational level. Focused attention on supranational due process can be considered to have been 'inspired' and even imposed by national legal orders on the Commission's operations. Institutional adaptation entitlements in that understanding allow for national and supranational levels to be better attuned to the needs of coordinated cooperation and accountability.

b. The constitutional architecture of competition law coordination in the service of cooperative accountability rights

111. *Four stages* – The structuring powers of supranational cooperative accountability entitlements can be detected into four procedural rights stages: the initiation of the investigation, the allocation and cooperation, the decision-making and the appeal stages. These stages present a chronologically structured framework of reference in which the intensity of procedural rights intervention varies in accordance to the stage represented. Particular institutional features and structures are reflective of the cooperative accountability structures underlying the system of EU market supervision.[528]

112. *The initiation stage* – Firstly, the Commission emphasizes the importance of parties being informed of any investigatory measure or formal investigation launched against them. Paragraph 15 of the 2011 Best Practices explicitly refers to these information obligations at the supranational level. In so doing, the Commission enables persons subject to an investigation to prepare their defence at the earliest possible stage. The institutional prerequisite resulting from that requirement is the establishment of a communicative arrangement between the prosecuting body – DG Competition – and the investigated parties. The concrete institutional translation of that communicative arrangement comprises an enforceable right to be informed by the case handling team at the earliest convenience. Failure to inform equates a failure to honour legitimate expectations created by the Commission while conducting investigations. Investigated undertakings are thus entitled to control the Commission's actions in that regard.

In practice, the concrete consequences of that approach are not at all clear however. It is uncertain to what extent the refusal of the right to be informed promptly might result in the breach of an essential procedural requirement and the ensuing annulment of a Commission decision, especially if subsequent procedural stages will provide ample opportunity to these parties to make their points of view known. It should therefore be questioned whether the right to be informed immediately should be capable of resulting in the annulment of an on-

[528] R. Nazzini, note 366, 1002.

going investigation. In addition, the right to be informed at the earliest convenience as a matter of EU law's supervision powers has only been recognized at the supranational level as a matter of EU law. It is at present unclear whether that right also exists in relation to national competition authorities applying EU law.[529] Given the Court's judgments in *Vebic* and the ensuing obligation of loyal cooperation between Union and Member States in the application of EU recognized fundamental rights[530], it would not however seem unlikely for the Court to accept that position, especially as it enables the coherent application of EU law.

113. *The allocation stage* – Secondly, the operations of case allocation mandate conversation or communication between the Commission and national authorities in the operations of the European Competition Network (ECN).[531] The interaction between the Commission and the national competition authorities in the realm of EU law could directly affect parties subject to an EU competition law investigation. Fundamental procedural rights could therefore enhance the functioning of the ECN. The ECN functions in relative obscurity. The minutes of ECN meetings and concrete discussions on the 'political' or thorny issues related to what authority is best placed to take a leading role remain undisclosed[532] and allocation decisions are not considered to be amenable to judicial review.[533] As such, it could be argued that the sole procedural right derived from any ECN deliberations is the right to be informed on the outcome of ECN deliberations.

Whilst that approach poses significant accountability problems associated with the functioning of a network[534], even the recognition of a right to be informed on the outcome of ECN deliberations remains inherently problematic. It is presently unclear who bears the right to be informed in this case. Are only parties to the investigation entitled? But what if not all parties have been determined by that time? How about third parties considering to scrutinize the public enforcement case with a view of submitting a private enforcement action? What legal basis could be relied on as a general right to inform? All these matters have not been clarified and could be remedied by making the operations of the ECN more transparent. An alternative proposal would be to establish an obligation on both the Commission and on the national competition authorities to publicize the investigations they are initiating based upon EU competition law and some indicative reasons for doing so. Such a general obligation would enable the convergence of publication operations and would bring some transparency in the allocation process. The Commission is presently committed to adopting that position.[535] Operationalizing that right would nevertheless require national competition authorities to

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[529] According to Temple Lang, fundamental procedural rights recognized at the EU level should also be respected by national competition authorities applying EU competition law, see J. Temple Lang, note 233, 553.

[530] See J. Temple Lang, 'Community Constitutional Law: Article 5 EEC Treaty', 27 *Common Market Law Review* (1990), 654-659.

[531] See for an overview, M. Araujo, 'The Respect of Fundamental Rights within the European Network of Competition Authorities' in B. Hawk (ed.), note 299, 511-531. For a general overview, see A. Andreangeli, note 274, 193-196.

[532] F. Cengiz, 'Multi-level governance in competition policy: the European Competition Network', 35 *European Law Review* (2010), 665. See also S. Brammer, note 251, 1422.

[533] See note 237 for references in that regard.

[534] F. Cengiz, note 532, 675.

[535] Article 2 Regulation 773/2004; 2011 Best Practices, para 20 confirms that the Commission may publicize an investigation and translates that confirmation into a commitment for doing so, unless such publication could harm the investigation. Consultation of the Press Releases demonstrates that the Commission indeed acknowledges that it initiated proceedings or issued statements of objections and that it informed the Member States' authorities of doing so. The Press Releases do not however refer to how the allocation process took place, but frequently invoke the Commission's prerogatives under Article 11(6) Regulation 1/2003. See among others http://europa.eu/rapid/press-release_IP-12-894_en.htm and http://europa.eu/rapid/press-release_IP-12-345_en.htm.

become public interlocutors even more than they are currently being assumed. The indirect publication of reasons for competence allocation could as a result provide an institutional basis for more transparency and legitimacy. It could equally serve as a tool to reslove allocation conflicts. Operating under the threat of publication, a particularly legalized and principled framework governing case allocation would be more likely to emerge.

114. *The decision-making stage* – The real scope for institutional modifications and convergence relates to the third phase, focusing on decision-making. That phase basically requires the right to be heard – i.e. the right to respond to the Commission's or national authority's allegations – and the ensuing right of access to the file to be incorporated into the institutional framework of both the EU and the national levels.[536] At the EU level, the recent upgrade of the Hearing Officer's mandate is illustrative in that regard. The Hearing Office is now more than ever structured as an *amicus Commissionis* office. It should be clear at the outset that the role of the Hearing Officer has never been perceived to be judicial.[537] That was especially the case under the previous two mandates, where the Hearing Officer mainly conducted the hearing and did not have direct interventionist powers in the investigation phases preceding the statement of objections.[538] Emphasis on his independence from the Commission and the ensuing delegation of powers of guaranteeing a fair hearing rather presented the Hearing Officer as a friend of the Commission, comparable to the *amicus curiae* or friend of the court concept that is also known in EU competition law.[539] According to the U.S. Supreme Court guidelines, an amicus *brings a matter before the Court to instruct it on a point of law not covered by the parties. Amici should be distinguished from interveners because they do not join pending litigation but rather present an additional perspective to the Court, without becoming a party to that dispute*.[540] The Hearing Officer also brings a matter to the attention of the Commissioner responsible for competition, without joining the concrete DG Comp investigation and ultimate Commission decision making stage. Unlike the DG Comp representatives, the Hearing Officer is not a party, but instructs the competition Commissioner and ultimately, the College of Commission Members, on procedural issues when deciding a case. In doing so, the Officer instructs the Commission on a point of law – procedural rights – not covered by the substantive focus of DG Comp investigations, but potentially invoked by one of the parties to the investigation. The Hearing Officer therefore does not instruct the Commission on a point of law not covered by parties, but on how parties

[536] Additional rights include the right not to incriminate oneself and the right to confidential communication with one's lawyer, see J. Temple Lang, note 233, 530, for an overview of rights in the competition law realm as extracted from the CJEU case law. The Court recognized the right to be heard as a general principle of EEC law in Case 17/74, *Transocean Marine Paint v Commission,* [1974] ECR 1063, para 15 and Case 85/76, *Hoffmann La Roche v Commission*, [1979] ECR 461, para 9. The right to legal professional privilege was established in the cases highlighted in Case 155/79, *AM&S Europe Limited* v *Commission,* [1982] ECR 1575, para 18 and Case C-550/07, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, judgment of 14 September 2010, nyr.; the right not to incriminate oneself originates in Case 27/88, *Solvay v Commission* [1989] ECR 3355 and Case 374/87, *Orkem v Commission*, [1989] ECR 3283, para 35. On subsequent evolutions, see I. Aslam and M. Ramsden, 'EC Dawn Raids: A Human Rights Violation?', 5 *Competition Law Review* (2008), 69-70 and A. Riley, 'The ECHR Implications of the Investigation Provisions of the Draft Competition Regulation', 51 *International and Comparative Law Quarterly* (2002), 64, P. Willis, '"You have the right to remain silent", or do you? The privilege against self-incrimination following Mannesmannrohren-Werke and other recent decisions', 22 *European Competition Law Review* (2001), 313-321 and O.B. Vincents, 'The application of EC competition law and the European Convention on Human Rights', 27 *European Competition Law Review* (2006), 694.

[537] L. Ortiz Blanco, note 178, 199.

[538] See J. Flattery, note 282, 70.

[539] According to Article 15(3) Regulation 1/2003, the Commission can make observations in front of national courts.

[540] Rule 37 of the Rules of the Supreme Court of the United States, http://www.supremecourt.gov/ctrules/2010RulesoftheCourt.pdf.

have applied the law in a particular investigative setting. The final report of the Hearing, based on the draft decision submitted to the Advisory Committee[541], resembles an amicus brief in that regard, aimed at instructing the Commission. The final report provides a summary on the effective exercise of procedural rights and considers whether the draft decision prepared by DG Comp deals only with objections in respect of which the parties have been afforded the opportunity of making known their views.[542]

At the same time, the Hearing Officer is not providing expert advice to a judicial body.[543] It rather provides quasi-judicial advice – advice on the application of procedural rights – to an administrative body, of which she is an agent. The Officer is appointed in accordance with the Staff Regulations[544] and is attached to the Competition Commissioner. The office thus functions as an administrative department that nevertheless remains independent from the Directorate General responsible for actual enforcement initiatives. It would also appear that it cannot receive instructions related to an individual case from the Commissioner. The general instructions and delegations attributed to it are therefore determined in a binding legal instrument precisely to create an environment of legal certainty. The Hearing Officer's role in the Commission would therefore not seem to conform to the classical amicus curiae perspective. The Hearing Officer remains a part of the Commission[545], at heart a political body guaranteeing the general interest of the European Union. The Hearing Officer's role comprises the effectuation of that general interest, translated into particular procedural rights. The Hearing Officer rather functions as a *de facto* administrative law judge, without however being attributed that particular quality.

The terms of reference of the Hearing Officer nevertheless highlight one particular feature in the Commission's institutional organization of competition law supervision.[546] In order to enable the right to be heard to remain meaningful and detached from an administrative authority relying on it, a functionally separate division should decide on the scope of the right. That division, separated from the actual decision-making body and from the prosecuting body, allows procedural disputes to be settled or at least highlighted at an early stage of the proceedings.

A similar institutional project could also be identified at the national level to some extent in the wake of the *Vebic* judgment. By requiring the participation of a competition authority in judicial review proceedings, the Court also stressed the often dual role of competition authorities in the prosecution and deliberation of cases.[547] Given that these functions are often separated, it should not be considered impossible that only the prosecuting division of the national authority represents that authority on appeal. A more refined argument could also be detected in that approach. It could that EU law, even if applied by national authorities,

[541] See Article 14 Regulation 1/2003.
[542] Article 16.1 Decision 2011/695/EU.
[543] On the insufficiency of the current framework and the proposing of alternatives, see J. Killick and P. Berghe, 'This is not the time to be tinkering with Regulation 1/2003 – It is time for fundamental reform – Europe should have change we can believe in', 6 *Competition Law Review* (2010), 259-285.
[544] Recital 6 Decision 2011/695/EU.
[545] M. Van der Woude, 'Hearing Officers and EC antitrust procedures; the art of making subjective procedures more objective', 33 *Common Market Law Review* (1996) 546.
[546] As such, the Commission compensates for particular deficiencies in the operations of its two-tier structure, which could also serve as a reliever for more intense judicial review requirements, see R. Nazzini, note 366, 1001. See also V. Tiili and J. Vanhamme, 'The "Power of Appraisal" (Pouvoir D'Appreciation) of the Commission of the European Communities vis-`a-vis the Powers of Judicial Review of the Communities' Court of Justice and Court of First Instance', 22 *Fordham International Law Journal* (1998), 899.
[547] For an argument in favour of more separation, see I. Forrester, note 279, 842, suggesting a true separation of functions at the supranational level.

requires a functional segregation between prosecution and deliberation as a matter of legitimate EU competition law enforcement in instances where the (adjudicative part of a national) authority is unable to appear in review proceedings against its own decisions.

115. *The appellate stage* – A complementary right to appeal a decision adopted by a supranational or national competition authority has also been recognized. In particular, the right to review involves the right to be heard and to discuss the decision adopted by that authority in a judicial discussion facing that authority.[548] Authority participation to the judicial discussion poses an institutional precondition to ensure effective judicial protection against market supervision decisions.

The *Vebic* judgment could be read as implementing a similar vision in the national realm. By directly requiring participation of the authority in appellate proceedings, the Court determined the conditions for legitimate competition law enforcement and the conditions of functional separation between competition authorities and competition courts. Although that situation directly trumps national institutional autonomy, it presents itself as a necessary institutional consequence of the review stage supplementing the decision-making process. Only in that way would a deliberative review procedure between decision-maker and the subject of its decision become a reality.

116. *Nascent supranational cooperative accountability entitlements?* – The abovementioned overview showcases that attention to fundamental procedural rights determines the scope and institutional format of both supranational and national market supervision in all stages of infringement proceedings. Whereas the concrete institutional format and structure of national and supranational supervisory structures differ across these stages, convergence among the institutional frameworks and structures can be noticed or predicted. Dedicated attention to procedural rights in that understanding provides a toolkit to fine-tune the supranational operations and to converge national institutional frameworks to the image of the supranational level. In that understanding, these procedural rights are reflective of more general supranationally determined cooperation entitlements. Such entitlements enable both national and supranational institutional frameworks to demand institutional transformations and to structure these transformations in a particular institutional format. In doing so, supranational and national legal orders can hold each other to account and support a movement towards converging institutional frameworks.

Cooperative accountability rights in that understanding serve as a supranational constitutional means to enable convergence among and cooperation across different legal orders. Translated into concrete procedural rights that apply at both the supranational and national levels, they aim to bring about institutional approximation across diverging market supervision systems. At the same time, these cooperative entitlements do not impose a single institutional structure on national legal orders. They rather allow these orders to design their own system as long as such design does not contradict the responsibilities entrusted to national authorities or courts within the supranationally structured market supervision framework. It should nevertheless be

[548] For a proposal redesigning DG Comp in that regard, see A. Andreangeli, note 274, 243. Andreangeli bases her proposal on Case C-11/00, *Commission v European Central Bank*, [2003] ECR I-7147. That case concerned whether a Commission investigation conducted by the functionally-segregated but not independent European Anti-Fraud Office (OLAF) would enable the Commission directly to intervene in independent central bank decisions. The Court rejected that argument in para 139-143. Since OLAF functioned as a segregated department, sufficient firewalls existed between different branches or offices within the Commission. Andreangeli reasons by analogy to find a justification for functional segregation as a potentially legitimate institutional technique. The *Vebic* judgment could be said to have confirmed that position. For a position arguing against more functional separation in the name of effectiveness, see N. Zingales, note 281, 138.

remembered that these cooperative accountability rights – manifested in fundamental procedural rights – serve as an EU constitutional structure to facilitate the emergence and maintenance of a supranational supervisory system grounded in operational support.

c. Supranationally structured national institutional adaptation entitlements

117. *Introduction* –The institutional functioning model outlined above presents an exemplary course of action as to how the EU projects cooperative accountability structure in which national legal orders participate on the condition of institutional alignment. The cooperative accountability framework is not however adopted in a voluntary fashion. The Court of Justice is essentially responsible to hold national institutional arrangements to account. Its case law on fundamental procedural rights provides a direct transformation device structuring the architectural standards for legitimate competition law enforcement entertained at the national levels.[549] In doing so, the Court of Justice implicitly relies on a technique of supranational 'institutional adaptation' entitlements to nudge national institutional frameworks into EU constitutionally desirable formats.

118. *Varieties in national institutional formats* – National competition authorities reflect a variety of institutional formats. As Trebilcock and Iacobucci have generally stated, distinctions in organizational structure can be made between integrated agency, bifurcated agency and bifurcated judicial models. An integrated agency model presupposes a single enforcement authority that investigates, prosecutes and considers antitrust enforcement structures.[550] According to the UNCTAD Model Law on Competition[551], the European Commission exemplifies this structure. Integrated agency structures function as both administrators and judges and could therefore also be called quasi-judicial.[552] Bifurcated agency structures on the other hand presuppose that an administrative authority performs investigative and enforcement functions, whereas a specialized judicial authority performs adjudicative functions.[553] In that perception, the involvement of a specialized competition law court and a prosecuting authority is necessary to establish an infringement of antitrust rules.[554] The soon-to-be-reformed Belgian model proves to be a variant of this type of institution. It incorporates a prosecutorial and an adjudicative division of one single administrative jurisdiction. In doing so, it merely segregates functions rather than truly separating them. Bifurcated judicial models finally require the general jurisdiction courts to perform the adjudicative functions. A competition authority will in those instances be called upon to investigate the matter and bring it for a general court for final enforcement proceedings.[555] The U.S. model, whereby the Department of Justice's Antitrust Division brings a case in a federal court is an example of that approach.[556]

A similar division of competences can be found in the EU Member States. Wright stated that the Member States' competition authorities can be divided into (a) an integrated agency, competent to investigate and to take decisions, with potential for judicial review of the final

[549] On that perspective, see already, I. Maher, note 413, 223.
[550] M. Trebilcock and E. Iacobucci, note 479, 459-464.
[551] Chapter IX of the United Nations Conference on Trade and Development (UNCTAD) Model Law on Competition (2010) distinguishes between bifurcated agency and bifurcated judicial models in addition to integrated agency structures such as the European Commission, see document TD/B/C.I/CLP/L.2 of 9 May 2011, available at http://www.unctad.org/en/docs/ciclpL2_en.pdf
[552] M. Trebilcock and E. Iacobucci, note 479, 463.
[553] M. Trebilcock and E. Iacobucci, note 479, 461.
[554] M. Trebilcock and E. Iacobucci, note 479, 462.
[555] M. Trebilcock and E. Iacobucci, note 479, 460.
[556] D. Crane, note 521, 96-97.

agency decision before a competent court; (b) split – or bifurcated[557] – functions, with the investigation carried out by an administrative agency, and the final decision taken by a court, again with the possibility of judicial review of the final decision; and (c) an administrative agency, which may reach a finding of no infringement, whilst a court must pronounce a prohibition or impose sanctions, with the possibility of that decision being appealed to a higher court.[558] Article 35 Regulation 1/2003 recognizes that variability and does not mandate a single national institutional blueprint. It rather allows each Member State to design its competition authorities in ways that would best enable them to exercise their functions.[559]

119. *Three formats of CJEU-triggered convergence* – The Court of Justice is nevertheless able to interpret that provision. In doing so, it is also capable of indirectly shaping the institutional outlook of national competition authorities in a more or less invasive way. The judgment in *Vebic* could be read to reflect such a preference. The judgment indeed projects particular institutional structures at the national level that need to function in accordance with the principled boundaries of competition law supervision established at the EU level. In the Court's reading, these structures either include a functionally segregated administrative authority adopting administrative decisions it will defend before a national court or an administrative authority adopting a prosecution decision that will or could be brought before an administrative tribunal or a court of general jurisdiction which will subsequently hear both the authority and the undertakings concerned.[560] In both instances, the institutional structure of national competition institutions should reflect a particular taste for adversarialism both in the decision-making and review stages. A major difference between both systems is that the latter posits a true separation of functions, whereas the former only requires these functions to be segregated.[561]

The following table graphically shows the institutional options available following the *Vebic* judgment. The institutional principles identified in *Vebic* allow concrete national and supranational institutional arrangements to vary along a multitude of options, as the table shows. In addition, these principles do not address the scope or intensity of review exercised by the national courts. It could therefore be expected that future institutional refinements may come from the Court willing further to narrow the institutional choices of national competition authorities in institutionalising a more adversarial procedural framework.

institutional formats allowed under EU law	national and supranational choices

[557] See also F. Rizzuto, note 457, 286.
[558] K. Wright, 'The 'Judicial', the 'Administrative' and consistent application after the decentralisation of EC antitrust enforcement', Paper for European Union Studies Association Eleventh Biennial International Conference, April 2009, available at www.eustudies.org, 7-8.
[559] And thus to overcome any dangers of regulatory capture, see R. Van den Bergh and P. Camesasca, note 91, 441-442 for examples in national law. See for an overview of different enforcement structures, J. Steenbergen, 'Decision-making in Competition Cases: The Investigator, the Prosecutor and the Judge' in L. Gormley (ed.), *Current and Future Perspectives on EC Competition Law* (The Hague, Kluwer Law International, 1997), 106-107; W. Wils, note 216, 65-66.
[560] See on that reading, P. Van Cleynenbreugel, note 526.
[561] In any instance, the separation or segregation of functions is deemed necessary to comply with the standards imposed by Article 6 ECHR, see T. Perroud, 'The Impact of Article 6(1) ECHR on competition law enforcement: A comparison between France and the United Kingdom', *Global Antitrust Review* (2008), 61.

segregated agency + agency participative judicial review	majority model: Commission; Germany; Greece; the Netherlands; Poland; UK *recent transformations: France, Belgium*
separated or segregated prosecution and judicial decision-making	UK (criminal), Ireland, Austria, Finland, Sweden
segregated prosecution and quasi-judicial[562] decision-making and *prosecutorial* participative judicial review	Commission?[563] *future national shifts?*

A first institutional format comprises the majority model of national competition law structures operating in the realm of EU law: a functionally segregated single agency that participates in judicial review against its own decisions. The European Commission, Germany[564], Greece[565], Italy[566], the Netherlands[567], Poland[568] and the United Kingdom (except for criminal law cartel procedures)[569] are but a few examples of this framework. Although the national competition authority is designed as a single integrated authority, its functioning is segregated and oftentimes specialised chambers have been created within the authority to decide upon a case. These authorities do not function as courts, but serve as administrative authorities and adopt administrative decisions. Judicial review is typically conducted against the authority, which can defend itself in court. Following from *Vebic*, this adversarial appellate review stance is obligatory for each authority applying EU law. The French *Autorité de la Concurrence* is an administrative agency and operates in a functionally segregated way.[570] According to French law however, the *Autorité* could not act as a defendant in appellate proceedings. It was upon the Minister of Economic Affairs to represent the 'public interest' as a defendant in appellate review cases.[571] A few weeks after *Vebic* however, the Paris Court of Appeal has been willing – despite legislative provisions

[562] By quasi-judicial, I refer judge-like bodies that are not formally a part of a national legal systems civil, criminal or administrative judiciary. They can best be compared to U.S. administrative law judges, who are specialised civil servants hearing claims before a classical judicial body will entertain the case, see M. Asimow an L. Dunlop, note 456, 142 and M. Trebilcock and E. Iacobucci, note 550, 463 refer to an integrated agency model in that respect.

[563] See for a minimalist proposal at the supranational level in that regard, R. Nazzini, note 366, 1002-1004.

[564] See §48 *GWB*. See also H. Schweitzer, note 352, 111.

[565] See Case C-53/03, *Syfait,* [2005] ECR I-4609, para 29-37; para 33 states that in so far as there is an operational link between the Epitropi Antagonismou [the Greek Competition Authority], a decision-making body, and its secretariat, a fact-finding body on the basis of whose proposal it adopts decisions, the Epitropi Antagonismou is not a clearly distinct third party in relation to the State body which, by virtue of its role, may be akin to a party in the course of competition proceedings. At the same time however, the administrative nature of the body was not called into question.

[566] As apparent from ECtHR, *Menarini*, para 12.

[567] See Article 2(3) Wet van 22 mei 1997, houdende nieuwe regels omtrent de economische mededinging (Dutch Competition Act), available at www.wetten.overheid.nl, referring to the Dutch Competition Authority as an independent administrative organ.

[568] C-375/09, *Tele 2 Polska*, para 11-13.

[569] See Section 1 Enterprise Act 2002; see H. Schweitzer, note 352, 121 for more background. See also C. Graham, 'The Enterprise Act 2002 and Competition Law', 67 *Modern Law Review* (2004), 273-288.

[570] Article L 461-1 French Commercial Code, available at www.legifrance.gouv.fr.

[571] Article R 464-11 French Commercial Code.

proclaiming the contrary – to recognise the administrative *Autorité de la Concurrence* as a sole defendant in appellate proceedings against its decisions.[572] In so doing, it has made the French institutional framework more adversarial and *Vebic*-proof.

A second institutional format presents a separated or segregated prosecution and decision-making body. In that 'bifurcated'[573] constellation, a prosecuting body adopts a preliminary position, which will subsequently be confirmed or adapted into a binding judicial or quasi-judicial decision. The Irish system[574] and the UK's criminal cartel procedure[575] are cases in point in that regard. The Belgian system also reflects that approach. Appeals taken against these judicial decisions will typically include the prosecuting (part of the) authority and the undertakings concerned, yet this should not be the case. In accordance with the Vebic principles, it would suffice if either the prosecution or the decision-making authority would be able to participate in appellate proceedings. Following *Vebic*, the simplest adaptation for Belgian law was to recognise the prosecuting part of the Competition Council's or the General Directorate's role in appellate proceedings. Although the Council could then formally take part in the appellate proceedings, the prosecuting part would be responsible for such participation. A system of Chinese walls between the prosecution and decision-making bodies currently in place in the internal operations of the Council would as a result be extended to the external appellate action stages. In case of the General Directorate's participation however, these issues would not materialize. The present reform proposals nevertheless

A third institutional format combines the previous two[576] and could be said to underlie both *Vebic* and the recent Commission procedural reforms. That format follows the *Vebic* reasoning to its fullest and would require the scope of adversarial judicial review to be institutionalised as *prosecutorial* participative judicial review. Prosecutorial review implies that the adversarial scope of judicial review should always take place between a prosecuting body and the undertakings concerned. If that conclusion is taken to its fullest extent, the organisation of national competition authorities should seriously be reorganised to strictly separate prosecution and decision-making bodies. Only the former bodies would then be able to participate in appellate proceedings, whereas the latter would serve as quasi-judges who could not intervene in appeals against their own decisions. Although no conclusive evidence for that evolution can be found in the Court's case law itself, the continuing wedge between the prosecution and decision-making stages at the Commission level, coupled with the imposition of national institutional segregation in *Vebic* at the very least hint at such a future approach. This is all the more confirmed at the Commission level. The Commission Legal Service, another segregated unit within the Commission, will not only represent the latter before the Courts, adopting its position on the case file assembled by the prosecuting director

[572] See Paris Cour d'Appel, SCP Fisselier Chiloux Boulay, judgment of 27 January 2011, available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=138 (last consulted 12 May 2013); see also N. Petit, note 422, 344.

[573] M. Trebilcock and E. Iacobucci, note 550, 461; N. Petit note 422, 343; F. Rizzuto, note 457, 286.

[574] See Sections 4 and 5 Irish Competition Act 2002, the infringement of which constitute criminal offences that will be brought by the Competition Authority before the District Court or the Central Criminal Court. F. Rizzuto, note 457, 286 also refers to Austria and Finland as examples of this model of enforcement, without direct reference to the criminal law nature of competition law in these systems. The Belgian model predating the 2006 legislative reform was captured by this format as well.

[575] See Section 190 2002 Enterprise Act. See also J. Joshua and C. Harding, note 281, 347.

[576] See for a similar perspective in the realm of U.K. institutional reform proposals, J. Aitken and A. Jones, note 417, 102-103.

and on the basis of the decision adopted by the Commission[577], but will also continuously be involved in the prosecution and preparatory stages of decision-making.[578] The Legal Service is therefore uniquely positioned to defend the position adopted by the Commission as such, but also reflective of the prosecutorial points of view adopted. A system of *prosecutorial* participative judicial review would precisely imply this: a prosecutorial body that also defends the position of the authority's final decision before the review court. In that constellation, the prosecutorial body only defends its own case file before the decision-making authority, but would be called upon to defend that authority's take on appeal lodged by disgruntled investigated undertakings.

Since *Vebic* did not explicitly recognise a right to initiate appeals for a prosecutorial body, it would appear that a preference for a passive prosecutorial participative appellate review underlies the judgment. The Court did not however make explicit whether a system of passive prosecutorial appellate review underlying the third format should always be preferred over the first institutional format as a matter of EU law.[579] In that understanding, national authorities operating in accordance with the first format would be mandated to segregate prosecutorial and decision-making functions not only in relation to agency decision-making procedures, but also in the realm of appellate review against these decisions. As a result, the responsible prosecuting officer (e.g. the Senior Responsible Officer within the OFT[580]) would not only be called upon to prosecute cases prior to the adoption of infringement decisions, but would also be obliged to defend the authority's position in appellate cases (e.g. before the CAT) as a matter of EU law. The imposition of this third format on national authorities would therefore seriously curtail their national institutional autonomy. It remains questionable whether the Court would really prefer this format to emerge across the Member States.

120. *Shrinking scope of national institutional autonomy* – At present, Article 35's adherence to national institutional autonomy remains valid as a matter of EU law. Member States can still choose their national organizational structures in the realm of competition law enforcement without any direct interference from the European Commission. The Court's judgment in *Vebic* nevertheless makes clear that Member States' institutional autonomy is necessarily confined by the demands of effective EU law application in the Member States. In doing so, the Court of Justice can impose some requirements on the *institutional operations* of national competition authorities as a matter of EU law. The Court therefore presupposes that these national authorities are inherent elements of the EU law enforcement system and could therefore be moulded in a more European fashion. Whilst *Vebic* was limited to requiring participative judicial review at the appellate stage, it also shows that the Court is willing to go beyond a mere institutional autonomy requirement to adapt the functioning of national authorities.

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[577] At this stage however, the Legal Service only expresses opinions that do not bind the Commission. As such, they cannot be invoked as evidence of the Commission adhering to a specific position when that position is not reflected in the final decision, see Case C-445/00, *Austria v Council*, [2003] ECR I-8549, para 28.

[578] M. Asimow an L. Dunlop, note 456, 157-158. See also W. Wils, note 279, 203.

[579] This also means that *active* prosecutorial participative review should not *per se* be excluded at the national level as a matter of EU law.

[580] The Senior Responsible Officer would in that image be supported by the General Counsel's staff. On the system of OFT decision-making and on the responsibilities of a Senior Responsible Officer, The OFT also inaugurated a Procedural Adjudicator to the image of the Commission's Hearing Officer. This might indicate that the movement towards convergence is more directly affecting the institutional realm of EU competition law enforcement. Future judicial proclamations in that regard could transform these convergence modes into necessary principles of adequate national institutional organisation mandated by EU law. See OFT Guidance, 'A guide to the OFT's investigation procedures in competition cases', October 2012, available at http://www.oft.gov.uk/shared_oft/policy/OFT1263rev (last consulted 27 February 2013).

The Court's role as projected here more generally points at the constitutional technique of imposed institutional adaptations in the service of a shared set of due process considerations. National institutional transformations are in that understanding justified by reference to due process considerations and the supranational Court of Justice is implicitly considered the legitimate guardian of such considerations, to the detriment of national institutional and democratically legitimised autonomy. In that understanding, the judicially identified supranational institutional adaptation entitlements constitute nothing more than a constitutionally justified method to invade and streamline national legal orders in the service of a supranationally structured market supervision project. Institutional adaptation rights – exemplified in due process considerations – comprise a constitutional technique to justify the development and implementation of a market supervision regime grounded in national operational support.

8. Judicial review in an integrated constitutional framework: commandeering and operational support

121. *Introduction* – The scope of judicial review at the EU and national levels analyzed in part A of this chapter highlighted that while a divide regarding the scope of review can be noticed in relation to the EU and national levels, national levels themselves are converging around a regulative standard reflected in the ECHR. In order to realign both EU and national approaches, Regulation 1/2003 would have to provide for a sufficient legality review of competition law decisions.

The dual system of judicial review does not however mean that additional tools of judicial interaction between the EU and the national levels would remain impossible or futile. The reference for a preliminary ruling mechanism does indeed guarantee that national courts will remain able to call upon the Court of Justice to obtain particular rulings. These rulings can contribute to the shaping of a particular institutional mechanism, in which the Court will eventually determine the obligations imposed on both national authorities and national courts, so as to maintain their functioning in an integrated market supervision system. The newly identified legal basis in the Charter will most certainly contribute to that evolution as well as the upcoming accession of the EU system to the ECHR regime and the institutional interactions and consequences following therefrom.[581] As a result, more convergence can be predicted to arise at the national levels through supranationally imposed procedural obligations.

This section conceptualizes the technique of judicial commandeering, on which the Court of Justice relies in its judgment in *Vebic*. It maintains that this commandeering role – on which the Court has frequently relied in the fields of remedies and national procedure – also serves as a justificatory constitutional structure in the organization and fine-tuning of market supervision features grounded in operational support.

122. *Judicial commandeering* – The Court's approach could be compared to the technique of commandeering read into the U.S. Constitution's Tenth Amendment.[582] Commandeering

[581] See S. Iglesias Sanchez, note 514, 1565-1612; For an earlier account, see A. Knook, 'The Court, the Charter, and the Vertical Division of Powers in the European Union', 42 *Common Market Law Review* (2005), 367-398. For a more general reflection, see E. Spaventa, 'Federalisation Versus Centralisation: Tensions in Fundamental Rights Discourse in the EU' in M. Dougan and S. Currie (eds.), note 227, 343-364 and A. Egger, 'EU-Fundamental Rights in the National Legal Order: The Obligations of Member States Revisited', 25 *Yearbook of European Law* (2006), 515-553.

[582] The Tenth Amendment reads that [t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People.

refers to the targeted imposition of affirmative and coercive duties imposed on state legislators or executive officials by the federal government.[583] In particular, commandeering comprises the direct and unconditional[584] obligation for state authorities or agencies to execute and implement federal policy without receiving any financial or monetary incentives for doing so. That practice, considered unconstitutional by the U.S. Supreme Court[585], directly imposed cooperative obligations to implement and supervise federal law and to devote defederated resources to that endeavour. The EU on the contrary frequently and necessarily relies on national authorities or agencies to render the application of EU law effective. The Court effectively validated commandeering as a constitutional technique of European integration.[586] Given the different natures of federalism or integration reflected in both the U.S. and EU legal systems, that should not come as a surprise. More surprising however is that the European Court of Justice also directly engaged in commandeering national courts to promote or mandate the reorganizing of national civil and administrative procedures.[587] In

[583] See M. Adler, 'State Sovereignty and the Anti-Commandeering Cases', *The Annals of the American Academy of Political Science* (2001), 164.

[584] R. Hills, 'The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't', 96 *Michigan Law Review* (1997-1998), 817. See also N. Siegel, 'Commandeering and its Alternatives: A Federalism Perspective', 59 *Vanderbilt Law Review* (2006), 1629-1691.

[585] *Printz v United States*, 521 U.S. 898 (1997). A precedent in that regard was *New York v United States* 505 U.S. 144 (1992), in which the seven-Justice majority agreed that 'while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so'. At the same time however, the Supreme Court held that Congress could indeed rely on the U.S. Constitution's taxing and spending clause to nudge state legislative amendments. In *South Dakota v Dole*, 483 U.S. 209 (1987), the Court validated a legislative programme that allowed for the withholding of federal funds to States that did not raise the alcohol purchase age to twenty-one. The Court held that Congress may impose such pressures on States, without however directly compelling them to act or not to act. More recently, in its 'Health Care Opinion' *National Federation Of Independent Business et al. v. Sebelius*, 567 U.S. __ (2012), the Supreme Court held that the expansion of a social security programme beyond well-established and limited categories of persons and the risk of States not willing to participate in this expansion to lose all funding related to that programme (Medicaid) would no longer put pressure on states but leave them no choice but to participate in that programme. That expansion was therefore held unconstitutional, resulting in Member States now being granted a choice to accede to the expanded programme. See for background N. Huberfeld, E. Weeks Leonard and K. Outterson, 'Plunging into Endless Difficulties: Medicaid and Coercion in the Healthcare cases', Boston University School of Law Working Paper 12-40, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128760.

[586] On the infeasibility of an anticommandeering principle in EU law attributed to the inherent connection between the Union and its Member States, see D. Halberstam, 'Comparative Federalism and the Issue of Commandeering' in K. Nicolaides and R. Howse (eds.), note 40, 213-251 for an overview of differences. See also F. Mayer, 'Competences- Reloaded? The Vertical Division of Powers in the EU after the New European Constitution' in J.H.H. Weiler and C. Eisgruber (eds.), 'Altneuland: The EU Constitution in a Contextual Perspective', *Jean Monnet Working Paper* 5/04, 18. It is indeed commonplace that the European Union may engage national legal orders in the operation of an EU-wide programme and in the enforcement of such programme throughout the Member States, see J. Jans, R. de Lange, S. Prechal and R. Widdershoven, *Europeanisation of Public Law* (Groningen, Europa Law Publishing, 2007), 220. See also R. Schütze, 'From Rome to Lisbon: "Executive federalism" in the (New) European Union', 47 *Common Market Law Review* (2010), 1418 for legislative examples of commandeering in the realm of telecommunications and electricity regulation.

[587] On civil procedure, see among others Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral*, [1976] ECR 1989, para5; Case 45/76 *Comet*, [1976] ECR 2043, para 17 and 18; case C-208/90 *Emmott* [1991] ECR I-4269, para 23; Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, para 48; Case C-312/93 *Peterbroeck*, ECR [1995], I-4599, para 14; Joined cases C-430/93 and C-431/93, *Van Schijndel*, [1995] ECR I-4705, para 21;Case C-188/95 *Fantask and Others* [1997] ECR I-6783, para48-52; Case C-231/96 *Edis* [1998] ECR I-4951, para 35; Case C-445/06, *Danske Slagterier*, [2009] ECR I-2119, para 56. On administrative procedure, see Case C-453/00, *Kühne & Heitz*, [2004] ECR I-837, para 28 provides the most evocative example in that regard. In that judgment, the Court evinced from a possibility for national administrative bodies to re-open final decisions an obligation to do so in cases warranted by EU law. See also Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007]

addition, by requiring remedies to be established and implemented, the Court provided national legal orders with a blueprint on how to proceed forward, without attributing particular resources or tools to these orders.[588] National law had to accommodate EU law requests, the concrete implementation of which remained within a now limited framework of national autonomy. National courts in that image commandeer national legal orders to comply with EU law requirements.

123. *Commandeering and national operational support* – The Court's approach in *Vebic* and - to a more limited extent- *Pfleiderer* reflects a similar taste for commandeering national legal orders with a view to adapt, restructure or align their institutional functioning to the needs of the supranational market supervision framework. Such commandeering does not directly neglect national institutional autonomy, but reconsiders the boundaries and limits of national procedural intervention. At the same time however, .[589]

Commandeering in that understanding comprises an additional constitutional technique to maintain a framework grounded in national operational support. In that understanding, the scope of competition law supervision and the ascertainment of judicial review by national courts in disputes relating to the application of EU law by national authorities will largely be determined by the European Court of Justice. The binding characteristics of the Charter provide an essential structural supporting mechanism in that regard.

The technique of commandeering serves as a justificatory device for the Court to legitimately proceed in refining and outlining a mandate for regulatory interaction and operational support in the field of judicial control over market supervision activities. The Court can do so since the EU constitutional framework and the necessities of an efficient and well-functioning integrated market supervision framework require such intervention. As such, the Court's commandeering role facilitates a project of EU market supervision based on constitutionally sanctioned interactions and national operations. The scope of national procedural autonomy becomes ever more regulated towards supporting precisely that project. As a result, commandeering serves further to diminish and restructure national institutional autonomy in the realm of competition law supervision organisation requirements. In doing so, reliance on commandeering essentially enables the national operational support mandate read into Article 103 TFEU to come further into shape.

9. Institutional heteronomy as an explanatory constitutional framework

124. *Introduction* – The operational support dimension read in Article 103 TFEU, supplemented by a supranational cooperative rights approach and judicial commandeering present techniques grounded in the EU constitutional framework to structure and maintain an integrated competition law supervision regime. This section argues that these constitutional benchmarks more generally reflect an *institutional heteronomy* reading of the EU constitutional framework. It conceptualizes the notion of heteronomy and identifies its features in the present EU competition law supervision framework.

ECR I-4233, para 41 and M. Eliantonio, *Europeanization of administrative justice? The influence of the ECJ's case law in Italy, Germany and England* (Groningen, Europa Law Publishing 2008), 295.

[588] It could nevertheless be argued that the U.S. Supreme Court is equally comfortable with commandeering State judges, see already *Testa v Katt*, 330 U.S. 386 (1947), where state courts are mandated to hear claims under federal law to the same extent that they hear state law-based claims.

[589] In doing so, it sides with the claim by M. Everson and C. Joerges, 'Reconfiguring the Politics-Law Relationship in the Integration Project through Conflict-Laws Constitutionalism', 18 *European Law Journal* (2012), 663, that 'the Member States of the EU are no longer autonomous. The are wholly interdependent and reliant on cooperation'.

This section subsequently briefly compares the newly identified institutional heteronomy features with the institutional mechanisms governing another dimension of EU competition law supervision, i.e. concentration control. Although the Commission largely remains the one stop shop supervisor in that field of law, particular cooperative mechanisms confirm the institutional heteronomy elements identified as a constitutional framework structuring the interactions between EU and national legal orders in the organization of market supervision arrangements.

a. Institutional heteronomy as a principled constitutional framework

125. *The heteronomy concept* – The notion of heteronomy derives from a contrast with the general conception of regulatory or institutional autonomy underlying Member States' legal system operations in the EU legal order. Institutional heteronomy is based on the concept of institutional autonomy. Institutional autonomy is argued to constitute an umbrella principle retaining a Member State's sovereignty over its own institutional organization.[590] Hans Kelsen's reference to heteronomy as 'a general norm by which an individual is obligated without [or] even against his will' is guiding in that respect.[591] Whilst Kelsen projected the heteronomy metaphor in the relationship between the state – or lawmaker – and the individual, a similar metaphor could also be developed in relation to multi-level institutional arrangements. The concept of heteronomy presupposes a hierarchical relationship, i.e. the capability of a particular authority or institution to obligate another authority or institution even against his will. In that image, institutional heteronomy refers to the *constitutionally established possibility for one institution to obligate another institution operating at a different level of governance*.

In the EU's constitutional context, this understanding of the 'heteronomy' *concept* captures at least three dimensions: subordination, empowerment and cooperative federalism. First, institutional heteronomy captures national law's subordination to, or at least dependence on EU rules and principles. That would be hardly surprising, as this is exactly what national procedural autonomy scholarship has been proclaiming for years. Within the scope of application of EU law[592], national procedural law remains an ancillary body of law to the enforcement of EU rights.[593] To some extent, that would imply that national procedural frameworks were already *obligated* to comply with EU requirements, but those requirements only entailed negative obligations (obligations to set aside contrary national provisions) or semi-positive obligations (obligations to extend the scope or range of a particular procedural provision to accommodate claims based on EU rights or to ensure the effective application of EU law and EU remedies). This dimension resembles the current state of 'national procedural competence' and aligns with the Court's approach in *Unibet*.[594] It does not as such require

[590] P. Haapaniemi, 'Procedural Autonomy: A Misnomer?' in L. Ervo *et al.* (eds.), *The Europeanization of Procedural Law and New Challenges to a Fair Trial* (Europa Law Publishing, Groningen 2009), 90.
[591] H. Kelsen, *General Theory of Law and State* (translated by A. Wedberg), (Harvard University Press, Cambridge 1945), 205. See more recently, N. MacCormick, 'The Relative Heteronomy of Law', 3 *European Journal of Philosophy* (1995), 69, referring to individual's subsumption to the will of some governing authority, even if that be a form of democratic legislature. The idea of heteronomy additionally reflects subsumption to a set of regulative principles structuring the will of a governing authority and translating that will into concrete regulatory outcomes.
[592] Whatever that may mean, given recent discussions on the extent of the application of general principles of EU law, see Editorial, 'The scope of application of the general principles of Union law: An ever expanding Union?', 47 *Common Market Law Review* (2010), 1589 -1596.
[593] See C. Kakouris, 'Do the Member States Possess Judicial Procedural Autonomy?', 34 *Common Market Law Review* (1997), 1390.
[594] Case C-432/05, *Unibet*, para 44.

national procedural rules to be designed beyond the extension of existing rules to accommodate EU claims, even though it may require the provision of new EU remedies.

Secondly, heteronomy refers to supranational empowerment over national judges. National judges are obliged, against their will but based on the expertise they have developed, to provide inroads for legislative or judicial reform of national procedural rules or principles. In the particular circumstances of *Vebic*, reform implied developing alternative routes to allow national authorities to be a *defending or responding party* to the appellate proceedings.[595] On a more general level, heteronomy promotes judge-created institutional standards or rules that are imposed on national legal orders *per se*: these rules are deemed essential to guarantee EU-wide adequate judicial protection and therefore have to be incorporated in national procedural regimes. These rules effectively empower EU law to demand or structure national institutional adaptations.

Thirdly, heteronomy theoretically presents limitless opportunities for judge-made 'Europeanized' standards. So far, it remains unclear to what extent the Court would be willing or comfortable developing such standards. The concept of heteronomy nevertheless incorporates a particular approach towards *cooperative federalism*: national legal orders do not only function as ancillary enforcement institutions in the establishment of EU law, they equally share responsibility and constitute parts of an organized playing field between different EU and national actors. From that perspective, the CJEU will only intervene *per se* in situations that cannot otherwise be adapted to requirements of EU integration and (quasi-) uniform application of EU law. Cooperative federalism imposes on the CJEU requirements of subsidiarity and proportionality traditionally linked to EU legislative policy in non-exclusive competences. Member States on the other hand bear a special responsibility in providing adequate national institutional rules that conform to EU requirements. To limit the scope of *per se* rules or principles, Member States can equally engage the EU's legislative process to provide for partial harmonization of particular elements of institutional or procedural organization.[596]

126. *Towards a heteronomy principle* – The conceptual dimensions can be translated into a dynamic principle of judicial practice. As a *principle*, institutional heteronomy involves a two-tier analysis, the extent and content of which is largely determined by the Court, the EU lawmaking process and the specific national institutional rules at stake. First, the Court takes the procedural rule of reason as applied by the principle of effectiveness as a basis for evaluating the adequateness of national institutional rules. The Court's evaluation nevertheless occurs within a more elaborated framework of adequate judicial protection and due process. *Vebic* presented a first step in providing the boundaries of that framework. Second, the Court guards those boundaries through a limited set of *per se* institutional organization rules or principles, such as the one demonstrated in *Vebic*. As such, institutional heteronomy compels the Court and the national legal orders to develop a mind-set of cooperative awareness that allows supranational judges directly to interfere with national institutional and procedural settings when national procedural regimes do not provide adequate judicial protection. As a constitutional principle of European integration, it would

[595] Case C-439/08, *VEBIC*, para 59.

[596] Particular sector-specific regulations in consumer law, environmental law and also competition law have indeed harmonized specific procedural parts. In addition, the Court's case law in those areas continues to contribute to sector specific harmonization as well. See J. Jans, 'Harmonization of National Procedural Law via the Back Door? Preliminary Comments on the ECJ's Judgment in *Janecek* in a Comparative Context' in M. Bulterman *et al.* (eds.), *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot* (Kluwer, Alphen a/d Rijn 2009), 267-275.

thus represent an instrument for aligning the institutional organization frameworks of Member States in the service of effective EU market supervision.

127. *Four elements of institutional heteronomy* – The emphasis Article 103 TFEU places on operational support and the Charter's potentially extensive application into the realm of competition law promote a judicially-structured cooperative EU competition law supervision framework. The system thus reflected could be captured by the notion of institutional heteronomy. Four specific elements of institutional heteronomy can be defined in that regard. First, institutional heteronomy presupposes *unity of policymaking*. Second, *cooperative incentives* operationalize the unity of policymaking principle in a multilevel supervision context by relying on the notion of cooperative rights. Third, cooperation occurs against the background of *second-line systemic supervision.* Fourth, all the foregoing features do not presuppose a mere hierarchical framework but a *hierarchical quasi-duality*.

Firstly, the decentralized system of EU competition law supervision functions within a unitary policymaking framework. General substantive and procedural choices are made at the EU level. The role of national authorities and courts is limited to the application of those choices. The unity of policymaking principle finds its constitutional basis in the direct effect of Article 101 TFEU and the *BRT v Sabam* judgment in which the latter provision was declared to be directly effective. Regulation 1/2003 specifically confirmed the unity of policymaking in its references to the primacy of EU competition law in direct relation to national competition law provisions in Article 3 of that regulation and by explicitly granting the Commission the power to temporarily withdraw cases from the national authorities under Article 11(6) TFEU.

Secondly, the obligation for national authorities and national courts to apply EU competition law require particular *incentives* to ensure that EU and national legal orders effectively cooperate in the enforcement of EU competition law. The constitutional framework itself provides ample incentives for cooperation between the national and supranational levels. These incentives are translated into cooperative rights that entitle different governance levels to particular supervisory roles within the system and allow each level to invoke that entitlement against the other and against market operators. In addition to the specific mechanisms outlined in this part, more general incentives equally serve that purpose. First, the creation of a reference for preliminary ruling mechanism in Article 267 TFEU constitutes the pinnacle of judicial collaboration between judges. Second and more specifically, the Article 103 TFEU legal basis explicitly promotes a constitutional mandate to determine the relationship between supranational and national competition laws as applied by competition authorities and national courts, but does not as such present concrete incentives to be adopted. The legal translation of that provision into Regulation 1/2003 structured two sets of such incentives. The first set of incentives – EU incentives – can be located in Articles 11, 15 and 22 of Regulation 1/2003. These provisions allow or oblige the European Commission to engage in cooperative ventures with national authorities (Article 11) and Courts (Article 15) in the process of decision-making, as well as in the process of inspections and investigative measures (Article 22). In so doing, the system of Regulation 1/2003 requires the Commission to ensure that its operations are supported or at least notified to national authorities, ensuring the facilitation of cooperation. The second set of incentives ascertains the same goal in a bottom-up fashion. It enables Member State authorities to call upon the European Commission to justify its actions in the realm of EU competition law, most predominantly in the field of inspections and investigatory measures (Articles 20-21 Regulation 1/2003).

Thirdly, a constitutional system predicated on institutional heteronomy presupposes a second-line systemic supervision framework. Systemic supervision refers to general oversight of the

operations of a particular rule-based system, with a view not only to monitor but also to remedy particular shortcomings that transcend the peculiarities of individual cases. As such, a systemic supervisor is tasked with monitoring the workability and integrating the multilevel cooperation *system*. Its supervisory role is second-line, as it monitors the authorities directly supervising market operators. Overall, the EU judiciary is called upon to act as a systemic second-line supervisor monitoring the institutional arrangements. EU competition law supervision reflects these features by virtue of Article 6 ECHR and Article 47 of the Charter of Fundamental Rights and the fair trial guarantees they incorporate. Both provisions enable the EU judiciary to establish rules of procedure or – as *Vebic* showcased – rules of institutional functioning with a view to ensure the proper functioning and the constitutionality of the system of market supervision created by Regulation 1/2003. Some provisions of the Regulation itself also hint at these systemic supervision roles. Article 16 allows the Commission to intervene in national disputes albeit supervised by the Court of Justice, and Article 35, formally granting Member States autonomy in designating the competent competition authority, has been interpreted to allow for participative judicial review against national competition authorities' decisions, even if the latter is a court in accordance with national law. The European Commission only partially acts as systemic second-line supervisor. In accordance with Article 105 TFEU, it is responsible for the direct supervision and enforcement of EU competition law. As such, it acts as a primary and first-line market supervisor. In monitoring the national authorities and courts, the Commission functions as a systemic second-line supervisor. Its role in that regard is nevertheless subject to Court of Justice scrutiny.

Fourthly, the previous three conditions presuppose the presence of a hierarchically structured relationship between different levels. As Kelsen argued, heteronomy presupposes someone or something having the power to oblige another to act or to develop a legal framework, even against his own will. It thus presupposes a hierarchical relationship. It is submitted that in a multi-level governance system, such hierarchy nevertheless should nevertheless incorporate room for cooperative incentives and interactions to allow inferior levels some playing room within the . The hierarchical regime does not indeed presuppose two entirely separated legal atmospheres, one superior and the other inferior. It rather presupposes some mechanisms referred to as interlocking legal structures[597] or quasi-federal principles[598] jointly contributing to a common purpose. The scope of that joint institutional venture requires legal orders to remain separate somehow, but all of them operating under a similar principled legal framework. Although no clear hierarchy could be detected between these legal orders, these orders are nevertheless integrated and called upon to establish a workable institutional compromise. That attitude can best be captured by the concept of *hierarchical quasi-duality*. That concept presupposes the operation of multiple legal orders and a set of constitutional principles governing and overcoming the quasi-duality or separateness that would otherwise impede their coordinated functioning. The legal translation of these constitutional principles into a workable compromise resulted in particular provisions in Regulation 1/2003 establishing the primacy of EU competition law (Article 3), the circumscribed role of national competition authorities in that realm (Article 5) and the Commission's role in finding the inapplicability of Article 101 (3) (Article 10). The principles identified thus establish some kind of hierarchy in an otherwise heterarchical legal environment.

[597] On the concept of interlocking legal orders, see K. Lenaerts, 'Interlocking legal orders in the European Union and Comparative Law', 52 *International and Comparative Law Quarterly* (2003), 873-906.
[598] See J. Komárek, 'Federal Elements in the Community Judicial System – Building Coherence in the Community Legal Order', 42 *Common Market Law Review* (2005), 9-34.

128. *Overview* – The following table summarizes the institutional heteronomy structure of EU competition law supervision:

elements of institutional heteronomy	constitutional basis	legal translation	judicial translation
unity of policymaking	art 101-103 TFEU	art 3 and 11(6) Regulation 1/2003	*Tele 2 Polska; T-Mobile; Toshiba*
cooperative rights	art 103 TFEU; art 267 TFEU	art 11, 15 and 22 Regulation 1/2003 (EU incentives); art 20-21 Regulation 1/2003 (national incentives)	*Vebic ; Pfleiderer*
second line systemic supervision by Commission and CJEU	art 47 Charter; art 19 TEU; art 105 TFEU	art 35 Regulation 1/2003 (Vebic); art 16 Regulation 1/2003	*France Télécom (T-340/04) ; X. BV*
hierarchical quasi-duality	art 103 TFEU	art 3, 5 and 10 Regulation 1/2003	*T-Mobile; France Télécom (T-339/04)*; *Vebic*

129. *Legislative and case law reflections* – The features identified above are mainly reflected in the provisions of Regulation 1/2003. The constitutional Treaty framework does nevertheless provide a basis for their elaboration and as such reflects the groundwork for these operational provisions to come into being. As a result, the legislative provisions turn the scope of constitutionally structured argument explicit. From that perspective, the legislative framework allows to identify these elements of regulatory interaction in EU competition law supervision. The abovementioned table precisely summarizes that extraction and proposes the four-pronged institutional heteronomy framework of reference as a basis for more principled constitutional inquiries into institutional heteronomy as a feature of the EU constitutional framework.

The Court of Justice equally reflects these features in its case law. In its judgments in *Tele2Polska* and *Toshiba*, the Court translated its unity of policymaking stance into concrete standards of cooperation among the EU and its Member States. In *Tele2Polska*, the Court most explicitly stated that national competition authorities were only allowed to adopt the limited categories of decisions regarding EU competition law outlined in Article 5 Regulation

1/2003. A national competition authority could not therefore adopt a decision declaring that an undertaking's behavior did not infringe EU competition law. According to the Court, '[s]uch a 'negative' decision on the merits would risk undermining the uniform application of Articles 101 TFEU and 102 TFEU, which is one of the objectives of the Regulation highlighted by recital 1 in its preamble, since such a decision might prevent the Commission from finding subsequently that the practice in question amounts to a breach of those provisions of European Union law'.[599] In *Toshiba*, the Court held that [t]he opening by the European Commission of a proceeding against a cartel […] Regulation No 1/2003 does not, pursuant to Article 11(6) of Regulation No 1/2003, read in combination with Article 3(1) of the same regulation, cause the competition authority of the Member State concerned to lose its power, by the application of national competition law, to penalise the anti-competitive effects produced by that cartel in the territory of the said Member State *during periods before the accession of the latter to the European Union*.[600] From the time that a Member State accedes to the EU however, EU competition law applies, including its principle of *ne bis in idem*. As a result, a national competition authority would no longer be able to prosecute and sanction the same facts the Commission already decided on.[601]

The availability of cooperative incentives structures nevertheless most directly appears in both *Vebic* and *Pfleiderer*. In *Vebic*, the Court explicitly obliged the Belgian legal order to incorporate institutional adaptations with a view to guarantee the uniform application of EU competition law through national structures. Belgian judges and legislators were thus invited to adopt a participative stance in the operations of decentralized competition law enforcement. *Pfleiderer* even more directly attested to that approach. In entrusting national judges with balancing EU law interests in order to determine whether or not to grant access to self-incriminating leniency statements, the Court of Justice not only mandates national institutional actors. It also entrusts them with responsibilities to ensure the system's proper functioning.

The Commission's role as a second line systemic supervisor is manifested most directly in the General Court's *France Télécom* and the Court's *X. BV* judgments. In these cases, the Court explicitly stated that the Commission maintains general supervisory powers. It could initiate an investigation despite an inquiry having commenced at the national level and it could – or should – intervene in disputes even remotely related to European competition law, such as the tax deductibility of competition law fines.[602]

The condition of hierarchical quasi-duality is equally reflected in the case law. In *T-Mobile*, the Court extended its uniform application narrative by incorporating particular presumptions into the scope of the Article 101 TFEU prohibition itself. The Court here specifically held that a *national court is required, subject to proof to the contrary, which it is for the undertakings concerned to adduce, to apply the presumption of a causal connection established in the Court's case-law, according to which, where they remain active on that market, such*

[599] Case C-375/09, *Tele 2 Polska*, para 28. A national competition authority can therefore only adopt a decision that the conditions for applying the prohibition are not met, not that the prohibition does not apply as a matter of EU law, see para 32.
[600] Case C-17/10, *Toshiba*, para 92.
[601] Case C-17/10, *Toshiba*, para 103. See in general, M. Wasmeier and N. Thwaites, 'The development of ne bis in idem into a transnational fundamental right in EU law: comments on recent developments', 31 *European Law Review* (2006), 565-578; F. Louis and G. Accardo, '*Ne Bis in Idem*, part "*Bis*"', 34 *World Competition* (2011), 97-112; G. Di Frederico, 'EU Competition Law and the Principle of *Ne Bis in Idem*', 34 *World Competition* (2011), 241-260.
[602] Case T-340/04, *France Télécom,* para 128; Case C-429/07, *X. BV*, para 32.

undertakings are presumed to take account of the information exchanged with their competitors.[603] As a result, national courts have to apply a particular presumption in order to allow the uniform application of EU competition law in the national legal order. These courts – whilst remaining national courts – nevertheless have to operate in accordance with EU law. In doing so, they have to mitigate potential tensions that might exist between autonomously functioning national legal orders and EU law.[604] That quasi-hierarchical operationalization of national courts is also apparent in *Vebic*, where national judges are called upon to ensure passive participative judicial review of national authorities and in *France Télécom*, where it became clear that national authorities always operate in the shadow of a potential Commission investigation being initiated.[605]

The Court's judgments do more than merely confirming the framework of institutional heteronomy underlying decentralized EU competition law enforcement. They translate the elements of institutional heteronomy into concrete operational standards that ensure the effective functioning of that framework. In so doing, the judicial translations aim to elevate national judges to first line operators of EU competition law. National law limitations on judges' ability to act within that framework should be removed and replaced with more fitting institutional alternatives. From that perspective, the autonomous competences of Member States are functionally limited to ensuring the application of EU law.[606]

b. EU-national interactions in concentration control supervision: confirming institutional heteronomy?

130. *Concentration control: introduction* – The image of institutionally heteronomous supervision identified in Regulation 1/2003 has been confirmed by the EU supervisory regime related to concentration control. The concentration control regime, in its format inaugurated by Regulation 139/2004 requires lasting structural changes in the operations of undertakings to be notified to the Commission in order to obtain *ex-ante* approval of such changes. According to the concentration control Regulation, proposed or intended mergers, acquisitions and joint ventures that have a Union dimension should be notified to the European Commission.[607] In contrast to Regulation 1/2003's emphasis on national authorities' and courts' involvement, the EU concentration control regime never denied that it remained centralized in its aspirations and operations. The Commission's ambition has been to continue developing a one-stop-shop regime with regard to mergers and acquisitions.[608] As a result, the Regulation relied both on Article 103 TFEU and on Article 352 TFEU, a general legal basis justifying additional necessary action by the institutions.[609] The institutions' reliance on an additional legal basis is remarkable and squares with the particular cooperative, non-centralized authorization dimension that has been read into Article 103. The EU concentration

[603] Case C-8/08, *T-Mobile,* operative part 2.
[604] L. Azoulai, 'The Force and Forms of European Legal Integration', *EUI Department of Law Working Paper* 2011/6, 1.
[605] Case T-339/04, *France Télécom*, para 81.
[606] D. Urania-Galetta, *Procedural autonomy of EU Member States: Paradise Lost?* (Heidelberg, Springer, 2010), 117.
[607] Article 4(1) of Council Regulation 139/2004 on the control of concentrations between undertakings, [2004] O.J. L24/1 (hereafter referred to as Regulation 139/2004).
[608] On the one-stop-shop regime established by predecessor Council Regulation (EEC) No. 4064/89 of December 21, 1989 on the control of concentrations between undertakings, [1990] O.J. L257/13, see W. Wils, note 175, 151. See Recital 8 Regulation 139/2004.
[609] See Recital 7 Regulation 139/2004, referring to the legal basis of the Regulation in both Article 103 TFEU and Article 352 TFEU, since it provides the Commission with additional, more centralized powers of authorization.

control regime nevertheless confirms the elements of institutional heteronomy underlying the supervisory system of Articles 101 and 102 TFEU.

131. *Confirmation of institutional heteronomy* – Regulation 139/2004's one stop shop notification system confirms the EU's tendency to impose limits on the regulation of Member States' competition law supervisory abilities. That is clear from the fact that numerical thresholds determine the scope of Union dimension. Doing so implies that the European Union only wants to focus on sufficiently important cases, leaving day to day matters to Member State consideration. The Member States will nevertheless have to operate within the boundaries set out by the EU legal framework. Referrals to national competition authorities are in that regard presented as upgrades, with a view to having an authority better capable of understanding the issues at stake to rule on the matter.

The scope for an institutionally heteronomous framework is also apparent from the mechanisms of cooperation that have been created with a view to enable the smooth assessment of merger cases. In particular, the continuous and mandatory exchange of information between the Commission and national authorities[610], a regime of regulated inspections similar to the one established in Regulation 1/2003[611] and increased attention to due process overall[612] highlight a willingness to enable interaction with national law regimes. Additionally, Regulation 139/2004 provides room for Court intervention into the referral scheme. In particular, Article 9 concerning the application of the German clause states that any Member State may appeal to the Court of Justice for the purpose of applying its national competition law.[613] Although that provision merely states that Member States can appeal a decision refusing or granting a referral, the Court could rely on that provision to identify the scope of judicial review and procedural guarantees accompanying that review and to further clarify the division of powers among the EU and its Member States.

132. *Limited 'parallel' application confirming institutional heteronomy* – The particular regime of parallel EU and national concentration control laws additionally confirms the emergence of a cooperative institutional heteronomy regime.

Firstly, the scope of 'parallel' application of EU and national concentration control regimes markedly differs under Regulation 139/2004. A Member State cannot apply both EU and national concentration control law, but only the latter. More specifically, the national authority must refrain from applying EU competition law, as this comes within the supervisory monopoly of the Commission. Parallel application of EU and national law can in this constellation be understood as one authority applying national law to a concentration that is also assessed on its compatibility with EU law in other geographical spheres by the Commission following a request to partially refer the matter as such. Whilst different in scope, the Commission also determines the boundaries within which such parallel application is possible.

Secondly, the 'parallel' application of EU and national law allows the Commission to examine the effects of the concentration in the territory of non-requesting or non-joining Member States when this examination is necessary for the assessment of the effects of the

[610] Article 19 Regulation 139/2004.
[611] Article 12-13 Regulation 139/2004.
[612] Article 18Regulation 139/2004; see also Article 19(3) on the establishment of an Advisory Committee.
[613] Article 9(9) Regulation 139/2004.

concentration within the territory of the requesting Member State(s).[614] The notice remains silent how this necessity should be determined and more problematically, on what consequences that could result from the Commission extending its assessment towards the territory of non-joining Member States. It could be argued that the requirement of necessity refers to the application of the principle of subsidiarity, resulting in the Commission taking over the entire assessment when necessary. If that were the case, it would seem that the Commission could discretionarily take over a case from a non-joining Member State on the basis of it being necessary for the investigation of the request. From that perspective, the subsidiarity assessment made would therefore exclude potential contradictions as long as the Commission is willing to honour the one stop shop system and extract the case from a non-willing national competition authority. The abovementioned analysis could however only be derived from a footnote in the notice, resulting in significant uncertainty on whether the Commission would indeed feel competent to do so. To the extent that that footnote should not be read as the Commission taking over the entire assessment, both the Commission and the national authority would investigate the same concentration and its effects on the same geographical market (albeit in different parts). The footnote does however confirm the Commission's willingness to avoid contradictions in that regard and thus to allow national legal orders only to intervene if and to the extent that the Commission deems such intervention desirable. In doing so, it confirms the hierarhical features of an institutional heteronomy framework, in which the Commission – aided by the Court of Justice – can structure and outline the role of national authorities as part of a supranationally structured market supervision framework.

c. The analytical relevance of an institutional heteronomy classification

133. *Institutional heteronomy as analytical framework* – The explanatory framework of institutional heteronomy supports the envisagement of particular future evolutionary developments in the operations of the EU's market supervision system. More specifically, the framework allows for the prediction of particular judicial evolutions and the institutional adaptations resulting therefrom. It additionally provides a window to compare institutional evolutions in EU competition law with similarly structured organizational developments in other sectors of EU market supervision.

Institutional heteronomy attributes a crucial role to the EU judiciary in ensuring the constitutional operations of the system. As the Court demonstrated in *Vebic* and *Pfleiderer* and Advocate General Kokott highlighted in her *Toshiba* opinion, the scope of the Charter of Fundamental Rights presents an extensive inroad into the operations and structures of EU market supervision and allows the Court to prick the boundaries of its institutional operations. In particular, the second-line systemic supervision role attributed to the Court allows it to regulate cooperative incentives and to police the boundaries of lawful operations, while also determining the constitutionality of the unitary policymaking initiatives adopted at the EU level. As a result, the scope of hierarchical quasi-duality projected by the system of institutional heteronomy largely remains in the hands of the Court of Justice and its interpretation of provisions already incorporating these quasi-dual premises. It could therefore be predicted that future judgments will operate along the lines of the particular features of institutional heteronomy identified here. Two evolutions should be considered in that regard. Firstly, the Court of Justice will most likely develop more and more in-depth standards of national procedure or institutional cooperation with a view to ensure the proper functioning of the system. Secondly, in order to counter well-known claims about the Court being activist or

[614] Para 50, footnote 45 Commission Notice on Case Referral in respect of concentrations, [2005] O.J. C56/2.

operating in an illegitimate fashion, it will be called upon directly to refer to and interpret the binding provisions of the Charter of Fundamental Rights and to ECtHR judgments, to ensure that its judgments do not directly encroach upon Member States' prerogatives outside the realm of these fundamental rights.

The relevance of developing a conceptual 'institutional heteronomy' framework does not lie in the need for a new vocabulary to structure the need for cooperation between and interaction among different regulatory levels in the realm of market supervision. It rather lies in the cross-sector value such a framework can provide and the constitutional framework of understanding that accompanies it. It could indeed be argued that institutional heteronomy elements are illustrations of particular constitutional *principles* of institutional heteronomy at work here. These principles would provide a legal basis for and structure to elements of institutional heteronomy. As constitutional principles, they would nevertheless transcend the realm of EU competition law supervision. National legal regimes are in this understanding obliged to adapt to converging standards imposed on them by the Court of Justice interpreting the constitutional regime of market supervision. At the same time however, these standards leave at least some leeway to national systems to continue operations with some diversity. That diversity allows Member States legal orders to remain in a somewhat competitive relationship with one another. The institutional heteronomy metaphor allows to conceptualize and structure that competitive relationship within the EU's constitutional framework and on a cross-sector level of understanding.

The following chapter will assess to what extent similar elements of institutional heteronomy can also be identified in a differently structured sphere of market supervision. This assessment will allow to ascertain whether these elements effectively constitute a translation of such constitutional principles and will provide an inroad to the identification of such constitutional principles as a matter of EU law.

Chapter 2. *Indirectly mandated* Internal Market supervision: the structure and operations of European Supervisory Authorities in financial market supervision

1. Introduction

134. *The Internal Market and financial supervision arrangements: introduction* – The EU's Internal Market comprises *an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties*.[615] The establishment of this market area resulted in the adoption of supranational regulatory standards promoting the free provision of *financial services* across Member States.[616] These standards aimed to establish a market for cross-border financial transactions. Member State supervisory authorities played a momentous role in the supervision and enforcement of that market.

The supranational level restructured the institutional organization governing the supervision and enforcement of EU financial market regulation in the wake of the 2008 financial crisis. Responding to that crisis in a particularly institutional fashion[617], the EU built upon and significantly overcame constitutional hurdles and limits reflected in previous institutional

[615] Article 26(2) TFEU.

[616] For a general perspective on financial regulation, see D. Heremans and A. Pacces, 'Regulation of Banking and Financial Markets', *Rotterdam Institute of Law and Economics (RILE) Working Paper No. 2011/04*, available at http://www.esl.eur.nl/arw/sectie_rechtseconomie/rotterdam_institute_of_law_and_economics_rile/rile_working_paper_series/ (last consulted 21 December 2012).

[617] The United States on the contrary favoured a more substantive approach. At the same time however, new institutions have equally been created. For an overview of the causes of the crisis rooted in U.S. deregulation, see R. Freeman, 'Reforming the United States' Economic Model after the Failure of Unfettered Financial Capitalism', 85 *Chicago-Kent Law Review* (2010), 686-693. See also M. Baradaran, 'Reconsidering the Separation of Banking and Commerce', 80 *George Washington Law Review* (2012), 385-441; These causes are often laid in the speculative and at times criminal nature of leverage practices, subprime lending, a belief in the continued rising of housing prices and the global interconnectivity of financial transactions, see R. Posner, *A Failure of Capitalism: The Crisis of '08 and the Descent into Depression* (Cambridge, Harvard University Press, 2009), 368 pp. On the U.S. public responses, S. Davidoff and D. Zaring, 'Regulation by Deal: the Government's Response to the Financial Crisis', 61 *Administrative Law Review* (2009), 463-541; M. Barr, 'The Financial Crisis and the Path of Reform', 29 *Yale Journal on Regulation* (2012), 91-119. See for an overview of U.S. post-crisis measures, C. Murdock, 'The Dodd-Frank Wall Street Reform and Consumer Protection Act: What Caused the Financial Crisis and Will Dodd-Frank Prevent Future Crises?', 64 *Southern Methodist University Law Review* (2011), 1243-1327 and J. Barth, G. Caprio and R. Levine, *Guardians of Finance. Making Regulators Work for Us* (Cambridge, MIT Press, 2012), 280 pp. On the role of diversified regulation and the need to both reign in and allow for financial innovation, see R. Romano, 'For Diversity in the International Regulation of Financial Institutions: Rethinking the Basel Architecture', draft available at http://www.nd.edu/~ndlaw/prog-law-economics/Romano.pdf and D. Awrey, 'Complexity, Innovation and the Regulation of Modern Financial Markets', forthcoming in *Harvard Business Law Review* (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1916649 as Oxford Legal Studies Research Paper 49/2011. For an institutional perspecitve, see R. Ahuja, 'Constitutional in Name: the Bureau of Consumer Financial Protection and the Obama Administration's Treatment of the Nondelegation Principle and the Appointments Clause', 14 *University of Pennsylvania Journal of Constitutional Law* (2011), 271-300.See also the contributions in 35 *University of Dayton Law Review* (2009), entitled A Panoramic View Of The Financial Crisis That Began In 2008: The Need For Domestic And International Regulatory Reform. The introductory essay by E. Chaffee, 1-13 provides an overview of the contributions to that volume. See for a schematic overview, E. Pan, 'Four Challenges to financial regulatory reform', 55 *Villanova Law Review* (2009), 744-745. A proposal towards more virtue-shaping values in financial regulation and practice can be found in R.J. Colombo, 'Towards a Nexus of Virtue', 69 *Washington & Lee Law Review* (2012), 3-84. For a methodological perspective, see D. Heremans and K. Bosquet, 'The Future of Law and Finance after the Financial Crisis: New Perspectives on Regulation and Corporate Governance for Banks', *University of Illinois Law Review* (2011), 1551-1576.

solutions. As a result of these transformations, three new EU supervisory authorities and a European Systemic Risk Board were established, all taking part in a new networked European System of Financial Supervision.

135. *Overview of this chapter* – This chapter identifies and frames institutional transformations in the realm of Internal financial Market supervision. It particularly evaluates the rise of the new EU financial supervision arrangements in the light of earlier EU law initiatives. It outlines how the establishment of new European Supervisory Authorities reflects room for integrated EU-Member State supervision and highlights how the EU constitutional framework was relied upon to justify such integration.

Part A of this chapter explores the institutional operations projected by the new legislative instruments. It illustrates the emergence of supranationally structured supervision as an instrument to complement a regime of supervision in which national supervisory authorities engage in the day-to-day supervision and enforcement of harmonized EU financial regulation.[618] This part sketches the rise of the EU's home country supervision regime and the post-crisis framework that sought to remedy its deficiencies. It particularly focuses on the establishment of three new European Supervisory Authorities (ESAs) in this realm. It analyzes the status, powers and operations of these authorities, as well as the role national and supranational judges play in reviewing supervisory decisions and in ensuring that due process standards are taken into account. This part proceeds in four sections. Section two outlines the gradual development of a supranational institutional framework for financial market supervision. Section three highlights how this mandate has progressively been extended and refined in the wake of crisis. Section four additionally focuses on supranational due process considerations influencing the outlook of the post-crisis institutional framework and the scope for national institutional convergence enabled by that framework. Section five concludes.

Part B of the chapter identifies the extent to which these new arrangements can be structured in accordance with institutional heteronomy benchmarks. Not unlike examples of directly mandated market supervision, indirectly mandated supervision relies on a legal basis, principles of institutional functioning grounded in supranational cooperative rights and judicial commandeering requirements to legitimate the establishment of a supranationally structured market supervision regime. Building upon the assessment part A provides, this part outlines how the constitutional categories of legal basis (section six), institutional functioning (section seven) and judicial review (section eight) have come to be perceived as transformation devices. That analysis will allow to subsequently determine to what extent similar elements of *institutional heteronomy* allow to explain and structure the institutional developments in the organization of supranationally structured financial market supervision (section nine).

[618] On the conceptualization of 'day-to-day' supervision vis-à-vis intervention-based supervision, see P. Schammo, note 1, 771-797.

A. The gradual institutional development of a supranational financial market supervision framework

136. *Introduction to this part* – This part outlines the gradual development of the financial supervision regime at the EU level. It first of all considers the non-emergence of the supranational framework and the ways in which institutional innovations only became a focal point of reform-minded policymakers in the wake of the 2008 financial crisis (section two). It continues by analyzing the supranational decision-making framework underlying crisis modifications (section three). This part concludes by analyzing how due process considerations operating at the supranational level provide for a national institutional convergence framework that seeks to refine the existing home state control regime (section four).

2. Institutionalizing EU financial market supervision from home state control to supranational agencification

137. *Situating financial regulation in the EU market integration project* – Financial regulation constitutes a particular sub-narrative in the overarching internal market integration project.[619] Precisely because of its perceived 'specialist' status, the general evolutions in EU internal market law that have been driven by the European Court of Justice somewhat neglected financial market integration.[620] The 1985 White Paper on the completion of the Internal Market heightened the prospects for EU-structured financial markets integration.[621] More importantly, the White Paper promoted the inauguration of a new approach to harmonization comprising minimum harmonization, home country supervision and mutual recognition of national legal frameworks which resulted in new regulatory initiatives.[622] Culminating in the 1990s, a Financial Services Action Plan proposed an extensive market regulation framework that remains guiding today.[623] In that framework, the European Union developed an extensive framework of EU financial market regulation.[624]

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[619] On the specificity of the financial services and especially the securities field, see I. Chiu, *Regulatory Convergence in EU Securities Regulation* (London, Kluwer, 2008), 4.

[620] These developments have most directly centred on the regulation of free movement of goods and services, see C. Barnard, *The Substantive Law of the EU: the Four Freedoms* (Oxford, Oxford University Press, 3rd Edition, 2010), 33-193 and 356-416 for an overview of so-called negative integration through CJEU case law. See also P. Oliver and W. Henning-Roth, 'The Internal Market and the Four Freedoms', 41 *Common Market Law Review* (2004), 407-441.

[621] Commission's White Paper on the Completion of the Internal Market COM 85(310) 1985, http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf.

[622] M. Ortino, 'The Role and Functioning of Mutual Recognition in the European Market of Financial Services', 56 *International and Comparative Law Quarterly* (2007), 322. See also M. Dougan, 'Minimum Harmonisation and the Internal Market', 37 *Common Market Law Review* (2000), 853-885.

[623] 'Implementing the framework for Financial Markets: Action Plan', http://ec.europa.eu/internal_market/finances/actionplan/index_en.htm (hereafter referred to as FSAP), 3.The Commission maintained that with the introduction of the euro, a unique window of opportunity existed to equip the EU with a modern financial apparatus in which the cost of capital and financial intermediation are kept to a minimum, see FSAP, 5. See also its follow-up documents See for an overview of regulatory activities directly flowing from the FSAP, http://ec.europa.eu/internal_market/finances/docs/actionplan/index/100825-transposition_en.pdf. For an overview of national implementing rules, see http://ec.europa.eu/internal_market/finances/actionplan/transposition/index_en.htm and White Paper Financial Services Policy 2005-2010, http://ec.europa.eu/internal_market/finances/docs/white_paper/white_paper_en.pdf. On the transposition of FSAP Directives and Regulations, http://ec.europa.eu/internal_market/finances/docs/actionplan/index/1208_postfsap_transposition_en.pdf. See also

138. *Overview of this section* – The gradual extension of EU regulation was also reflected in the equally gradual emergence of supranationally structured supervisory mechanisms. These mechanisms originally only enabled the Member States to engage upon home country supervision mitigated by host country intervention. Over time, supranationally structured convergence mechanisms additionally allowed national supervisory authorities to convene and design common approaches to implementing and applying EU financial market regulation. The 2008 financial crisis eventually triggered the development of full-fledged EU market supervision authorities.

a. From a supranationally structured *national institutional framework* governing financial market supervision…

139. *Negligible institutional discussions* – The Community's or its Member States' roles in implementing supranational regulatory instruments only marginally received attention in the earliest stages of EU market regulation.

In 1975, the Commission was instrumental in convening a committee of national and supranational experts to consider the role of national law in an economic and monetary union.[625] The interim report drafted by that committee pointed towards the lack of attention paid to the implementation of supranational norms and the necessity of national and supranational oversight in doing so.[626] Focusing on the implementation problem, Klaus Hopt in 1976 argued that 'the obvious solution to [ensuring effective enforcement of supranational provisions] seems to lie in entrusting the Commission or some other newly-created Community authority, with the application and enforcement of harmonised law'.[627] To the extent that the establishment of full-fledged supranational supervisory powers would prove incompatible, a framework for the organized exchange of information between different national authorities was deemed desirable or necessary.[628]

Hopt's proposed solutions reflect three presumptions that have since continued to guide the institutional framework of market integration. Firstly, the establishment of Community-wide authorities or the entrusting of the Commission with direct supranational oversight capabilities in the absence of an express constitutional mandate was not considered feasible and – whilst deemed necessary – should remain subordinate to the market building programme at large.[629] Secondly, national authorities were necessary to monitor and coordinate the implementation and application of supranational provisions in the absence of supranational enforcement options. That bottom line presupposes the availability of such bodies in the national legal orders. As Hopt argued, the German system directly provided for

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M. Merlin, 'Le plan d'action sur les services financiers', *Revue du droit de l'Union Européenne* (2002), 692. M. G. Warren, The Harmonization of European Securities Law', *The International Lawyer* (2003), 215.

[624] J. Mogg, 'Regulating Financial Services in Europe: A New Approach', 26 *Fordham International Law Journal* (2002-2003), 60.

[625] P. Verloren van Themaat, *Economic law of the member states of the European Communities in an economic and monetary union an interim report with provisional conclusions and recommendations, based on reports or interim reports on the economic law of Belgium, Germany, France, Italy, The Netherlands and the United Kingdom,* Commission of the European Communities, Studies: Competition - Approximation of legislation, Series 20 (Brussels 1973), 75 pp. (Hereinafter referred to as Verloren van Themaat, Interim Report). See also P. Verloren van Themaat, 'Introductory remarks on the role of national economic law in an economic and monetary union', 13 *Common Market Law Review* (1976), 153.

[626] Verloren van Themaat, Interim Report, 50.

[627] K. Hopt, 'The Necessity of Co-Ordinating or Approximating Economic Legislation, or of Supplementing or Replacing It By Community Law. Report.', 13 *Common Market Law Review* (1976), 249.

[628] K. Hopt, note 627, 250.

[629] K. Hopt, note 627, 250.

independent federal administrative authorities in different fields.[630] Other legal systems did not necessarily reflect a similar approach and left these supervisory tasks with central administrative departments.[631] Thirdly, the emergence of formal or informal networks of national authorities was to be promoted. During this time-frame however, neither of these proposals effectively materialized.

140. *Home country supervision as institutional alternative: the example of credit institution supervision* – The EU level addressed Hopt's objections against supranationally organized market supervision by establishing a home country control supervision regimen in the realm of credit institutions.

The second banking Directive allowed a credit institution authorized to carry out particular banking activities in one Member State to operate these authorized services in other Member States by means of a branch or the direct provision of services.[632] In order to be able to enjoy the benefits of a single banking passport, credit institutions had to apply for authorization in one Member State. Once they obtained that authorization however, host Member States were no longer allowed to require authorization for branches of that credit institution. In addition, credit institutions could provide cross-border services to another Member State by merely notifying the competent supervisory authority of its home Member State.[633] That authority would then notify the host Member State's authority.

According to Article 13 of the second Banking Directive, the prudential supervision of a credit institution remained the responsibility of the home Member State. Home Member State authorities shall require that every credit institution have sound administrative and accounting procedures and adequate control mechanisms.[634] In other words, the state in which a credit institution has its registered office was responsible for overseeing its compliance with harmonized standards and its own national prudential law requirements. Host Member States were even to allow the home Member States' authorities to carry out on-the-spot verification actions in the host Member States with regard to branches of a credit institution registered in the Home State.[635] Host Member States had not however completely been deprived of any

[630] K. Hopt, note 627, 250.
[631] K. Hopt, note 627, 250.
[632] See the already mentioned Article 18(1) Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, [1989] O.J. L 386/1 (hereinafter referred to as second banking Directive). See also the annex to the second Banking Directive for a list with activities subject to mutual recognition. See also M. Ortino, note 622, 318; P.H. Verdier, 'Mutual Recognition in International Finance', 52 *Harvard International Law Journal* (2011), 72; P. Griffin, 'The Delaware Effect: Keeping the Tiger in Its Cage: The European Experience of Mutual Recognition in Financial Services', 7 *Columbia Journal of European Law* (2001), 337-355; from a law & economics perspective, see G. Hertig, 'Imperfect Mutual Recognition for EC Financial Services', 14 *International Review of Law and Economics* (1994), 177-186. At 180, Hertig particularly argues that imperfect mutual recognition can be agreed upon much more rapidly and allows a higher degree of regulatory flexibility, given the diminished constraints in areas where no complete agreement regarding essential requirements has been reached. This is an advantage not only regarding the rules themselves, but also in their enforcement. States that are contrived into accepting too high an essential requirement may just decide not to enforce the regulations; states that are contrived into accepting too easy an entry may block it through protectionist "interpretation" or even through new domestic regulations.
[633] Article 19 second Banking Directive. See also E. Lomnicka, 'The Home Country Control Principle in Financial Services Directives and the Case Law' in M. Andenas and W. H. Roth (eds.), *Services and Free Movement in EU law* (Oxford, Oxford University Press, 2001), 295-320.
[634] Article 12(2) second Banking Directive.
[635] Article 15 second Banking Directive. On supranational involvement in the home state authorization process, see M. Gruson and W. Nikowitz, 'The Second Banking Directive of the European Economic Community and Its Importance for Non-EEC Banks', 12 *Fordham International Law Journal* (1989), 205-241.

supervisory responsibility. According to Article 14(2), host Member States retained responsibility for the supervision of the liquidity of the branches of credit institutions. That responsibility was nevertheless to be shared with the Home state's competent authorities. In addition, host Member States could still require branches of credit institutions to report on their activities on the host State's territory.[636] The host State could also act if and to the extent that a credit institution does not comply with the legal provisions adopted in that state pursuant to the provisions of the second banking Directive involving the powers of host state competent authorities.[637] These actions would nevertheless only materialize to the extent that the home state authority is unable or unwilling to take action.[638]

National competent authorities were thus required to engage upon intense and coordinated cooperation.[639] To that extent, the second Banking Directive relied on techniques operating in the shadow of EEC law. First, it confirmed the importance of a contact Committee between banking supervisory authorities, through which mutual exchanges on individual credit institutions could be supported and structured.[640] The Contact Committee, which resulted from the first Banking Directive, continued to play an important role in that regard. Second, the Directive also fostered bilateral exchanges between national authorities in order to deal with cross-border emergency situations. These types of contacts would lead to coordinated responses in the absence of a general monitoring EU financial regulator.[641] Third, the national authorities were to apply all supranational rules. In the preamble to the second Banking Directive, the Council empowered the Commission to make necessary technical modifications or refinements as are necessary. In doing so, the Commission was to consult the Banking Advisory Committee and act in accordance with the implementing Comitology procedure.[642]

The (recast) third Banking Directive confirmed this approach.[643] The Contact Committee was nevertheless replaced by the *Committee of European Banking Regulators* and the Banking

[636] Article 21(1) second Banking Directive.
[637] Article 15(3) second Banking Directive.
[638] Article 21(9) second Banking Directive. See also the following recital: Whereas that mutual information procedure will not in any case replace the bilateral collaboration established by Article 7 of Directive 77/780/EEC [the first Banking Directive]; whereas the competent host Member State authorities can, without prejudice to their powers of control proper, continue either, in an emergency, on their own initiative or following the initiative of the competent home Member State authorities to verify that the activities of a credit institution established within their territories comply with the relevant laws and with the principles of sound administrative and accounting procedures and adequate internal control;
[639] For the limits and dangers this approach incorporated, see R. Lee, 'The Legal Foundation for Competition in EC Capital Markets: The Gap Between Rhetoric and Reality', 17 *International Review of Law and Economics* (1994), 163-173.
[640] See the following Recital to the second Banking Directive: Whereas the smooth operation of the internal banking market will require not only legal rules but also close and regular cooperation between the competent authorities of the Member States; whereas for the consideration of problems concerning individual credit institutions the Contact Committee set up between the banking supervisory authorities, referred to in the final recital of Directive 77/780/EEC, remains the most appropriate forum; whereas that Committee is a suitable body for the mutual exchange of information provided for in Article 7 of that Directive.
[641] Article 21 second Banking Directive.
[642] See e.g. Article 4(2) second Banking Directive.
[643] Article 22 Directive 2006/48/EC, which recasts Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, [2000] O.J. L126/1. See Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions, [2006] O.J. L177/1. See also recital 7; it is appropriate to effect only the essential harmonisation necessary and sufficient to secure the mutual recognition of authorisation and of prudential supervision systems, making possible the granting of a single licence recognised throughout the Community and the application of the principle of home Member State prudential supervision. Even more explicitly, see recital 10: The principles of mutual recognition and home Member State supervision require that Member States' competent authorities should not grant or should withdraw an authorisation where

Advisory Committee had been transformed into a *European Banking Committee*.[644] The system of home country supervision remains in force as a principle of EU law until today.

b. … over supranational supervisory convergence mechanisms…

141. *The 'Lamfalussy' Report*– Despite a gradual increment in supranational financial regulation, the organisation of EU-level supervision and enforcement of these rules remained remarkably limited.[645] The organization of financial supervision was explicitly retained at the national legal orders and resided entirely in the realm of national institutional autonomy.[646] The Financial Services Action Plan generally maintained the diversified landscape of national supervision.

At the same time however, the timely implementation of the Financial Services Action Plan necessitated a smoother decision-making procedure.[647] To accomplish that objective, the Council in its ECOFIN composition mandated a specific Committee of seven 'Wise Men'[648] to consider, in cooperation with the Commission, a renewed approach to regulation in *securities* Markets[649]. Alexandre Lamfalussy was appointed Chairman, resulting in the outcome of the Committee's workings being referred to as the Lamfalussy-approach[650]. The Committee was to '*consider how to achieve a more effective approach towards transposition and implementation*' in the realm of EU securities law.[651]

The Committee published an initial[652] and a Final Report, endorsed at the Stockholm European Council of March 2001.[653] This Report developed a four-level approach to EU decision-making in the realm of financial markets. Level one action aimed to adopt general principles in EU Regulations and Directives.[654] Level two intended to implement these

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factors such as the content of the activities programmes, the geographical distribution of activities or the activities actually carried on indicate clearly that a credit institution has opted for the legal system of one Member State for the purpose of evading the stricter standards in force in another Member State within whose territory it carries on or intends to carry on the greater part of its activities.

[644] Recital 22 and Article 151 Directive 2006/48/EC.

[645] Emphasis on mutual recognition implies a preference for national supervisory practices. Detraction from that principle would impose increasing responsibilities on supranational institutions, see M. Möstl, 'Preconditions and Limits of Mutual Recognition', 47 *Common Market Law Review* (2010), 415–416. For a critique in the realm of financial services, see R. Lee, note 639, 167-168.

[646] On the notion of institutional autonomy, see P. Girerd, Les principes d'équivalence et d'effectivité: encadrement ou désencadrement de l'autonomie procédurale des Etats membres?', 38 *Revue Trimesterielle de Droit Européen*. (2002), 76-77.

[647] FSAP, 30.

[648] The secretariat of the Committee was coordinated by two senior Commission civil servants, see N. Berger and M.A. Mergelina, 'Un nouveau système de régulation communautaire des marches de valeurs mobilières dans l'Union Européenne', *Revue du Marché Commun de l'Union Européenne* (2001), 530.

[649] See in that respect, E. Ferran, *Building an EU Securities Market* (Cambridge, Cambridge University Press, 2004), 61.

[650] In addition to Alexandre Lamfalussy, the Committee consisted of C. Herströter, L.A. Rojo, B. Rydén, L. Spaventa, N. Walter and N. Wicks.

[651] Terms of Reference granted by the European Union's Economic and Finance Ministers, published as an annex to the Initial Report of the Committee of Wise Men, http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/initial-report-wise-men_en.pdf, 30. See in general J. Andersson, 'The Regulatory Technique of EU Securities Law – A Few Remarks', *European Business Law Review* (2002), 313-322.

[652] Available at http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/initial-report-wise-men_en.pdf

[653] Stockholm European Council Conclusions No. 100/1/01, to be consulted on http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.%20ann-r1.en1.html..

[654] Final Report, 22-23.

principles at the EU level through technical and detailed level two Regulations or Directives.[655] It relied on the so-called Comitology framework to transform these legal rules into EU law standards.[656] Level three inaugurated so-called convergence mechanisms for coordinated implementation of levels one and two measures. It operated in the shadow of EU law. A level three network of national supervisory authorities – the Committee of European Securities Regulators (CESR)[657] – would issue non-binding guidelines and recommendations on the transposition and interpretation of levels one and two Regulations and Directives.[658] At the same time, the Committee was also invited to adopt guidelines to ensure regulatory convergence in fields not explicitly covered by the Levels one and two measures and to design a common set of supervisory guidelines.[659] Level four focused on enhanced enforcement by the European Commission through the infringement procedure in Article 226 EC Treaty (now Article 258 TFEU).[660]

The Council and European Parliament subsequently endorsed the levelled regulatory approach and extended it to banking and insurance regulation.[661] The extension resulted in the creation of a Committee of European Banking Regulators (CEBS) and a Committee of European Insurance and Occupational Pension Supervisors (CEIOPS) in addition to CESR at level three.[662]

142. *Lamfalussy level three: towards supranationally structured supervision* – Level three committees comprised an institutional oddity in the overall EU regulatory framework. Created by a Commission Decision, the Committees lacked EU legal personality.[663] This structure inspired some scholars to conclude that the Committees did not enjoy any legal personality at

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[655] Final Report, 28. On the differences between Levels 1 and 2, see Y. Avgerinos, 'Essential and Non-essential Measures: Delegation of Powers in EU Securities Regulation', 8 *European Law Journal* (2002), 269-289.

[656] The Comitology regime in EU law presents an elaborate framework of committees comprising national civil servants or technocratic experts that draft measures the Commission should adopt. The Commission itself formally adopts these measures, but the national representatives actually determine its contents. See for the then prevailing regime, K. Lenaerts and A. Verhoeven, 'Towards a Legal Framework for Executive Rule-Making in the EU? The Contribution of the New Comitology Decision', 37 *Common Market Law Review* (2000), 645-686. See also E. Vos, 'Fifty Years of European Integration, Forty-Five Years of Comitology' in A. Ott and E. Vos (eds.), *Fifty Years of European Integration: Foundations and Perspectives* (The Hague, T.M.C. Asser Press, 2009), 31-56.

[657] Commission Decision 2001/527/EC, [2001] O.J. L 191/44, replaced by Commission Decision 2009/77/EC, [2009] O.J. L 25/18.

[658] On CESR, see E. Wymeersch, '"Het "Committee of European Securities Regulators" of "CESR"', *Forum Financier/Droit Bancaire et Financier* (2007), 211-224. On networks in general, see P. Thurner and M. Binder, 'European Union Transgovernmental Networks: The Emergence of a new Political Space beyond the Nation State', 48 *European Journal of Political Research* (2009), 80-106; B. Eberlein and A.L. Newman, 'Escaping the International Governance Dilemma? Incorporated Transgovernmental Networks in the European Union', 21 *Governance* (2008), 25-52; M. De Visser, note 23, 45-50; M. Zinzani, note 21, 23-25; P. Van Cleynenbreugel, note 34, 13-14.

[659] Final Report, 37-38.

[660] Final Report, 40.

[661] See on these evolutions among others, B. Vaccari, 'Le processus Lamfalussy: enjeux, leçons et perspectives', *Revue du droit de l'Union Européenne* (2007), 41-72.

[662] For CEBS, see Commission Decision 2004/5/EC, [2004] O.J. L 3/28, replaced by Commission Decision 2009/78/EC, [2009] O.J. L25/23. For CEIOPS, Commission Decision 2004/6/EC, [2004], O.J. L3/30, replaced by Commission Decision 2009/79/EC, [2009], O.J. L25/28.

[663] According to Article 288 TFEU, a decision is binding in its entirety and is addressed to particular individuals. In this case however, a decision is used to adopt a particular binding act in case no particular instrument has been prescribed, see K. Lenaerts, P. Van Nuffel and R. Bray (ed.), *Constitutional Law of the European Union* (London, Sweet & Maxwell, 2006, 2nd ed.), 784.

all.[664] All committees had however been incorporated under the national corporate laws of one Member States and thus operated as national law legal persons. CESR for example was officially[665] a legal person under the French 1901 Statute on the contract of association.[666] According to that Statute, an association comprises members that group their knowledge or activities in order to attain a goal different from profit sharing.[667] An official declaration of this grouping activity grants the association the opportunity to act as a legal person under French law.[668] Both CEBS and CEIOPS relied on similar statutes in German and English law to gain national law legal personality.[669]

Prior to the crisis, the level three system was perceived as a model for new bottom-up law-making methods in the European Union.[670] The adoption of guidelines and recommendations at level three would gradually bring convergence among Member States' legal frameworks and would thus contribute to a common European financial regulatory framework.[671] In so acting, level three committees would function as unofficial supranational supervisory authorities.[672] The informal coordination roles of level three network committees also justified their limited legal status at the EU level. Their national law incorporation nevertheless limited the committees' capacities to act on an EU-wide basis. To some extent, the private laws of one Member State were called upon to incorporate and group foreign public supervisory authorities with a view to create and develop coordinated implementation guidelines. In different Member States, Committees' decisions merely presented decisions adopted by a national or foreign corporate legal person that did not bear any specific EU 'public law' characteristics. As such, one could only rely on particular legal provisions related to the law of associations and their application to transnational situations to allow some binding force for level three association decisions.[673]

143. *Lamfalussy level three shortcomings* – From an institutional point of view, level three Committees were meant to reflect a more flexible alternative to EU agencies. The argument

[664] S. Lavrijssen and L. Hancher, 'De rol van de netwerken van nationale mededingingstoezichthouders bij de bevordering van good governance in de Europese Unie' in P. Eijlander and R. Van Gestel (eds.), *Domeinconflicten tussen nationaal en Europees toezicht* (The Hague, Boom, 2006), 98; D. Fischer-Appelt, 'Does the EU need a single European securities regulator?' in H. Hofmann and A. Türk (eds.), note 217, 254.

[665] Although this fact had hardly been publicized on the CESR website. Its former chairman nevertheless explicitly stated so in a scholarly article, see E. Wymeersch, note 658 above, 213

[666] Loi du 1er Juillet 1901 relative au contrat d'association, www.legifrance.gouv.fr (hereinafter referred to as Loi 1901)

[667] Article 1 Loi 1901: L'association est la convention par laquelle deux ou plusieurs personnes mettent en commun, d'une façon permanente, leurs connaissances ou leur activité dans un but autre que de partager des bénéfices. Elle est régie, quant à sa validité, par les principes généraux du droit applicables aux contrats et obligations.

[668] Article 5, Loi 1901; In order to obtain legal personality, a preliminary declaration is to be submitted, encompassing *le titre et l'objet de l'association, le siège de ses établissements et les noms, professions et domiciles et nationalités de ceux qui, à un titre quelconque, sont chargés de son administration. Un exemplaire des statuts est joint à la déclaration*

[669] The Commission itself referred to this national law legal personality in its 'Proposal for a Decision of the European Parliament and the Council establishing a Community program to support specific activities in the field of financial services, financial reporting and auditing', COM (2009) 14, http://ec.europa.eu/internal_market/finances/docs/committees/financing-decision_en.pdf, 4.

[670] See also I. Chiu, note 619, 164-182.

[671] See in that respect, W. van Gerven, 'Bringing (Private) Laws Closer to Each Other at the European Level' in F. Caffagi (ed.), *The Institutional Framework of European Private Law*, (Oxford, OUP, 2006), 57-60.

[672] N. Moloney, 'Law-making Risks in EC Financial Market Regulation after the Financial services Action Plan' in S. Weatherill (ed.), *Better Regulation* (Oxford, Hart, 2007), 352.

[673] See for a proposal in that regard, P. Van Cleynenbreugel, note 34, 13-31.

therefore persisted that the level three Committees provided a first – and potentially preliminary – step towards a European Securities Regulator.[674]

Because of their format of national law legal persons entrusted with EU-wide coordination tasks, the authority of Committee guidelines and recommendations remained unclear as a matter of EU and national law. A consensus seemed to have emerged that level three guidelines constituted merely soft law from an EU law perspective and could therefore only be addressed to the members of the association, i.e. the national supervisory authorities, without recourse to classical EU law judicial protection and enforcement mechanisms. National authorities could not be forced by EU Institutions to comply with guidelines and recommendations. They only had to present each other with the reasons for their unwillingness to do so (*comply or explain*).[675] The enforcement of level three guidelines thus relied on the willingness of national supervisors to ensure their application. Guidelines or recommendations were no part of EU law and could therefore not be captured by the EU judicial review system. At the same time however, it was also recognized that level three measures constituted much more than mere soft law guidelines.[676] They projected an additional regulatory layer onto the EU financial markets regulatory field. That layer was nevertheless entirely placed in the shadows of EU and national law. It could not therefore be considered an adequate replacement for a supranational financial markets regulator.

144. *The road not taken: supranational financial market regulators* – The establishment of a European Securities agency had long been envisaged.[677] Over the years, scholars have argued in favour of a more centralized supervisory decision-making scheme.[678] Some fiercely opposed the approach taken by the Lamfalussy report and argued that a full-fledged securities regulator was a necessary precondition for an integrated European securities market.[679] Others were less critical in that respect, yet urged for the need gradually to develop a regulatory agency with a view to overcome accountability and legitimacy difficulties reflected in the current construction.[680] In reaction to proposals relating to the establishment of a supranational market supervision agency, a canon of constitutional objections was elaborated. Three constitutional objections had been proposed, relating to the *vertical division* of

[674]That regulator would be construed as an agency; N. Moloney, *EC Securities Regulation* (Oxford, Oxford University Press, 2002), 872.
[675] This is apparent from Article 14 of the former 2009 CESR decision, note 657 above.
[676] T. Tridimas, 'EU Financial Regulation: Federalization, Crisis Management, and Law Reform' in P. Craig and G. De Búrca (eds.), note 51, 787.
[677] See already K. Hopt, note 627, 250.G. Hertig and R. Lee, 'Four predictions about the Future of EU Securities Regulation', *Journal of Corporate Law Studies* (2003), 372-373; D. Fischer-Appelt, note 664, 270-278; E. Ferran, note 649, 119; as far as the advantages of a regulatory agency are concerned, Ferran mentions conditions that have been developed by Y. Avgerinos, 'EU Financial Market Supervision Revisited: The European Securities Regulator', *Jean Monnet Working Paper 7/03*, http://www.jeanmonnetprogram.org/papers/03/030701.html, as well: *This would establish a machinery for the production of better laws more quickly, assist with the uniform implementation of rules on a pan-European basis, facilitate exploitation of scale economies, provide a one-stop shop for investor complaints and concerns, diminish the risk of regulatory capture and provide at least the potential for improved transparency and accountability*.
[678] See the volume by Andenas and Avgerinos as well: M. Andenas and Y. Avgerinos (eds.), *Financial Markets in Europe: Towards a Single Regulator?* (London, Kluwer Law International, 2003), 544 pp.
[679] G. Hertig and R. Lee, note 677, 372-373. Arguing their assumptions are wrong concerning bureaucratic and institutional tensions that would justify creating a new agency, M. McKee, 'The Unpredictable Future of European Securities Regulation: A Response to Four Predictions about the Future of EU Securities Regulation by Gerard Hertig and Ruben Lee', *Journal of International Banking Law and Regulation* (2003), 277-283
[680] E. Ferran, note 649, 122.

competences, to the *horizontal division* of competences and to the nature of the EU's *economic constitution*.

Firstly, the establishment of supranational regulatory agencies was said to infringe the constitutional principles of conferral, subsidiarity and proportionality enshrined in the EU Treaty framework. EU operations are based on a system of conferred competences and powers. Competences not attributed to the Union institutions by the Treaties shall remain with the Member States. To the extent that a particular competence has been mentioned or implied in the Treaty, its operationalization depends on the powers provided in the EU Treaty. These powers determine what legal instrument, what legislative procedure and what kind of policy debates will precede the adoption of EU legislation.[681] Since the Treaty did not directly refer to financial market supervision, the generic legal bases of Article 95 EC (approximation of national legislation) or Article 308 EC (necessary additional competences) were considered the most viable alternatives. Both provisions had been relied on to justify the establishment of supranational bodies. Article 95 EC had nevertheless been read only to allow for supporting agencies to be established. Regulatory agencies with binding decision-making powers would not fall within that provision's scope.[682] Article 308 EC allowed for the creation of a truly novel and complementary supranational legal regime, a legal basis for which could not be found in the other Treaty provisions. The establsihment of supranational financial market supervision agencies would not truly be novel, but rather supplementary to the establishment of a supranational regulatory framework.[683] In addition, it required unanimity in the decision-making procedure, rather than a qualified majority of voting Member States. Political opposition of one Member State would have been sufficient indefinitely to halt the regulatory project. The availability of EU competences would as a result seem rather uncertain. To the extent that EU competences could nevertheless be detected, the principles of subsidiarity and proportionality further limited the *exercise* of these competences.[684] Both principles mainly served as *procedural* devices limiting the exercise of competences, but had also been given a highly political content. In particular, it was argued that a decentralized and disaggregated regime of national supervisors convening in a particular network better reflected the scope of financial integration. A more in-depth integration would no longer match the constitutional framework in that regard.[685]

Secondly, even if the EU was held to be competent to establish agencies, additional difficulties related to the *delegation* of such competences to specifically established agencies.

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[681] Article 5(2) TEU. On the notion and content of legal basis in EU law, see R. van Ooik, note 43.

[682] See the case law referred to in note 49. As a result, agencies are generally not associated with rulemaking powers, see E. Chiti, note 61, 94.

[683] The meaning of new rights remains unclear, but has mainly been applied to establish Union-wide intellectual property rights. For an overview of cases, see references in K. Gutman, 'Case C-66/04, Smoke Flavourings; Case C-436/03, SCE; & Case C-217/04, ENISA', 13 *Columbia Journal of European Law* (2006-2007), 152. The Lisbon Treaty has slightly altered the scope of Article 352 TFEU. See for this and for examples, D. Chalmers, G. Davies and G. Monti, *European Union Law: Texts and Materials* (Cambridge, Cambridge University Press 2010), 214 et seq.

[684] Article 5(3) and (4) TEU: Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, 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 or effects of the proposed action, be better achieved at Union level. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

[685] Arguments have been developed in order to state subsidiarity and proportionality requirements are fulfilled when creating a European agency, see Y. Avgerinos, note 677, 13-14 See in that regard the Final Report, 8, considering a European regulator impractical; see the European Commission, "Review of the Lamfalussy Process – Strengthening Supervisory Convergence", COM 2007 (727), 3.

The institutional roles of the Council, the Commission, the European Parliament, the Court of Auditors and the Court of Justice need to be balanced in accordance with their respective Treaty-identified competences.[686] The Commission is charged with promoting the general interest of the Union. It should ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them and should additionally oversee the application of Union law under the control of the Court of Justice of the European Union.[687] That provision – and its predecessor version[688] - have been interpreted to limit the scope of delegation of Commission competences to specialized offices, bodies or agencies in the Court's *Meroni* and *Romano* judgments. In *Meroni*, the Court invalidated a *delegation* of *discretionary* regulatory competences to a private body.[689] As a result of that judgment, it has long become common sense among EU lawyers that the delegation of regulatory competences to a body outside of the Commission would frustrate the institutional balance supporting EU integration. *Romano* was said to have confirmed that position.[690] Recent studies on both judgment nevertheless hint at a more nuanced approach. They argue that *Meroni* rather limited delegation to *private* bodies but did not as such envisage the creation of EU-wide agencies.[691] *Meroni* has therefore rather been read a tool to confirm a political unwillingness to establish independent EU agencies.[692]

c. … to post-crisis EU agencies

145. *The 2008 crisis* – The global financial crisis[693] provided a welcome opportunity to develop a new set of institutional arrangements reflective of more intense supranationally

[686] For an overview, see B. De Witte, 'The Role of Institutional Principles in the Judicial Development of the European Union Legal Order" in F. Snyder (ed.), *The Europeanisation of Law* (Oxford, Hart, 2000), 92; K. Lenaerts and A. Verhoeven, 'Institutional Balance as a Guarantee for Democracy in EU Governance" in C. Joerges and R. Dehousse (eds.), *Good Governance in Europe's Integrated Market,* Oxford, Oxford University Press, 2002, 37-49; S. Prechal, 'Institutional Balance: A Fragile Principle with Uncertain Contents' in T. Heukels, N. Blokker and M. Brus (eds.), *The European Union after Amsterdam. A Legal Analysis*, (The Hague, Kluwer Law International, 1998), 282-283. See also C. De Visscher and O. Maiscocq, 'The Lamfalussy Procedure and the EC Institutional Balance: From Comitology Procedures to Policy Levels', http://www.eu-newgov.org/database/DELIV/D07D07b_Lamfalussy_Process_and_the_EC_Institutional_Balance.pdf.

[687] Article 17 TEU.

[688] Article 213 EC Treaty.

[689] Case 9/56, *Meroni v. High Authority*, [1958] ECR 133. For the continuing relevance of *Meroni* in the delegation of powers to private bodies, see R. van Gestel and H.-W. Micklitz, 'European integration through Standardization: How judicial review is breaking down the club house of private standardization bodies', 50 *Common Market Law Review* (2013), 178.

[690] Case 98/80, *Giuseppe Romano v. Rijksinstituut voor Ziekte- en Invaliditeitsverzekering,* [1981] ECR 1981, 1241, § 20 on the prohibition to take binding decisions by an administrative commission; See even recently Case C-154/04 and 155/04, *Alliance for Natural Health*, [2005] ECR, I-6451, 90 states that when the Community legislature wishes to delegate its power to amend aspects of the legislative act at issue, it must ensure that that power is clearly defined and that the exercise of the power is subject to strict review in the light of objective criteria (see, to that effect, Case 9/56 *Meroni* v *High Authority* [1958] ECR 133, at p. 152) because otherwise it may confer on the delegate a discretion which, in the case of legislation concerning the functioning of the internal market in goods, would be capable of impeding, excessively and without transparency, the free movement of the goods in question.

[691] M. Chamon, note 30.

[692] See in that regard, the 2008 Moratorium the Commission placed on the creation of new agencies, paying more attention to their proliferation than to their actual competences, European Agencies – The Way Forward. Communication from the Commission to the European Parliament and Council, COM 2008 (135), 11 March 2008, 6, see as well the Commission Staff Working Document accompanying the Communication, SEC 2008 (323), 23 p. See also M. Groenleer, *The Autonomy of European Union Agencies. A Comparative Study of Institutional Development* (Delft, Eburon, 2009), 111.

[693] E. Pan, note 617, 744. See on the causes of the crisis also R. Lastra and G. Wood, 'The Crisis of 2007-09: Nature, Causes, and Reactions', 13 *Journal of International Economic Law* (2010), 531-550.

organised institutional cooperation. The 2009 *De Larosière* Report drafted in the wake of the crisis particularly referred to the institutional weaknesses of the system at hand and proposed innovative institutional arrangements at the EU level.[694] The fact that the financial system as a whole could be exposed to common risks was not sufficiently taken into account in the pre-crisis framework.[695] In order to improve systemic supervision, the Report developed a distinction between macro- and micro-supervision.[696] The objective of macro-prudential supervision is to limit the distress of the financial system as a whole in order to protect the overall economy from significant losses in real output.[697] The main role of micro-prudential supervision is to supervise and limit the distress of individual financial institutions, thus protecting the customers of the institution in question. That distinction served as an inroad to bring about institutional adaptations.[698]

146. *Building on De Larosière* – Convinced that, in order to mitigate the feeling of crisis, at least something had to be done[699], the European Commission, the Council and the European Parliament agreed to the Report's approach. As a result, institutional reform of the EU financial supervision framework grew into a panacea for everything that failed during the financial crisis. In response to the *De Larosière* proposals, the Commission endorsed the Report's recommendations and supported the creation of EU supervisory agencies in a Communication of 27 May 2009 on European financial supervision.[700] It subsequently succeeded in convincing the Council and European Parliament to adopt legislative proposals.[701]

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[694] The High Level Group on Financial Supervision in the EU. Report, http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf, 85 p. (hereinafter referred to as De Larosière Report).

[695] De Larosière Report, para 146.

[696] De Larosière Report, para 145.

[697] De Larosière Report, para 147.

[698] Others have preceded me in outlining these institutional and regulatory nuances to a large extent. See for an overview, I. Begg, 'Regulation and Supervision of Financial Intermediaries in the EU: the aftermath of the financial crisis', 47 *Journal of Common Market Studies* (2009), 1107-1128; E. Grossman and P. Leblond, 'European financial integration – Finally the great leap forward', 49 *Journal of Common Market Studies* (2011), 413-435; E. Posner and N. Véron, 'The EU and Financial Regulation: Power without Purpose?', 17 *Journal of European Public Policy* (2010), 400-415; L. Quaglia, *Governing Financial Services in the European Union* (London, Routledge, 2010), 198 pp.; F. Recine and P.G. Teixeira, 'The New Financial Stability Architecture in the EU', *Paolo Baffi Centre Research Paper No. 2009-62*, available at http://ssrn.com/abstract=1509304 or http://dx.doi.org/10.2139/ssrn.1509304. For particulars on the De Larosière Report, see J. V. Louis, 'The Implementation of the Larosière Report: A Progress Report' in M. Giovanoli and D. Devos (ed.), *International Monetary and Financial Law. The Global Crisis* (Oxford, OUP, 2010), 146-176; T. Tridimas, note 676, 783-804. On the interaction between institutional and substantive reform, see B. Sousi, 'La réglementation bancaire de l'Union européenne après la crise: un monde sans conscience et sans confiance?', *Euredia* (2011), 121-132 ; J. Wouters and S. Van Kerckhoven, 'The EU's Internal and External Regulatory Actions after the Outbreak of the 2008 Financial Crisis', 8 *European Company Law* (2011), 201-206. For a general critique, see C. Noyer, 'Les défis de la nouvelle architecture de la supervision européenne', *Euredia* (2010), 151-155. See also references in note 713.

[699] On the notion that something had to be done, see K. Geens, 'Post Financial Crisis Regulation in Belgium', 8 *European Company Law* (2011), 211; see also N. Moloney, note 37, 1317 – 1383.

[700] See the 27 May Communication of the Commission European Financial Supervision COM(2009) 252 final, available at http://ec.europa.eu/internal_market/finances/docs/committees/supervision/communication_may2009/C-2009_715_en.pdf. See also G. Ferrarini and F. Chiodini, 'Regulating Cross-Border Banks in Europe: a Comment on the De Larosière Report and a modest proposal', 4 *Capital Markets Law Journal* (2009), 123-140.

[701] On these proposals in particular, see A. Lefterov, 'How feasible is the proposal for establishing a new European system of financial supervisors?', 38 *Legal Issues of European Integration* (2011), 33-64; A. Neergaard, 'European Supervisory Authorities. A New Model for the Exercise of Powers in the European

The European Institutions built upon the Report's recommendations and turned the proposed –albeit slightly modified – architecture of enhanced market supervision into legislative reality at macro- and micro-supervisory levels.[702]

147. *Macro-supervisory reform* – At the macro-economic level, the European Union established a European Systemic Risk Board (ESRB) - rather than a Council as proposed by the Report – Regulation 1092/2010 of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board.[703] Chaired by the President of the European Central Bank, the ESRB comprises a General Board, a Steering Committee, a Secretariat, an Advisory Scientific Committee and an Advisory Technical Committee. The Steering Committee prepares and structures the meetings of the General Board, in which the concrete supervisory decisions will be adopted.[704] The ESRB's task is to 'monitor and assess systemic risk[705] in normal times for the purpose of mitigating the exposure of the system to the risk of failure of systemic components and enhancing the financial system's resilience to shocks. In that respect, the ESRB should contribute to ensuring financial stability and mitigating the negative impacts on the internal market and the real economy. In order to accomplish its objectives, the ESRB should analyze all the relevant information'.[706] The ESRB is responsible for the macro-prudential oversight of the financial system within the Union in order to contribute to the prevention or mitigation of systemic risks to financial stability in the Union that arise from developments within the financial system and taking into account macroeconomic developments, so as to avoid periods of widespread financial distress. It shall contribute to the smooth functioning of the internal market and thereby ensure a sustainable contribution of the financial sector to economic growth.[707] Despite its broad-sweeping mission however, the Board's role is limited to providing advice and information. As the Regulation specifies, the ESRB's role consists in collecting and analyzing all the relevant and necessary information and identifying and prioritizing systemic risks. In addition, the ESRB can issue warnings where systemic risks are deemed to be significant and issue recommendations for remedial action in response to the risks identified and, where appropriate, make these warnings and recommendations public. It is also to advise to the Council on the presence of an emergency situation.[708] The ESRB can address recommendations or warnings to the European institutions, European supervisory

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Union?', *Euredia* (2009), 603-630*;* E. Wymeersch, 'The Institutional Reforms of the European Financial Supervisory System, an Interim Report', http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1541968, 19 p; T. Tridimas, 'EU Financial Regulation: From Harmonization to the Birth of EU Federal Financial Law' in P. Birkinshaw and M. Varney (eds.), *The European Union Legal Order after Lisbon* (The Hague, Kluwer, 2010), 117-135.

[702] On the macro-micro interrelationship, see D. Green, 'The Relationship between Micro-Macro-Prudential supervision and central banking' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 57-68.

[703] Regulation 1092/2010 of 24 November 2010 of the European Parliament and Council on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, [2010] O.J. L331/1 (ESRB Regulation), see E. Ferran and K. Alexander, 'Can soft law bodies be effective? The special case of the European Systemic Risk Board', 35 *European Law Review* (2010) 751-776. See also C. Papathanassiou and G. Zagouras, 'A European Framework for Macro-Prudential Oversight' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 159-171.

[704] Article 4 ESRB Regulation.

[705] According to Recital 15 ESA Regulations (referred to in note 713), systemic risk should be defined as a risk of disruption in the financial system with the potential to have serious negative consequences for the internal market and the real economy. All types of financial intermediaries, markets and infrastructures may be potentially systematically important to some degree.

[706] Recital 10 ESRB Regulation.

[707] Article 3(1) ESRB Regulation.

[708] Article 3(2) ESRB Regulation.

agencies, Member States' supervisory authorities and to Member States themselves.[709] Its recommendations or warnings, depending on the circumstances of the case, are not directly binding. Inaction in response to a recommendation on behalf of the European Commission, the Member States or their national supervisory authorities needs to be justified.[710] In particular instances, the ESRB could decide to make particular recommendations public.[711] Regulation 1096/2010 complemented the ESRB Regulation by outlining the specific tasks conferred on the European Central Bank in the administration of and operational support to the ESRB.[712]

148. *Micro-supervisory reform* – At the micro-supervisory level, the extensive regulatory update logically resulted in the creation of three European Supervisory Authorities (ESAs)[713]: the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA).[714] The three supranational micro-supervision authorities[715] constitute improved successors to CEBS, CEIOPS and CESR.[716] They have explicitly been granted EU legal personality.[717] All authorities comprise a board of national supervisors, a Management Board, a full-time

[709] Article 16 ESRB Regulation.
[710] Article 17 ESRB Regulation.
[711] Article 18 ESRB Regulation.
[712] Council Regulation 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board, [2010] O.J. L331/162.
[713] D. Fischer-Appelt, 'The European Securities and Markets Authority: the beginnings of a powerful European Securities Authority?', *Law and Financial Markets Review* (2011), 21-32; N. Moloney, 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market –A Tale of Two Competences: Part (1) Rule-Making', 12 *European Business Organization Law Review* (2011), 41-86 (hereinafter referred to as N. Moloney, (2011) I); N. Moloney, 'The European Securities and Markets Authority an Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (2) Rules in Action', 12 *European Business Organization Law Review* (2011), 177-225 (already referred to in note 37, hereinafter referred to as N. Moloney, (2011) II); N. Moloney, 'Supervision in the Wake of the Financial Crisis: Achieving Effective 'Law in Action' – A Challenge for the EU' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 71-110. E. Wymeersch, note 37, 35-38, distinguishing the rulemaking, implementing, emergency situation, conflict resolution and product restriction powers. For a general and detailed overview, see E. Wymeersch, 'The European Financial Supervisory Authorities or ESAs' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 232-317.
[714] Regulation 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision 716/2009/EC and repealing Commission Decision 2009/78/EC, [2010] O.J. L 331/12 (hereinafter referred to as EBA Regulation); Regulation 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) amending Decision 716/2009/EC and repealing Commission Decision 2009/79/EC, [2010] O.J. L 331/48 (hereinafter referred to as EIOPA Regulation); Regulation 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 716/2009/EC and repealing Commission Decision 2009/77/EC, [2010] O.J. L 331/84 (hereinafter referred to as ESMA Regulation). All regulations follow the same structure and numbering of Articles. I will refer to all regulations collectively as the ESA Regulations. See also E. Ferran, 'Understanding the New Institutional Architecture of EU Financial Market Supervision', E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 111-158. Remarkably, the establishment of the internal market is no longer the expressed focus of these regulations, see E. Fahey, 'Does the Emperor have Financial Crisis Clothes? Reflections on the Legal Basis of the European Banking Authority', 74 *Modern Law Review* (2011), 586.
[715] Even though the regulations refer to them as 'authorities', they function and operate as regulatory agencies, see N. Moloney, note 699 above, 1341.
[716] Their seat remains where the level three Committees used to be headquartered, see Article 7 ESA Regulations. The Regulations formally reconfirm the seats of the authorities in Frankfurt (EBA), London (EIOPA) and Paris (ESMA).
[717] Article 5 ESA Regulations.

Chairperson and an independent Executive Director.[718] Most decisions are adopted by the Board of Supervisors by means of qualified majority voting similar to the procedures in the Council.[719] Accountability mechanisms, consultation and transparency obligations[720] have significantly improved by incorporating those obligations within the general EU legal and budgetary framework.[721] At the same time, the authorities are themselves non-contractually liable towards third parties.[722] Permanently institutionalized stakeholders groups allow the ESAs to interact with selected market participants.[723] The authorities officially cooperate more closely with national supervisory authorities and foster the establishment of colleges of supervisors for cross-border financial institutions.[724] The ESAs also regularly convene in a joint committee.[725]

Most importantly, the authorities can adopt binding individual decisions addressed to national supervisory authorities and/or individual financial institutions in cases of breach of substantive EU financial law[726], 'emergency situations'[727] and towards the settlement of disagreements between competent national authorities in cross-border situations.[728] An ESA body cannot adopt a binding individual decision without first reminding a national authority of its obligations, addressing guidelines or recommendations and allowing the Commission to address a non-binding advice to the Member State concerned.[729] In addition, the ESA body can only adopt a decision addressed to individual market participants or financial institutions where the relevant requirements of the EU's substantive financial law framework are directly applicable to financial institutions and where national supervisory authorities did not take appropriate action. Binding individual decisions remain an *ultimum remedium*. These decisions are always supposedly addressed to individual supervisors or market participants and are not general in nature. They nevertheless allow direct intervention in the financial markets. Binding decisions are additionally subject to review by a newly established Board of Appeal.[730]

At the instigation of the European Parliament, the ESAs needed to devote particular attention to the protection of consumers engaged in financial activities. More specifically, the ESAs were to take a leading role in promoting transparency, simplicity and fairness in the market for consumer financial products or services across the internal market. In addition, they should monitor new and existing financial activities and may adopt guidelines and recommendations with a view to promoting the safety and soundness of markets and convergence of regulatory practice. To the extent that a financial activity threatens the short-,

[718] Article 6 and 40-53 ESA Regulations.
[719] Article 44(1) ESA Regulations. In particular instances of settlement of supervisory disputes, the Board of Supervisors shall decide by means of simple majority; the proposal can however be blocked by a qualified majority, see Articles 44 (1), paras. 3 and 4.
[720] Article 29-35 ESA Regulations.
[721] Article 62-66 ESA Regulations.
[722] Article 69 ESA Regulations.
[723] Article 37 ESA Regulations.
[724] Article 21 ESA Regulations.
[725] Article 54-57 ESA Regulations.
[726] Article 17 ESA Regulations.
[727] Article 18 ESA Regulations.
[728] Article 19 ESA Regulations.
[729] Binding decisions should be considered as EU law in the national legal orders and are deemed to provide the effects generally attributed to directly applicable EU standards, see proposed – but later discarded - recital 19 ESA Regulations explicitly confirming this position, Report on the proposal for a regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority (COM(2009)0503 – C7-0167/2009 – 2009/0144(COD)), available at www.europarl.europa.eu (Giegold Report), 16.
[730] Article 60 ESA Regulations.

medium- and long-term stability of the financial markets, the authorities may issue a warning. The ESAs may therefore temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union in the cases specified and under the conditions laid down in the legislative acts. The adoption of the Alternative Investment Fund Managers Directive and the Short Selling Regulation comprise examples in that regard.[731] Additionally, the ESAs can act in cases where the Council determines a particular situation to be an 'emergency' situation captured by Article 18 ESA Regulations. In other instances, the ESAs may call upon the Commission to facilitate or enable that prohibition by means of direct EU regulation.[732]

In addition to their supervisory roles, the authorities are involved in preparing, drafting and, in most instances, semi-adopting regulatory and implementing technical standards.[733] According to the ESA regulations, technical standards do not imply strategic decisions or policy choices. They implement requirements imposed by level one acts. The process of drafting these acts allows little leeway for the European Commission and basically charges the ESAs with the authority to develop legislation in the field. The Commission mainly adopts these standards by means of regulations or decisions, but can also object to particular standards. In that case however, the ESAs almost always retain the final authority on the contents of these standards.[734] The drafting of these standards is also supported by consultations of market participants, who have been granted participation rights in the decision-making process. At the same time, the ESAs are empowered – just like the level three Committees were – to adopt general guidelines and recommendations with a view to establish consistent, efficient and effective supervisory practices and to ensure a common, uniform and consistent application of Union law.[735] Guidelines and recommendations are non-binding: competent national authorities and financial institutions shall nevertheless make every effort to comply with them and they can be obliged to report in a clear and detailed way on their compliance.[736]

149. *A European System of Financial Supervision* – Both ESRB and ESAs have been enshrined into the newly created European System of Financial Supervisors (ESFS).[737] The main objective of the ESFS shall be to ensure that the rules applicable to the financial sector are adequately implemented to preserve financial stability and to ensure confidence in the financial system as a whole and sufficient protection for the customers of financial services.[738] The ESFS does not function as an independent body. It rather constitutes a network of bodies. According to the appropriate legislative texts, the ESFS comprises the ESRB, three newly established European Supervisory Authorities (ESAs), the Joint Committee of the ESAs and

[731] See for references and analysis nrs. 237 and 239.
[732] Article 9 ESA Regulations.
[733] Article 10-15 ESA Regulations.
[734] Article 10-15 ESA Regulations. On the delegated lawmaking procedures in Articles 290-291 TFEU and their roles in financial regulation, G. Diezhandino, 'A New EU Institutional Balance in the Delegation of Legislative and Implementing Powers: An Insurance Perspective. Overview of the changes brought by the Lisbon treaty and the new European Supervisory Architecture', *Euredia* (2011), 217-239. See also Section 4 of this chapter for in-depth assessment.
[735] Article 16 ESA Regulations.
[736] Article 16(3) ESA Regulations. See on the binding force of ESA soft law powers, T. Tridimas, 'Financial Supervision and Agency Power' in N. Nic Shuibhne and L. Gormley (eds.), *From Single Market to Economic Union. Essays in Memory of John A Usher* (Oxford, Oxford University Press 2012), 71.
[737] Article 2 ESA Regulations.
[738] Article 2(1) ESA Regulations.

the competent supervisory authorities in the Member States.[739] Membership of the ESFS implies a direct obligation to supervise financial market participants in accordance with the substantive legal framework of EU financial market regulation.[740] In addition, in accordance with the principle of sincere cooperation under Article 4(3) of the Treaty on European Union, the parties to the ESFS shall cooperate with trust and full mutual respect, in particular in ensuring the flow of appropriate and reliable information between them.[741]

150. *The future: an upgraded and integrated EU banking supervision system?* – The upgraded supranational supervision system apparently reflected a mere starting point for more *integrated* supervisory reform. On 12 September 2012, the European Commission stated that despite the initiatives already taken, '[f]urther steps are needed to tackle the specific risks within the Euro Area, where pooled monetary responsibilities have spurred close economic and financial integration and increased the possibility of cross-border spill-over effects in the event of bank crises.[742] With a view to ensure coherent banking supervision and the resolution of crises within the Euro-zone, the Commission proposed to deliver a single supervisory mechanism, a common system for deposit guarantees and an integrated crisis management framework.[743] The single supervisory mechanism envisaged would be based on the transfer to the European level of specific, key supervisory tasks for banks established in the Euro Area Member States.[744] The European Central Bank would be responsible for adopting particular supervision decisions. National supervisory authorities would merely play a subordinate role in that respect, retaining responsibility for consumer protection.[745]

A Proposal for a Regulation accompanied the Commission Communication. It identified Article 127(6) TFEU as a direct legal basis to confer specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions and other institutions.[746] In this proposal, the Commission particularly interprets that provision as a constitutional mandate to establish a supranational regime of credit institution supervision. In doing so, credit institution supervision in the hands of the ECB would become an example of *directly mandated market supervision*, rather than supervision based on a vague mandate read into Article 114 TFEU. The competences granted to the ECB only apply to banks in participating Member States, i.e. countries of which the currency is the Euro.[747]

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[739] Article 2(2) ESA Regulations.
[740] Article 2(5) ESA Regulations.
[741] Article 2(4) ESA Regulations.
[742] 'Communication from the Commission to the European Parliament and the Council. A Roadmap towards a Banking Union', 12 September 2012, http://ec.europa.eu/internal_market/finances/committees/index_en.htm, 3. For comments, see E. Wymeersch, 'The European Banking Union: a First Analysis', available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2171785. See for an early proposal in that regard already, G. Di Giorgio and C. Di Noia, 'Financial market regulation and supervision: how many peaks for the Euro area?', 28 *Brooklyn Journal of International Law* (2002-2003), 463-494. See more recently, G. Ferrarini and F. Chiodini, 'Nationally framgemented supervision over multinational banks as a source of global systemic risk: a critical analysis of recent EU reforms' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 201, arguing for more centralized supervision for cross-border banks. These authors do not however advocate a banking union, but rather enhanced powers for EBA, see 225-230. See for similar critiques, M. Lamandini, 'Towards a New Architecture for European Banking Supervision', 6 *European Company Law* (2009), 6-13.
[743] Communication, 6.
[744] Communication, 7.
[745] Communication, 7.
[746] Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, available at http://ec.europa.eu/internal_market/finances/committees/index_en.htm, 3.
[747] See Article 2(1) proposed Regulation.

In the understanding of this Regulation, the ECB would become a *full-fledged* market supervisor, directly engaging with private market operators. In doing so, it would effectively replace the authorities of participating Member States.[748] Despite the proposed attribution of direct supervisory powers to the supranational level, the ECB would only replace the national authorities as direct supervisors. These authorities would retain an independent supervisory role in areas not covered by the abovementioned powers. In addition, national authorities would remain to be represented in the *European Banking Authority*. The latter authority would also retain its powers to address and adopt individual decisions in limited circumstances. A second proposed Regulation projects to adapt its structure so that it can superimpose its decisions on ECB actions as well.[749] In that image, the EBA remains at the top of a supranationally structured market supervision regime.

3. An indirect constitutional mandate to structure EU market supervision in the wake of crisis

151. *Overview of this section* –Even within a potential single ECB supervisory mechanism for the supervision of credit institutions in Euro-zone Member States, the ESAs comprise the supranational apex of EU financial law supervision. This section seeks to explain how the ESA framework relies on a particular indirectly mandated constitutional framework to justify the structure and expanding scope of action granted by the ESAs. The section first develops a narrative of *supranational operational support* read into Article 114 TFEU as a basis for the establishment of the ESA supervisory regime. This reading subsequently justifies the establishment of EU supranational agencies and the gradual extension of their powers in the service of building a more complete supranationally structured market supervision system. Both the narrative found in the ESA Regulations and the gradual extension of decision-making powers reflect the boundaries of an indirectly mandated market supervision structure underlying Article 114 TFEU.

a. Supranational operational support: European Supervisory Authorities in search for a legal basis

152. *Introduction to this subsection* – This subsection assesses Article 114 as a Treaty legal basis relied on to justify the establishment of the ESAs and the ESRB. The ESA Regulations' recitals extensively refer to the Court's case law on the establishment of supporting EU agencies. At the same time however, the Commission, the Council and the European Parliament adhered to an extensive reading of that case law to justify the ESAs establishment. Following an overview of the relevant case law in this field (i), this subsection identifies an operational support reading reflected in Article 114 TFEU (ii).

i. In search for a legal basis: Article 114 TFEU as open-ended institutional mandate

[748] Article 4(2) proposed Regulation states that when credit institutions established in a non-participating Member State establish a branch or provide cross-border services in a participating Member State, the ECB shall carry out the tasks referred to in paragraph 1 for which the national competent authorities of the participating Member State are competent. In doing so, the Regulation confirms the division of supervisory powers between the home and host country authorities. In that image, the ECB acts as a host supervisor for branches of non-participating Member States' credit institutions.

[749] See Article 1(1) Proposal for a Regulation of the European Parliament and the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards its interaction with Council Regulation (EU) No…/… conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, available at http://ec.europa.eu/internal_market/finances/committees/index_en.htm.

153. *Regulating the Internal Market through Article 114 TFEU*– Article 114 TFEU allows for the adoption of *measures for the approximation* of national laws which have as their object the *establishment and functioning of the Internal Market*.[750] In its case law on the scope of that provision, the Court distinguished two 'prongs' to address constitutional limits of Article 114 TFEU harmonisation.[751] On the one hand, Article 114 TFEU measures must have as their *object* the establishment and functioning of the Internal Market. On the other, these measures should be conceived as *measures for the approximation* of national laws or regulations.

154. *The object prong* – The *object prong* determines the object of Union *competence* to regulate the Internal Market. It essentially allows to delineate the scope of *the establishment and functioning of the Internal Market*.[752] The notion of 'Internal Market' integration provides a limiting factor to unfettered regulatory ambition identified in Article 114 TFEU.[753] The scope of the Internal Market notion determines the *object* of approximation measures designed on the basis of that provision. In order to ensure the emergence of an obstacle-free or at least obstacle-limited area, products and services could be required to comply with minimum 'safety' standards before being brought into the Internal Market.[754] The import of such products produced outside the EU or within a single Member State could thus be banned by supranational legislation.[755] It was even determined that products exclusively intended for the market in one Member State could be banned in case of non-compliance with EU minimum standards, in order to allow for undistorted competition between these and imported products.[756] Article 114 TFEU could in that image be relied on to impose a general ban on

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[750] The provision reads that the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

[751] K. Gutman, note 683, 175.

[752] See S. Weatherill, 'The Limits of Legislative Harmonization Ten Years after *Tobacco Advertising*: How the Court's Case Law has become a "Drafting Guide"', 12 *German Law Journal* (2011), 827-864.

[753] See A. Von Bogdandy and J. Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform', 39 *Common Market Law Review* (2002), 245. For a contrary perspective, see Case C-300/89, *Commission v Council (Titanium Dioxide)* [1991] ECR I-2867, para 15, generally referring to likely obstacles. See also Case C-350/92, *Spain v Council* [1995] ECR I-1985, para 35, according to which the Court agreed that Article 114 measures can be adopted if their aim is to prevent the heterogeneous development of national laws leading to further disparities which would be likely to create obstacles to the free movement of medicinal products within the Community. These developments are directly capable of affecting the establishment and the functioning of the internal market.

[754] See for examples, D. Wyatt, 'Community Competence to Regulate the Internal Market' in M. Dougan and S. Currie (eds.), note 227, 99-100. On minimum standards, M. Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union', 12 *European Law Journal* (2006), 509.

[755] R. Barents, note 43, 106.

[756] An analogy can be made with the Court's case law on Article 34-36 TFEU, which prohibits measures of equivalent effect to a quantitative (import or export) restriction. These measures include purely national measures that could nevertheless affect inter-state trade. It has equally been interpreted that these rules could thus be the subject of harmonization. At the same time however, both provisions differ in scope and format, see T. Konstadinides, note 46, 198. On the thesis that Article 114 TFEU resembles, but does not completely mirror Article 34 TFEU, see G. Davies, 'Can selling arrangements be harmonised?', 30 *European Law Review* (2003), 374. Davies specifically relates this disconnect to the rule established by the Court in Joined Cases C-267/91 and C-268/91, *Keck and Mithouard* [1993] ECR I-6907, in which the Court ruled that particular 'selling arrangements' did not fall within the scope of the Article 34 TFEU prohibition. For an argument against such limiting approach and in favour of a complete mirroring of both provisions, see Opinion of A.G. Bot in Case C-110/05, *Commission v Italy* [2008] ECR I-519, para 91, in which he argued that to exclude from the scope of Article 28 EC national rules governing not only selling arrangements for goods but also arrangements for their use is contrary to the Treaty's objectives, namely the creation of a single and integrated market. In my view, such a solution would undermine the useful effect of Article 28 EC, since it would once more make it possible

non-complying products or services, to guarantee the free movement of complying products or services and to design minimum safety standards underlying these products or services.[757]

The *Tobacco Advertising I* judgment explicitly confirmed that position by annulling a Directive that did not comply with the 'object' philosophy of Internal Market integration. At stake in that case was the validity of a Directive that mandated a ban on the advertising and sponsorship of Tobacco products.[758] Whilst Article 114 TFEU had previously been relied on to justify a ban on certain products that did not comply with harmonized EU-wide product safety standards[759], the introduction of such ban in the absence of common EU-wide safety standards or approaches would go beyond the idea of Article 114 as supporting the creation of an internal market in which obstacles to trade would be removed.[760] The Court held that 'to construe [Article 114] as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle […] that the powers of the [Union] are limited to those specifically conferred on it'.[761] The Court continued that 'a measure adopted on the basis of [Article 114 TFEU] must genuinely have as its *object* the *improvement of the conditions* for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition[762] liable to result therefrom

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for Member States to legislate in areas which, on the contrary, the legislature wished to 'communitarise'. That is not the course that European construction and the creation of a single European market should follow. A product must be able to move, unhindered, within the common market, and national measures which, in whatever way, create an obstacle to intra-Community trade must be ones that the Member States can justify. See also T. Horsley, 'Anyone for Keck? – Comment on Case C-110/05, Commission v. Italy, Judgment of the Court (Grand Chamber) of 10 February 2009, nyr; Case C-142/05, Åklagaren v. Percy Mickelsson and Joakim Roos, Judgment of the Court (Second Chamber) of 4 June 2009, nyr; Case C-265/06, Commission v. Portugal, Judgment of the Court (Third Chamber) of 10 April 2008, [2008] ECR 1-2245', 46 *Common Market Law Review* (2009), 2001-2019; I. Lianos, 'Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of "Economic Integration"', *European Business Law Review* (2010), 724. See for background on the scope of Article 34 TFEU in this respect, P. Oliver, 'Of Trailers and Jetskis: Is the Case Law on Article 34 TFEU Hurtling in a new Direction?', 33 *Fordham International Law Journal* (2009-2010), 1423-1471; L. Gormley, 'Free Movement of Goods and their Use – What Is the Use of It?', 33 *Fordham International Law Journal* (2011), 1589-1628. On Keck as an example of decentralized governance, see N. Bernard, note 32, 23.

[757] See on limits incorporated in that provision, R. Schütze, *European Constitutional law* (Cambridge, Cambridge University Press, 2012), 157-158.

[758] See Case C-376/98, *Tobacco Advertising I*, para 12-32 (hereinafter referred to as *Tobacco Advertising I*). The Directive concerned was Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, [1998] O.J. L213/9.

[759] T. Konstadinides, note 46, 190.

[760] *Tobacco Advertising I,* para 99-100. See also Opinion of AG Fennelly to *Tobacco Advertising I,* para 118: Community competence under Article 100A of the Treaty to harmonise national rules in order to secure undistorted competition is confined to measures which concern, in a more than merely incidental way, conditions in a specific sector and that the economic sector addressed by the Advertising Directive is that of advertising and sponsorship of tobacco products and related trade in media products. In the event, it is not necessary to analyse whether, or how, competition was distorted in the sector under discussion, or whether any such distortions were appreciable or passed any other applicable threshold. In my view, the Directive simply cannot be regarded as contributing to the equalisation of conditions of competition in the sector addressed for the simple reason, already outlined above, that it eradicates, to a very great extent, the sector in question and, to the extent that it does not do so, fails to achieve any harmonisation of conditions.

[761] *Tobacco Advertising I*, para 83.

[762] Despite the phrasing here, the Court identified the 'distortions of competition' requirement as more than just a complementary element to the object of Article 114 TFEU approximation measures. Later on in the *Tobacco Advertising I* judgment, the Court distinguished the removal of obstacles to free movement and the abolition of distortions to competition as two equiposed conditions, see *Tobacco Advertising* I, para 106. Some have argued that Article 114 TFEU only refers to the four freedoms rather than to the distortions of competition, see A.

were sufficient to justify the choice of Article 100a as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory. The Court would then be prevented from discharging the function entrusted to it […] of ensuring that the law is observed in the interpretation and application of the Treaty'.[763] As the Court later on stated in *BAT*, measures adopted on the basis of Article 95 EC 'intended to improve the conditions for the establishment and functioning of the internal market […]must genuinely have that object, actually contributing to the elimination of obstacles to the free movement of goods or to the freedom to provide services, or to the removal of distortions of competition'.[764]

At the same time, the Court did not expressly require an outright product ban to be accompanied by substantive minimum safety standards. In line with earlier case law[765], it explicated that recourse to Article [114 TFEU] as a legal basis remains possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them'.[766] These conditions did not impose clear and direct limits on EU harmonization action. According to *Somek*, 'any plausible correlation between the policies pursued and the instrumentality of harmonization to their end is sufficient for Union power to arise'.[767] As long as a conceivable relation between an existing or future obstacle and its successful removal through harmonization exists, the Court would seem willing to defer matters to the Council and European Parliament. The Council and European Parliament would in that instance have to justify why the proposed or adopted measures do indeed prevent future obstacles without constructing 'unnecessary' future obstacles to free movement of goods, persons, services or capital.[768] If that proves to be the case, the Court will not intervene

Later case law nevertheless clarified that regulatory divergence across national regimes that obstructs the Treaty's free movement provisions or is likely to create distortions of competition provides a sufficient basis to justify EU harmonization initiatives.[769] Once an

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Somek, note 12, 121; L. Gormley, 'Competition and Free Movement: Is the Internal Market the Same as a Common Market?', *European Business Law Review* (2002), 521. Somek therefore contends that the Court deliberately extended its reasoning so as to enable a particular format of 'market holism' to take shape, see A. Somek, note 12, 122. For a contrary position, see K. Mortelmans, 'The Common Market, the Internal Market and the Single Market: what's in a market?', 35 *Common Market Law Review* (2010), 107. See also M. Ludwigs, 'Annotation of Case C 380/03, *Federal Republic of Germany* v. *European Parliament and Council of the European Union (Tobacco Advertising II)*. Judgment of the Court (Grand Chamber) of 12 December 2006, [2006] ECR I-11573', 44 *Common Market Law Review* (2007), 1167.

[763] *Tobacco Advertising I*, para 84.

[764] Case C-491/01, *R v. Secretary of State ex parte BAT and Imperial Tobacco*, [2002] ECR I-11543, para 60 (hereinafter referred to as *BAT*).

[765] See note 753 and T. Konstadinides, note 46, 192. On the difficult application of these conditions, see S. Weatherill, 'Better Competence Monitoring', 30 *European Law Review* (2005), 38.

[766] *Tobacco Advertising I*, para 86.

[767] A. Somek, note 12, 114.

[768] A. Somek, note 12, 114. See also M. Kumm, note 754, 515, stating that rules thus established are presumed to be legitimate.

[769] Case C-210/03, *Swedish Match*, [2004] ECR I-11893, para 33 ; Case C-434/02, *Arnold André*, [2004] ECR I-11829, para 34 and Case C-380/03, *Federal Republic of Germany v European Parliament and Council of the European Union*, [2006] ECR 11573 (hereinafter referred to as Tobacco Advertising II); see also for more background and comments H.-W. Liu, 'Harmonizing the Internal Market or Public Health? – Revisiting Case 491/01 (British American Tobacco) and Case 380/03 (Tobacco Advertising II)', *Columbia Journal of European Law Online* (2009), 41. See also more recently Case C-301/06, *Ireland v. Parliament and Council*, [2009] ECR I-593 and Case C-58/08, *Vodafone Ltd.*, [2010] ECR I-4999. For additional background, see T. Konstadinides, 'Wavering between centres of gravity: comment on Ireland v Parliament and Council', 35 *European Law Review* (2010), 88-102; D. Keyaerts, 'Ex ante evaluation of EU legislation intertwined with EU judicial review?

envisaged legal instrument incidentally harmonizes national provisions with a view to either remove obstacles to free movement or distorted competition or establish common conditions enabling such movement or competition, the envisaged regulatory framework is viewed as genuinely contributing to the realization of the Internal Market. In identifying and addressing those obstructions, the Union has *discretion, depending on the general context and the specific circumstances of the matter to be harmonised, as regards the method of approximation most appropriate for achieving the desired result, in particular in fields with complex technical features*.[770]

Despite the Court's rhetoric in *Tobacco Advertising I* that 'to interpret [Article 114 TFEU] as meaning that the Community legislature may rely on [that provision] with a view to eliminating the smallest distortions of competition would be incompatible with the principle […] that the powers of the Community are those specifically conferred on it'[771], the Court has not developed a particular 'appreciable distortions of competition warranting regulatory intervention' test.[772] Combined with the possibility of addressing future obstacles, the substantive delegation mandate appears to be virtually unlimited.[773]

155. *A deferential Internal Market object test* – It is apparent from the case law that the Court does not pose real limitations on the other institutions. To the extent that the institutions identify 'genuine' obstacles to trade or 'appreciable' distortions of competition, they may adopt legislation banning products or services that do not comply with the harmonized standards, as long as they guarantee the free movement of complying products.[774] The Court will essentially defer its opinion to the findings of the legislator, as long as free movement is enhanced or competition distortions are addressed throughout the new regulatory framework. The following scheme outlines the Court's deferential testing framework.

Constitutional delegation reflected in art 114 TFEU	removal of (future) obstacles to free movement	elimination of appreciable (future) distortions to competition
legislature (Commission, Council, Parliament)	new rules or product and service bans; free movement guarantees	new rules

Comment on Vodafone Ltd v Secretary of State for Business, Enterprise and Regulatory Reform (C-58/08)', 35 *European Law Review* (2010), 873; M. Brenncke, 'Annotation of Case C-58/08, *Vodafone Ltd and Others* v *Secretary of State for Business, Enterprise and Regulatory Reform*, Judgment of the Court of Justice (Grand Chamber) of 8 June 2010', 47 *Common Market Law Review* (2010), 1803 and J. Sluijs, 'Network neutrality and internal market fragmentation', 49 *Common Market Law Review* (2012), 1664-1670.

[770] *Tobacco Advertising II*, para 42. For a more in-depth analysis of how the institutional understanding of Article 114 TFEU fits within and deviates from the substantive harmonization mandate, see part B of this chapter.

[771] *Tobacco Advertising I*, para 107.

[772] S. Weatherill, note 752, 839-840. On the uncertainties in that regard, see F. Nicola and F. Marchetti, 'Constitutionalizing Tobacco: The Ambivalence of European Federalism', 46 *Harvard International Law Journal* (2005), 518-519. See also G. Tridimas and T. Tridimas, 'The European Court of Justice and the Annulment of the Tobacco Advertisement Directive: Friend of National Sovereignty or Foe of Public Health?', 14 *European Journal of Law and Economics* (2002), 171.

[773] See T. Konstadinides, note 46, 202, arguing that these interpretations reflect the comatose state in which the principle of subsidiarity is currently operating.

[774] At least according to *Tobacco Advertising I*, para 101.

judiciary (Court of Justice)	deferential 'genuinity' test	deferential 'appreciability' test

The table demonstrates that the EU legislature to a large extent remains at liberty to identify obstacles to free movement and/or distortions of competition. The Court of Justice defers the choice of intensity of regulation to the legislature as long as the measures aimed at removing the obstacles are genuine or the distortions of competition are appreciable. In doing so, the legislative institutions are able to draw upon the Court's case law when agreeing on legislation, as well as rely on it when called upon to defend the extent of their intervention.[775] Whilst the case law projects genuinity and an appreciability tests restraining the legislature in that regard, these tests remain superficial at best and do not present a real bite to react against new legislative proposals.[776]

156. *Measures for the approximation* – Even when the object of approximation would easily fit the requirements of Article 114 TFEU, the institutional '*measures for approximation' prong* still limits the scope of permissible discretionary forms and methods of approximation.[777] These measures for the approximation have long been thought only to comprise rules directly approximating national rules and thereby replacing diverging national alternatives. The Court nevertheless gradually created room for alternative institutional arrangements. As a result, it has been accepted that Article 114 TFEU could serve as a legal basis to institutionalize common or integrated product authorization mechanisms. In *Smoke Flavourings*[778], the Court held that the discretion about the 'measures for the approximation' reflected in Article 114 TFEU 'may be used in particular to choose the most appropriate harmonisation technique where the proposed approximation requires physical, chemical or biological analyses to be made and scientific developments in the field concerned to be taken into account'.[779] In that instance, an instrument grounded in Article 114 TFEU may contain a mere authorisation procedure if two conditions are fulfilled. Firstly, the authorisation procedure instrument has to follow upon a basic legislative instrument outlining a harmonized substantive law background framework. Secondly, the Union legislature clearly has to establish the detailed rules for making decisions at each stage of such an authorisation procedure, and [to determine and circumscribe] precisely the powers of […] the body which has to take the final decision.[780] In *Vlaamse Dierenartsenvereniging VZW*, the Court explicitly held that 'European Union legislation laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services *contributes* to the proper functioning of the internal market by ensuring, in

[775] S. Weatherill, note 752, 843.
[776] Weatherill here states that the Court has nowhere to go to in reviewing the plausibility of the claims. As a result, Article 114 TFEU in practice presents a source of inflation of centralized authority in EU law. See S. Weatherill, note 752, 843.
[777] See similar conclusions in K. Gutman note 683, 177. The relationship between both prongs and the extent to which the object prong affects the scope of the approximation prong are considered in part B of this Chapter, as it seeks to explain constitutional transformations underlying the institutional setup of the present supervisory regime.
[778] Case C-66/04, *United Kingdom v Parliament and Council*, [2005] ECR I-10553, para 60-61 (hereinafter referred to as *Smoke Flavourings*).
[779] *Smoke Flavourings*, para 46.
[780] *Smoke Flavourings*, para 50.

particular, the free movement of goods'.[781] That passage highlights that the Court considers the establishment of a supranational procedure that supplements – and not merely replaces – national authorization or information procedures capable of being justified under Article 114 TFEU. Whilst these procedures do not as such directly harmonize national rules, they enable earlier or future harmonization initiatives by gathering additional information in that regard.

The Court also addressed this issue with respect to the creation of new, independent EU bodies in its *Enisa* judgment.[782] *Enisa* concerned the constitutionality of a newly established EU body on the basis of Article 114 TFEU (ex-Article 95 EC). Enisa, the European Network and Information Security Agency, was established to function as a supplementary and informal advisory and coordinating body promoting information security across the Member States.[783] A European agency, it bears EU legal personality.[784] It aims to ensure a high and effective level of network and information security and to develop a culture of network and information security for the benefit of the citizens, consumers, enterprises and public sector organisations.[785] Its tasks include enhancing, coordinating and structuring information exchanges without having formal action powers.[786] Its existence was initially limited to five years with significant review and extension options, which have effectively been relied on.[787] Enisa is still in operation today.

Contrary to the argument of the United Kingdom[788] and the Advocate General[789], the Court held that the Council could indeed ground ENISA's creation in Article 95. It stated that 'nothing in the wording of Article 95 EC implies that the addressees of the measures adopted by the Community legislature on the basis of that provision can only be the individual Member States. The legislature may deem it necessary to provide for the establishment of a Community body responsible for contributing to the implementation of a process of harmonisation in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate'.[790] In those instances, legislative provisions concerning the establishment and organisation could equally be adopted on the basis of Article 95 EC.

157. *A similarly deferential 'approximation' test* – Despite this general possibility of creating independent bodies, the Court maintains a strict justificatory test assessing the constitutionality of those bodies: 'the tasks conferred on such a body must be closely linked to the subject-matter of the acts approximating the laws, regulations and administrative provisions of the Member States. Such is the case in particular where the Community body thus established provides services to national authorities and/or operators which affect the

[781] See Joined Cases C-42/10, C-45/10 and C-57/10, *Vlaamse Dierenartsenvereniging VZW*, [2011] ECR I-2975, para 67. See also already Case C-359/92, *Germany* v. *Council,* [1994] ECR I-3681, para 37, which stated that Article 114 TFEU could serve to adopt individual measures that did not have general application.
[782] See note 49. The case will hereinafter be referred to as *Enisa.* The Court equally considered the imposition of institutional conditions on national authorities, see Case C-518/07, *Commission v Germany* [2010] ECR I-1885,. See also A. Ottow, note 22, 214.
[783] Regulation (EC) No 460/2004 of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency, [2004] O.J. L 77/1 (hereinafter referred to as ENISA Regulation).
[784] Article 18 ENISA Regulation.
[785] Article 1(1) ENISA Regulation.
[786] Article 3 ENISA Regulation.
[787] Articles 25 and 27 ENISA Regulation. On the importance of this limitation, see Enisa, para 65.
[788] *Enisa*, para 16.
[789] Opinion of AG Kokott to *Enisa*, para 38-39.
[790] *Enisa*, para 44.

homogenous implementation of harmonising instruments and which are likely to facilitate their application'. The Court distinguishes two stages in that regard: 'it needs to be determined, first, whether those objectives and tasks are closely linked to the subject-matter of […]'present Community legislation', and secondly, if the answer is yes, whether those objectives and tasks may be regarded as supporting and providing a framework for the implementation of that legislation'.[791]

The test first of all relates the establishment of a Union body to an already existing substantive law framework. A Union body needs to be incorporated in a broader substantive law framework.[792] Mere references to the existing legal framework in the legal instrument creating the Union body would seem to suffice in order to ensure compliance with this first step.[793] The second stage is more demanding. It posits that the objectives and tasks attributed to a supranational body must be regarded as *supporting and providing an implementing framework likely to facilitate the application of harmonised instruments*. The Court hardly clarified the scope of this second step. In *Enisa*, it derived the constitutionality of the regulation establishing the new body from it being part of an existing substantive law context, its role in addressing probable divergences in transposition and implementation[794] and the limited time frame for its operations.[795] It did not however elaborate on that condition to a more general extent.

158. *Article 352 TFEU as an unlikely alternative* – Article 352 TFEU[796] (ex-Article 308 EC) would also appear to allow for the establishment of EU bodies.[797]. The scope of that legal basis is nevertheless nevertheless uncertain with regard to the establishment of supranational agencies complementing a harmonized legal framework. According to the Court, 'recourse to Article 308 EC as a legal basis is […] excluded where the Community act in question does not provide for the introduction of a new protective right at Community level, but merely harmonises the rules laid down in the laws of the Member States for granting and protecting that right'.[798] In other words, Article 352 TFEU can be relied on to create a new Union right, or body, that leaves the national laws of the member states unaffected and imposes additional rights.[799] But what if those additional 'rights' are reflected in new remedies, not just alongside national rights or remedies but also interacting with them?[800] To what extent is the imposition of binding regulations by a Union body that itself mainly functions to facilitate

[791] *Enisa*, para 47.
[792] *Enisa,* para 58 states that 'consequently, the tasks conferred on the Agency under Article 3 of the regulation are closely linked to the objectives pursued by the Framework Directive and the specific directives in the area of network and information security'.
[793] *Enisa,* para 49.
[794] *Enisa,* para 60-62.
[795] *Enisa*, para 65.
[796] That provision states that if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.
[797] A. Neergaard, note 701, 621-622. Neergaard refers to the subsidiary nature of Article 352, limiting its application to cases where no other legal basis can be relied on. See also M. Lamandini, 'When More is Needed: The European Financial Supervisory Reform and Its Legal Basis', 6 *European Company Law* (2009), 197-202.
[798] Case C-436/03, *European Parliament v Council* [2006] ECR I-3733, para 37.
[799] Ibidem, para 44-45
[800] This problem has been highlighted by Advocate-General Stix-Hackl, stating that Article 352 leaves room for a broader interpretation of Article 114, see Opinion A.G. Stix-Hackl in Case C-436/03, *European Parliament v Council,* , para73.

implementation and coordination of an already substantial EU law framework really 'new'? Does the creation of such bodies not merely 'approximate' the national legal systems, given the *subsidiary nature*[801] of their binding competences? These remaining questions suggest that Article 352 TFEU presents an unlikely alternative for supranational regulatory bodies that seek to *integrate* existing national structures into a supranationally structured substantive and institutional framework.

ii. Operational support as regulatory justification

159. *Article 114 TFEU putatively justified* – The ESA Regulations referred to Article 114 TFEU and more precisely the Court's interpretation of that provision in *Enisa* to justify the establishment of ESMA, EBA and EIOPA. The ESA regulations describe the *purpose* and the *tasks* of the new authorities as assisting competent national supervisory authorities in *the consistent interpretation and application of Union rules and contributing to financial stability necessary for financial integration*. According to the preambles, these aims are closely linked to the objectives of the Union acquis concerning the internal market for financial services and therefore justify the legal basis of Article 114 TFEU.[802] In so justifying however, the Council and the European Parliament significantly short-circuited the object and approximation prong tests distinguished in the Court's case law.

160. *A more elaborate justification on the basis of the Regulations preambles* – The abovementioned limited justification does not include a step-by-step analysis of all *Enisa* test requirements. The preambles could nevertheless be read as seeking to provide such justification. Looking beyond the single recital referring to *Enisa*, it could indeed be argued that more elaborate justifications underlie the ESA Regulations. These justifications address both the object and approximation prongs underlying the Court's case law.

The ESA regulations' preambles extensively refer to cross-border, spill-over and global objectives of EU intervention. [803] The ESAs purportedly contribute to improving the functioning of the Internal Market by means of ensuring a high, effective and consistent level of prudential regulation and supervision, protecting investors, protecting the integrity, efficiency and orderly functioning of financial markets, maintaining the stability of the financial system and strengthening international supervisory coordination.[804] In that understanding, the *object* of EU intervention is to address likely distortions to the free movement of trade across the Member States.

Although the objectives of the ESA Regulations could indeed be justified as removing obstacles to trade, the Council and Parliament did not directly consider whether the establishment of the ESAs would constitute a constitutionally sanctioned *measure for the approximation* of national law. According to the regulations, the Union had reached the limits of what can be done with the present status of the Committees of European Supervisors.[805] European agencies, endowed with EU legal personality and significant regulatory powers, would better be able to protect the integrity and stability of the financial system, the transparency of markets and financial products and the protection of investors. Indirectly, the ESA Regulations' preambles seek to justify both stages in the *Enisa* test.

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[801] See the CJEU's discussion in Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, [*2008*] *ECR* I-6351 para 211.
[802] Recitals 17 EBA and ESMA Regulations; Recital 16 EIOPA Regulation.
[803] Recitals 1 and 6 EBA and ESMA Regulations; Recitals 1 and 7 EIOPA Regulation
[804] Recitals 11 EBA and ESMA Regulations; Recital 10 EIOPA Regulation.
[805] Recitals 8 EBA and ESMA Regulations: Recital 7 EIOPA Regulation.

The first stage of the test – incorporation in a substantive law framework – hardly constitutes a problem. The ESAs did not develop a European financial regulation framework from the ground. Before the crisis, the Union already established a significant substantive law framework.[806] Reform proposals mainly aimed to bring 'more Europe' into the supervisory and enforcement dimension of that framework.[807] In addition, the ESAs have been incorporated in a wider supranational institutional framework with the newly created European Systemic Risk Board[808] and an informal, European Network of national supervisory authorities (European System of Financial Supervisors – ESFS).[809]

The second stage – supporting and providing a framework for implementation – also underlies the preambles. Four implicit justifying elements could be read into the ESA Regulations' preambles in that regard.

Firstly, the Regulations emphasize *the need for a balance between supplementary supranational intervention powers and continuous day-to-day supervision powers at the national level.*[810] That balance particularly reflects a *subsumption* of EU intervention powers to national supervisory autonomy. EU bodies would not entirely replace, but merely supplement national supervision and enforcement structures. The more substantive law approximation has taken place, the more need for supporting structures would emerge.[811] This understanding would not however allow for a general attribution of supervisory powers to the EU level.

Secondly, the powers attributed to the ESAs are framed as 'guiding devices' for national supervisory authorities.[812] The regulations put emphasis on cooperation through colleges of national supervisors, the arbitrating role of the EU authorities and the ESA's roles in providing a forum for interaction with global or third country national supervisory structures.[813] The guidance justification confirms the extent to which EU authorities play a predominantly advisory role.

Thirdly, the Regulations seek to *frame the Union enforcement mechanisms within the reality of national enforcement structures*.[814] This enforcement justification recognizes the need for supranational enforcement in a supranational regulatory environment. According to the ESA regulations, the financial crisis showed that at least some binding powers are required with a view effectively to remedy shortcomings in a multi-layered framework of regulation and enforcement.[815] Binding secondary intervention powers therefore *protect* the cooperative aims of regulatory integration and seek to maintain high standards in national enforcement structures.

Fourthly, the Regulations emphasize the need to safeguard Member States' prerogatives.[816] Even in instances where supranational bodies have been able to adopt supranational decisions,

[806] See Article 1 (2) ESA Regulations.
[807] N. Moloney, note 699.
[808] See Section 3.
[809] Article 2 ESA Regulations.
[810] See reflections of this kind in Recitals 9 EBA and ESMA Regulations, Recital 8 EIOPA Regulation. See also Recitals 23 EBA and ESMA Regulations and Recital 22 EIOPA Regulation.
[811] See for a similar argument E. Ferran and K. Alexander, note 703, 769
[812] Recitals 40-45 EBA and ESMA Regulations; Recitals 39-44 EIOPA Regulation
[813] Article 30-35 ESA Regulations reflect this guidance role of the new authorities; the enforcement competences in Article 17-19 ESA Regulations also reflect emphasis on guidance.
[814] Recitals 51 and 58 ESA Regulations.
[815] Article 60-61 ESA Regulations
[816] Recitals 50 ESA Regulations.

particular options and rights exist for Member States to contest and remedy the adoption of such measure. The ESA Regulations contain a specific safeguard clause and additionally provide for a specific administrative review system through the Board of Appeal.

161. *Operational support justifications* – These four justificatory elements highlight the essential supporting role attributed to the ESAs. They confirm the image projected by *Enisa* that Article 114 TFEU grants supranational regulatory competences to support the day-to-day application, implementation and enforcement of harmonized standards at the national levels.[817] As Article 114 TFEU has been considered to establish such supporting bodies, nothing in that provision would seem to impede the attribution of supplementary binding individual decision-making powers to such bodies. Since these supporting competences belong to the EU level, an agency could in principle be entrusted with their exercise. The Regulations' preambles seek to justify the ESAs' roles precisely on such *supranational operational support* rationale. As long as the ESAs would not become primary market supervision bodies, their establishment could indeed be justified on the basis of Article 114 TFEU.

b. Article 114 TFEU operational support as justification for more extensive ESA decision-making powers

162. *Building on the operational support mandate of Article 114 TFEU* – The reading of Article 114 TFEU underlying the ESA Regulations thus serves as a means to support the day-to-day operations of national supervisory authorities in the implementation and application of EU law. Article 114 nor the ESA Regultaions' preambles contain any specific limits on the scope of what operational support amounts to, except for the vague conditions of subsumption, guidance, protection and national safeguards. As such, the mandate reflects an open-ended structure in which various justifications for additional supranational support mechanisms can be adduced. This subsection outlines how operational support has been conceived in the ever expanding ESA framework. Starting with the supplementary decision-making powers entrusted to the ESAs (i.), this section proceeds to outline the ESAs' quasi-regulatory powers in the preparation of technical standards (ii.), ESMA's full-fledged supervisory role in the policing and fining of Credit Rating Agencies (iii.) and the ESAs' *discretionary* powers in prohibiting or restricting specific financial activities in the name of consumer financial protection (iv.). These different types of powers entrusted to the ESAs demonstrate the flexibility and potentially unlimited extension an operational support reading can provide.

i. Supplementary binding decision-making powers in the ESA Regulations

163. *Binding subsidiary and emergency decision-making powers* – The Regulations entrust the ESAs with binding subsidiary and emergency powers. Subsidiary powers allow the ESAs to intervene if traditional decentralized supervision actors do not function effectively. Binding supranational decisions serve to remedy these shortcomings. The ESA Regulations' framework envisages subsidiary powers in cases of breach of Union law and disputes among national authorities. Emergency powers allow the ESAs directly to act or react upon shifting market circumstances through binding decisions. Articles 17-19 ESA Regulations incorporate these powers.

[817] P. Schammo, note 1, 783.

164. *Breach of Union law* – Breach of Union law decision-making powers address situations in which a competent national authority[818] does not apply the substantive legal framework as prescribed, or applies it in ways which fail to ensure that a financial market participant satisfies the requirements laid down in the substantive framework. Breach of EU law in that understanding only refers to breach of EU substantive financial regulation obligations.[819] The provision does not however limit these provisions to directly applicable EU law standards. It equally applies to provisions incorporated in Directives. National authorities can be called upon to apply the obligations contained in these Directives from the moment the transposition period expired.[820] Non-compliance with supervisory obligations incorporated therein could justify the initiation of 'breach of Union law' procedures.[821]

The regulations significantly structure the format and powers of intervention attached to the ESAs. The responsible ESA may investigate the alleged breach or non-application of EU law upon request from one or more competent authorities, the European Parliament, the Council or the responsible Stakeholders Group, or on its own initiative. All relevant information may be requested from the national authorities concerned. On the basis of such information and no later than two months following the initiation of its investigation, the ESA may address a recommendation to the competent authority.[822] That non-binding recommendation sets out the action necessary to comply with Union law.[823] The addressed national authority has to report whether or not it intends to comply. It is obliged, within ten days upon receipt of the ESA's recommendation, to inform it of the steps it has taken or intends to take to ensure compliance with Union law.[824]

In case the competent authority does not comply within one month from the receipt of the ESA's recommendation, the *European Commission* can, after having obtained all necessary information, issue a formal opinion requiring the competent authority to take the action necessary to comply with Union law.[825] The Commission shall issue its opinion no later than three months following the adoption of the ESA recommendation.[826] The nature and binding force of the Commission's *formal opinion* remains uncertain. Whilst an opinion is presumed to be non-binding, Article 17(7) states that competent national authorities *shall comply with*

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[818] As procedures are directly addressed to a competent authority, the procedure differs from Article 258 TFEU, in which the Commission addresses Member States' action or inaction, see E. Wymeersch, 'The European Financial Supervisory Authorities or ESAs' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 256.

[819] Article 17(1) ESA Regulations. E. Wymeersch, 'The European Financial Supervisory Authorities or ESAs' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 256-257. For an overview of acts falling within the ESA Regulations, see the same contribution at 246.

[820] See in the context of the direct effect of Directives and the invocability of a Directive against all public authorities of a Member State, Case C-188/89, *Foster*, [1990] ECR I-3313, para 20. See also S. Prechal *Directives in EC law* (Oxford, Oxford University Press, 2nd Edition, 2005), 60. It could indeed be inferred from that position that public authorities called upon to apply Directives are a part of the State to whom a Directive is addressed in accordance with Article 288 TFEU.

[821] E. Wymeersch, 'The European Financial Supervisory Authorities or ESAs' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 257.

[822] Tridimas argues that an informal settlement could equally be reached within this time frame, see T. Tridimas, note 736, 72.

[823] Article 17 (2) ESA Regulations.

[824] Article 17 (3) ESA Regulations.

[825] Article 17(4) ESA Regulations. In doing so, the Commission shall take the ESA's recommendation into account.

[826] Article 17 (4) ESA Regulations. See also N. Moloney, 'Rules in Action', note 713, 198-199. The 'shall' requirement does not imply that the Commission is in any instance obliged to provide a formal opinion, see E. Wymeersch, 'The European Financial Supervisory Authorities or ESAs' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 260.

the formal opinion issued by the Commission.[827] In that image, the Commission's opinion is binding but only for national authorities which it is addressed to and could even require positive action from the authorities in doing so.[828] It thus produces limited legal effects. As such, a formal opinion resembles a Commission Decision identified in Article 288 TFEU. According to that provision, a Decision shall be binding in its entirety. A Decision which specifies those to whom it is addressed shall be binding only on them. These decisions are directly applicable and can be challenged before the Courts[829] and enforced like any other binding EU decision in a national context. It is also well-known that the Court does not pay attention to the denomination of an act as formal opinion, but effectively identifies the effects such an opinion produces.[830] In that understanding, a formal opinion would indeed comprise a Commission Decision adopted in the context of an Article 17 ESA Regulations procedure.

In cases where a formal opinion has been issued, the competent national authority will have to report what steps it has taken to comply with the formal opinion. When a competent authority does not (take steps to) comply with the Commission's formal opinion, and where it is necessary to remedy in a timely manner such non-compliance in order to maintain or restore neutral conditions of competition in the market or to ensure the orderly functioning and integrity of the financial system, the ESA itself may, where the relevant requirements of the substantive law framework are directly applicable to financial market participants, adopt an individual decision addressed to a financial market participant requiring the necessary action to comply with its obligations under Union law including the cessation of any practice.[831] The authority's decision shall prevail over any previous decision adopted by the national authority on the same matter. National authorities shall be required to comply with such decision.[832]

It is important to understand the limits of direct ESA intervention. First, it is limited to cases where the Commission adopted a formal opinion. The Commission is not obliged to adopt this opinion and may consider the ESA recommendation sufficient to address the problem. Second, the competent national authority will be granted a time limit within which to comply and during which the ESA cannot take a decision addressed to market participants. Third and most important, the ESA may only act whenever the relevant substantive law requirements at stake are *directly applicable* to financial market participants. This wording evokes some conceptual confusion, as theoretically only Regulations or Decisions are directly applicable in the Member States' legal orders. Most fundamental financial services law provisions can however be found in Directives, which are obviously not directly applicable. The ESA Regulations preambles state that the authority's direct decisional power should be limited to exceptional circumstances in which Union law is directly applicable to financial market participants *by virtue of existing or future Union Regulations*.[833] This particular choice of

[827] Article 17(7) ESA Regulations.
[828] T. Tridimas, note 736, 72.
[829] T. Tridimas, note 736, 73 argues that a formal opinion could be contested before the ESAs' Board of Appeal as a binding measure adopted within an ESA procedure. Article 60 ESA Regulations nevertheless limits access to the Board of Appeal to decisions taken by the *Authorities* in that context and not those by the Commission. It should thus be argued that such decisions can only be reviewed by the EU Courts and not by the Board of Appeal. For a contrary position equating a formal opinion with a reasoned opinion as a mere provisional position, see E. Wymeersch, 'The European Financial Supervisory Authorities or ESAs' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 260.
[830] This is apparent from Article 263 TFEU, which also allows for the annulments of acts intended to produce legal effects vis-à-vis third parties. A formal opinion mandating compliance could indeed be said to produce such effects.
[831] Article 17(6) ESA Regulations.
[832] Article 17 (7) ESA Regulations.
[833] Recitals 29 ESMA and EBA Regulations; recital 28 EIOPA Regulation.

words seems to indicate that only compliance with Regulations qualifies to be the object of an ESA decision, leaving Directives and even Decisions (to the extent that they have been adopted) out of the scope of ESA breach of Union action.[834] This approach justifies the exceptional nature of direct ESA intervention, imposing binding decisions on financial market participants. The only tool available to ensure compliance with Directives – and potentially Decisions – is through informal recommendations, a Commission *formal opinion* or a cumbersome Commission or Member State initiated infringement procedure in Articles 258-260 TFEU. These drawbacks can somewhat be mitigated by the new emphasis on regulatory and implementing technical standards, adopted by regulation or decision. Fourth, ESA intervention is limited to situations where it is necessary to remedy in a timely manner non-compliance in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system.[835] The ESA can only adopt individual decisions to particular financial market participants. Generally applicable decisions cannot as such be adopted.

165. *Settling supervisory disputes* – The ESAs additionally are to ensure the efficient cooperation between different competent national supervisory authorities. The ESA Regulations ensure such cooperation in a binding 'settlement of disagreements' procedure. That procedure applies to both cross-border and cross-sector disputes. It thus applies to disputes between two or more competent authorities in different Member States and two or more authorities responsible for different sectors of financial market supervision. In the latter instance, the dispute settlement procedure is entrusted to the Joint Committee of the ESAs.[836] The Joint Committee procedure is not explicitly limited to two or more cross-sector supervisors operating in different Member States. Cross-sector disputes could therefore also deal with two or more authorities *within one and the same Member State* disagreeing about the scope of their competences. The cross-sector dispute regime only presupposes conflicts among different *micro-supervision* authorities across the Member States. It does not envisage cross-sector conflicts between macro- and micro-supervisors.

The procedure in Article 19 ESA Regulations can be outlined as follows. Where a competent national authority disagrees about the procedure or content of an action or inaction by another Member State's competent authority acting in cases specified the EU substantive financial regulation framework, or where, on the basis of objective criteria[837], disagreement between national authorities acting in cases specified in the EU substantive financial regulation framework can be detected, the ESA may, either at the request of one or more of the authorities concerned, or on its own initiative[838], assist the authorities in reaching an agreement.[839] The procedure distinguishes between conciliation and settlement stages.

The conciliation stage allows the national authorities concerned to reach an agreement under the competent ESA's or the Joint Committee's auspices. In practice, the ESA shall set a time limit for conciliation, during which it acts as a mediator. If the competent authorities concerned fail to reach an agreement within that time limit […], the ESA itself will settle the dispute. The Regulations allow for the ESAs to take a decision requiring national authorities

[834] See P. Schammo, note 90, 46 for such argument.
[835] See Article 17(6) ESA Regulations.
[836] Article 20 ESA Regulations.
[837] Schammo relates the need for objective criteria to complying with Meroni requirements, see P. Schammo, note 90, 48.
[838] Wymeersch argues that the 'own initiative' reference should be comprehended as allowing for private parties involved in the subject to call upon the ESA directly, see E. Wymeersch, 'The European Financial Supervisory Authorities or ESAs' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 268.
[839] Article 19(1) ESA Regulations.

to take specific action or to refrain from action in order to settle the matter. The ESA decision will be binding on the authorities concerned.[840] Prior to its adoption, the Board of Supervisors shall convoke an independent panel to facilitate an impartial settlement of the disagreement, consisting of the Chairperson and two of its members, who are not representatives of the competent authorities which are party to the disagreement and who have neither any interest in the conflict nor direct links to the competent authorities concerned. That panel will propose a decision to be adopted by the Board of Supervisors.[841] The ESA shall adopt its decision by simple majority, although a qualified blocking minority could impede the decision's adoption.[842]

The supervisory settlement decision does not impede direct ESA decision-making as well.[843] In case the competent authority does not comply with the decision of the ESA and thereby fails to ensure that a financial market participant complies with requirements directly applicable to it by virtue of the EU substantive law framework, the ESA may adopt an individual decision addressed to a financial market participant, requiring the necessary actions of compliance, including the cessation of a practice.[844] Those decisions are binding on the financial market participant and the national authority concerned. They pre-empt contrary national authorities' decisions.[845]

166. *Emergency powers* – Direct ESA intervention is also possible in cases of adverse developments which may seriously jeopardize the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union.[846] In such circumstances, the Regulations provide a particular regulatory intervention scheme.

The triggering of adverse development emergency situation powers requires a Council decision acknowledging the existence of adverse developments.[847] Such Council decision will be addressed to the competent ESA and will be reviewed at regular intervals and least once a month. The Council may also declare the discontinuation of the emergency situation at any time. A Council decision will be adopted following the request by an ESA, the Commission or the ESRB.

In case of a declared emergency situation, the competent ESA shall actively facilitate and, where deemed necessary, coordinate any actions undertaken by the relevant national

[840] Article 19(3) ESA Regulations.
[841] Article 41(2)-(3) ESA Regulations.
[842] Article 44(1) ESA Regulations.
[843] On the parallels between both procedures, see E. Wymeersch, 'The European Financial Supervisory Authorities or ESAs' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 268.
[844] Article 19(4) ESA Regulations.
[845] Article 19(5) ESA Regulations.
[846] Article 18(1) ESA Regulations. In order to be able to perform that facilitating and coordinating role, the Authority shall be fully informed of any relevant developments, and shall be invited to participate as an observer in any relevant gathering by the relevant national competent supervisory authorities
[847] Article 18(2) ESA Regulations. This Council decision will be adopted in Consultation with the Commission and the ESRB and where appropriate, the ESAs themselves. Where the ESRB or the Authority considers that an emergency situation may arise, it shall issue a confidential recommendation addressed to the Council and provide it with an assessment of the situation, following which the Council assess the need for a meeting. The Council can only declare an emergency situation upon request from the Authority, the Commission or the ESRB. At appropriate intervals, it will review that decision. Review is obligatory at least once a month. If the decision is not renewed at the end of a one-month period, it shall automatically expire. In addition, the Council may at any time declare the discontinuation of the emergency situation. Parliament and Commission will be informed without delay about the existence of an emergency situation. Before adopting a decision however, due care of confidentiality should be guaranteed.

competent authorities.[848] This first and foremost implies that the ESA shall be fully informed of any relevant developments and be invited to participate as an observer in any relevant gathering by the relevant national competent authorities.[849] In case of an adverse developments emergency situation and in exceptional circumstances where coordinated action by national authorities is necessary to respond to adverse developments which may seriously jeopardize the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union, the ESAs can direct specific binding decisions to national supervisory authorities with a view to ensure compliance with the EU substantive legal framework. Those decisions are *individual* in nature. They are addressed to individual national supervisory authorities and should only require national authorities to take necessary action in compliance with requirements imposed on them by the substantive legal framework.[850]

When the national authority does not comply with the decision within a time period laid down in that same decision, the ESA may direct binding individual decisions to a financial market participant, requiring the necessary action to comply with its obligations, including the cessation of any practice.[851] Again, those binding individual decisions are limited to cases where the relevant requirements laid down in the substantive law framework, including its regulatory or implementing technical standards, are directly applicable to financial market participants.[852] The ESAs will only intervene if the competent authority refrains from applying the EU substantive legal framework or where it applies that framework in a way which appears to be a manifest breach of those acts, and where urgent remedying is necessary to restore the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union. Decisions shall be binding and shall prevail over any national authority's decision. National authorities effectively have to comply with the ESA decision taken.[853] ESA decisions thus adopted are amenable to Board of Appeal review.[854]

ii. Preparatory rule-making powers in the ESA Regulations

167. *ESAs as technical standard-setters* – The ESAs serve as a forum within which national supervisory authorities convene to develop EU-wide technical standards. Harmonized technical standards in financial services to ensure, also through a single rulebook, a level playing field and adequate protection of investors and consumer across the Union. It was deemed efficient and appropriate to *entrust* the Authority, in areas defined by Union law, with the elaboration of draft regulatory technical standards, which do not involve policy choice.[855]

According to Article 290 TFEU, a legislative act may 'delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a

[848] Article 18(1) ESA Regulations.
[849] Article 18(1) para 2 ESA Regulations.
[850] Article 18(3) ESA Regulations.
[851] Article 18(4)-(5) ESA Regulations.
[852] Article 18(4) ESA Regulations.
[853] Article 18(5) ESA Regulations.
[854] Article 60 ESA Regulations.
[855] Recitals 22 ESMA and EBA Regulations and Recital 21 EIOPA Regulation. See also N. Moloney, part I Rule-making, note 716, 66.

delegation of power'.[856] The Court of Justice in that image remains competent to determine what essential elements are.[857] The ESA regulations add an additional layer to this delegation, allowing the Commission to delegate its regulatory power to the ESAs.[858] Where the European Parliament and the Council delegate power to the Commission to adopt regulatory technical standards by means of delegated acts under Article 290 TFEU, the Authority *may* develop draft technical standards in order to enable consistent harmonization of financial regulation.[859] Despite the apparently voluntary nature of ESA intervention, the preambles' references to *entrusting* the ESAs with the preparation of such standards point to a more intensive involvement than mere voluntary adoption of standards.[860] It could indeed be argued that the authorities serve *de facto standard setters*.[861] The authority has to submit its draft standards to the Commission for endorsement.[862] Although the *European Commission* remains entrusted with the task of adopting these regulatory acts[863], its endorsement options are significantly restrained.[864]

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[856] On Article 290 TFEU, see J. Driessen, 'Delegated legislation after the Treaty of Lisbon: An Analysis of Article 290 TFEU', 35 *European Law Review* (2010), 837-848 and R. Schütze, ' "Delegated Legislation in the (new) European Union: A Constitutional Analysis', 74 *Modern Law Review* (2011), 685 arguing that '[f]rom a democratic point of view, Article 290 represents a constitutional revolution'. In adopting delegated acts related to financial services, the Commission will nevertheless continue to rely on experts, as Declaration 39 on Article 290 of the Treaty on the Functioning of the European Union states, see [2008] O.J. C 115/350. The Court considers itself competent to rule on whether or not essential elements have been delegated, see Case C-355/10, *European Parliament v Council*, judgment of 5 September 2012, nyr, para 67 and M. Chamon, 'How the concept of essential elements of a legislative act continues to elude the Court. *Parliament* v. *Council'*, 50 *Common Market Law Review* (2013), 849-860. Implementing acts on the other hand confer the Commission, supervised by the Council and the European Parliament, specific powers to implement EU legislative acts, a competence normally attributed to Member States. For an analysis from the vantage point of transparency and openness and calling for an upgraded institutional design, see J. Mendes, note 61, 26: 'Both a teleological and a systematic argument justify that transparency and participation ought to be complementary sources of democratic legitimacy of delegated and implementing acts'. Along the same lines, W. Voermans, 'Delegation is a matter of confidence. The New EU Delegation System under the Treaty of Lisbon', 17*European Public Law* (2011), 13-30.

[857] J. Mendes, note 61, 29.

[858] H. Hofmann and A. Morini, 'Constitutional aspects of the pluralisation of the EU executive through "agencification"', 37 *European Law Review* (2012), 430 conceptualize this delegation reflects the necessary pluralisation of the EU's executive realm.

[859] Declaration 39 on Article 290 TFEU stated that this provision should be read as allowing assistance of technical expertise in a form which is specific to the financial services area. Recital 21 ESA Regulations therefore allows the authorities to provide such expertise. From that perspective, E. Wymeersch distinguishes Commission only and ESA plus Commission binding delegated acts, see E. Wymeersch, 'The European Financial Supervisory Authorities or ESAs' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 250.

[860] For a similar argument in the realm of Article 290 delegated acts, see S. Peers and M. Costa, 'Accountability for Delegated and Implementing Acts after the Treaty of Lisbon', 18 *European Law Journal* (2012), 451; T. Tridimas, note 736, 70.

[861] See also P. Schammo, 'The European Securities and Markets Authority: Lifting the Veil on the Allocation of Powers', 48 *Common Market Law Review* (2011), 1883.

[862] Articles 10(1) ESA Regulations.

[863] See also Article 290 TFEU and its discussion in note 733. See Articles 12 ESA Regulations for the specifics of a revocation of delegation. 1. The delegation of power referred to in Article 10 may be revoked at any time by the European Parliament or by the Council. 2. The institution which has commenced an internal procedure for deciding whether to revoke a delegation of power shall endeavour to inform the other institution and the Commission within a reasonable time before the final decision is taken, indicating the delegated power which could be subject to revocation. 3. The decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect immediately or at a later date specified therein. It shall not affect the validity of the regulatory technical standards already in force. It shall be published in the *Official Journal of the European Union*.

[864] For an argument that such endorsement is problematic from a constitutional law point of view, see M. Chamon, note 30, 1068.

Article 291 TFEU additionally allows for the adoption of implementing acts where uniform conditions are needed.[865] Those acts shall confer implementing powers on the Commission or in duly justified specific cases on the Council. the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.[866] The ESAs are entrusted with particular quasi-regulatory decision-making powers in this regard.[867] These powers focus on the adoption of both regulatory and implementing technical standards.

168. *Regulatory technical standards* – Regulatory technical standards shall be technical, shall not imply strategic decisions or policy choices[868] and their content shall be limited by the legislative acts on which they are based.[869] The Commission initiates the standard-setting procedure. It requires the competent Authority[870] to develop a draft version of regulatory technical standards within a particular time frame. The substantive regulatory framework determines the instances in which the Commission may do so.[871] Upon being so instructed, the Authority is to conduct open public consultations on draft regulatory technical standards.[872] The ESA additionally has to analyze the potential related costs and benefits of such standards. Consultations and analyzes need not be conducted if they are deemed disproportionate in relation to the scope and impact of the draft regulatory technical standards or to the urgency of the matter.[873] Only when the Authority did not submit a draft within the time limit specified in the substantive law instruments and when it does not respect an additional time limit imposed by the Commission beyond that first time-limit, the Commission may adopt a regulatory technical standard without a draft of the Authority. In

[865] That right is generally reserved to the Member States however, see R. Schütze, note 586, 1398. See also T. Christiansen and M. Dobbels, note 61, 44, who argue that Article 291 TFEU does not define what an 'implementing' feature amounts to. See for a similar claim, J. Bast, 'New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law', 49 *Common Market Law Review* (2012), 889, arguing that implementing acts constitute 'acts that do not find their legal basis directly in the Treaties but rather in an act of the institutions that has delegated the power to adopt implementing measures'.

[866] On implementing acts, see J. C. Piris, *The Lisbon Treaty. A Legal and Political Analysis*, (Cambridge, Cambridge University Press, 2010), 103. In April 2011, the Council and the European Parliament streamlined their intervention in delegated acts-making in a common understanding, available at http://register.consilium.europa.eu/pdf/en/11/st08/st08753.en11.pdf. This resulted in Regulation 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, [2011] O.J. L55/13, establishing an upgraded comitology framework. See also P. Craig, 'Delegated acts, implementing acts and the new Comitology Regulation', 36 *European Law Review* (2011), 671-687 for an overview.

[867] T. Tridimas, note 736, 67; M. Chamon, note 30, 1069 refers to quasi-legislative powers.

[868] Technical and political choices are nevertheless closely intertwined and a clear dividing line is difficult to draw in that regard, see T. Tridimas, note 736, 69; N. Moloney, part I Rule-making, note 716, 68.

[869] Article 10(1) para 2 ESA Regulations.

[870] Each regulation and the substantive legal framework have incorporated a division of competences among the different Authorities. The Omnibus Directive clearly states which Authority is the competent one with respect to particular directives or regulations, it being either ESMA, EBA or EIOPA.

[871] See for examples Articles 2 and 5 of Directive 2010/78/EU of the European Parliament and the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority), [2010] O.J. L 331/120.

[872] See also E. Chiti, note 61, 101.

[873] Article 10(1) para 3 ESA Regulations.

that case, the Commission itself will be required to organize public consultations.[874] The Commission will be obliged to send its draft to the Authority, which may still amend it.[875]

Within three months of receipt of a draft regulatory technical standard, the Commission shall decide whether or not to endorse it. The Commission may endorse the entire draft or part of it, reject it or propose amendments, where the interests of the Union so require.[876] The endorsement ability signifies that the Commission has the final authority on the political feasibility, regulatory intensity and considered legality of Authorities' drafts. The Regulations' references to the Union's interests would seem to entrust the Commission with general political discretion on whether or not to endorse draft standards. The ESA Regulations' preambles nevertheless define the notion of Union interest in a strict fashion. Regulatory technical standards should be subject to amendment only in very restricted and extraordinary circumstances, since the Authority is the actor in close contact with and knowing best the daily functioning of financial markets. Draft regulatory standards would therefore only be subject to amendment if they were *incompatible with Union law*, did not respect the *principle of proportionality* or ran counter to *the fundamental principles of the Internal Market for financial services* as reflected in the *acquis* of Union financial services legislation.[877] These grounds for objection refer to strictly legal or constitutional considerations. The Commission would in that understanding only be able to intervene if proposed measures do not comply with EU constitutional principles or secondary legislation, including *fundamental principles of the Internal Market for financial services*. The ESA Regulations do not however devfine these fundamental principles. It can be expected that these principles include the well-known substantive and organizational principles – such as home country supervision and mutual recognition. Such fundamental principles can only be set aside by 'level one' fundamental regulatory principles. The preambles' references to the principle of proportionality would confirm that position. The Commission would as such be able to object against a draft that would disproportionately affect the operation of these fundamental principles.

The ESA Regulations explicitly confirm the limited scope of Commission amendments. Commission amendments should not change the contents of a draft technical standard without prior coordination with the Authority. Where the Commission intends not to endorse a draft regulatory technical standard or to endorse it in part or with amendments, it shall send the draft […] back to the Authority.[878] The Authority will subsequently be granted six weeks to amend its draft on the basis of the Commission's proposals and resubmit it to the Commission by way of *formal opinion*. The Regulations do not explain what a formal opinion amounts to. As an opinion, it is presumably non-binding and would not therefore produce legal effects. Its formal status would nvertheless seem to indicate that this opinion is in some ways producing direct legal effects on the Commission. It could indeed be argued that a formal opinion allows the Commission only either to accept or reject the adapted draft standard. In that way, the draft presents an all-or-nothing solution to the Commission. If the Authority chooses not to respond to the Commission's objections or amendments – by not submitting an amended draft, or submitting a draft not consistent with the Commission's proposals – the Commission

[874] Article 10(2) ESA Regulations.
[875] Article 10(3) ESA Regulations. See also Article 10(1) para 8: The Commission may not change the content of a draft regulatory technical standard prepared by the Authority without prior coordination with the Authority.
[876] Article 10(1) para 5 ESA Regulations.
[877] Recitals 23 ESMA and EBA Regulations; Recital 22 EIOPA Regulation. See also P. Schammo, note 90, 44.
[878] Article 10(1) para 6 ESA Regulations.

may adopt the standard with the amendments it considers relevant, or reject it.[879] Such adoptions take the form of a Regulation or a Decision.[880]

The Council and European Parliament can directly intervene in the regulatory process. Drafts or formal opinions by the Authority or by the Commission will immediately be forwarded to the European Parliament and the Council.[881] The adoption of regulatory technical standards shall also be notified immediately to these institutions.[882] Within one month from the date of notification, to be extended once, or three months in cases the Commission did not adopt the same standards as the ones in the draft by the Authority, the European Parliament or the Council can object to a regulatory technical standard.[883] Before the expiry of that period, both institutions can inform the Commission of their intentions not to raise objections. In that case, the Commission can publish a Regulation or Decision incorporating the standards in the *Official Journal*. In case of objections, the adopted standards shall not be published or enter into force.[884] The scope of objections to be raised by the Council and the European Parliament is not specified within the regulatory framework. As a result, the Council and Parliament are effectively able to object to a particular draft standard on political grounds rather than on the legality-focused Union-interest grounds the Regulations impose on the Commission.

169. *Implementing technical standards* – A similar framework of ESA and Commission interaction underlies the adoption of so-called implementing technical standards. Their content shall be to determine the conditions of application of substantive harmonization instruments.[885] The interactions between the ESAs and the Commission are regulated in a similar fashion compared to regulatory technical standards. The Council and European Parliament can object to the proposed standards in accordance with the provisions of the Comitology Regulation.[886] Implementing technical decisions shall also be adopted by means of Regulations or Decisions.[887]

iii. Full-fledged market supervision powers over Credit Rating Agencies

170. *Regulation and supervision of Credit Rating Agencies* –EU law dramatically commenced regulating the process of licensing and overseeing the activities of credit rating agencies.[888] As is well-known, credit rating agencies have often been blamed for aggravating deteriorating financial market conditions by virtue of their downgrading credit ratings.[889] In order to enhance clarity on the scope of ratings, the operations of rating agencies and the maintenance of an integrated market, the European Union adopted a 2009 Regulation allowing for the supervision of their activities.[890] A second Regulation placed their operations under more

[879] Article 10(1) para 7 ESA Regulations.
[880] Article 10(4) ESA Regulations.
[881] Article 10(1) para 3 and Articles 10(3) para 3, Articles 11(2) and Articles 14 ESA Regulations.
[882] Article 11 (3) ESA Regulations.
[883] Article 13 (1) ESA Regulations.
[884] Article 13(2) ESA Regulations.
[885] Article 15(1) ESA Regulations. Pointing to the unclarity of the scope of implementing technical standards, P. Schammo, note 90, 44.
[886] See note 866. See also T. Christiansen and M. Dobbels, note 61, 48, referring to an appeal committee.
[887] Article 15 ESA Regulations.
[888] Proposals had been developed in the De Larosière Report, para 66-72.
[889] De Larosière Report, para 35.
[890] Regulation 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, [2009] O.J. L302/1 (hereafter referred to as CRA Regulation). For a first analysis, see F. Amtenbrink and J. De Haan, Regulating Credit Ratings in the European Union: A Critical First Assessment of Regulation 1060/2009 on Credit Rating Agencies. 46 *Common Market Law Review* (2009), 1915-1949. The regulation was amended in 2011. I will refer to its amended version as the amended credit rating agency regulation.

intense EU supervisory scrutiny.[891] In December 2011, an additional amending Regulation has been proposed by the European Commission, with a view to address additional issues such as civil liability of rating agencies.[892] In May 2012, four delegated Regulations specifying the content, format and provision of information to ESMA have been adopted.[893]

The EU's 2009 intervention in regulating and supervising credit rating agencies resulted in a complex web of supervisory relationships between national competent authorities called upon to supervise the licensing process and the actual operations of credit rating agencies.[894] At the time of its instatement, the 2009 Regulation already recognized that the current supervisory architecture should not have been considered the long-term solution for the oversight of credit rating agencies.[895] Following the establishment of the ESAs in January 2011, the credit rating agency regulatory framework has been adapted. From that moment, centralized authorization[896], supervision and enforcement of credit agency regulations was placed in the hands of the European Securities and Markets Authority (ESMA).[897]

171. *ESMA's full-fledged authorization and market supervision powers* – Regulation 513/2011 of 11 May 2011 (the amending Credit Rating Agencies Regulation) appointed ESMA as the responsible authority for the registration[898] and on-going supervision of credit rating agencies.[899] ESMA would also prepare draft technical standards concerning the information to be provided by a credit rating agency.[900] Most importantly however, it would directly enforce potential infringements of EU law. An annex to the Regulation contains a list of infringements related to conflicts of interest, organisational or operational requirements,

[891] Regulation 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation 1060/2009 on credit rating agencies, [2011] O.J. L145/30. See P. Schammo, note 861, 1879-1914.
[892] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on credit rating agencies, COM(2011) 361, available at http://ec.europa.eu/internal_market/securities/docs/agencies/COM_2011_747_en.pdf. This proposal aims to add additional amendments governing the regulatory functioning of credit rating agencies operating in the EU market. For background and a summary, see J. Oster, 'The Commission Proposal to Amend the Regulation on Credit Rating Agencies', 19 *Maastricht Journal of European and Comparative Law* (2012), 206-211, who considers the new proposal not to go far enough.
[893] Commission Delegated Regulation (EU) No 446/2012 of 21 March 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to regulatory technical standards on the content and format of ratings data periodic reporting to be submitted to the European Securities and Markets Authority by credit rating agencies, [2012] O.J. L140/2; Commission Delegated Regulation (EU) No 447/2012 of 21 March 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies by laying down regulatory technical standards for the assessment of compliance of credit rating methodologies, [2012] O.J. L140/14; Commission Delegated Regulation (EU) No 448/2012 of 21 March 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to regulatory technical standards for the presentation of the information that credit rating agencies shall make available in a central repository established by the European Securities and Markets Authority, [2012] O.J. L140/17; Commission Delegated Regulation (EU) No 449/2012 of 21 March 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to regulatory technical standards on information for registration and certification of credit rating agencies, [2012] O.J. L140/32.
[894] See for references to Regulation 1060/2009, note 890.
[895] Recital 51 CRA Regulation.
[896] Authorization has not hereto been within the powers of any other supranational agency, see T. Tridimas, note 736, 58. See for examples of other authorization procedures, part IV, Chapter 1 of this dissertation.
[897] See in more detail on that matter, P. Schammo, note 861, 1888-1890.
[898] Article 15 CRA Regulation.
[899] But not for the oversight of the users of credit ratings, recital 9 Regulation 513/2011. CRAs should rely on a back-testing model, see Article 8(3) CRA Regulation.
[900] Recital 11 Regulation 513/2011.

infringements related to obstacles to the supervisory activities and infringements related to disclosure provisions.[901]

The Regulation more specifically adds particular powers of investigation and supervision. As a basic constraining principle, ESMA shall not interfere with the actual content of credit ratings or methodologies.[902] Where, in carrying out its supervisory duties, ESMA finds that there are serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in the annex to Regulation 513/2011, ESMA shall appoint an independent investigating officer to investigate the matter. That investigating officer shall not be involved or have been involved in the direct or indirect supervision or registration process of the credit rating agency concerned and shall perform his functions independently from ESMA's Board of Supervisors.[903] The investigating officer can organize searches, request information and engage upon on-site inspections.[904] In doing so, particular tasks can be delegated to national supervisory authorities.[905]

Upon completion of an investigation and before submitting the file with findings to ESMA's Board of Supervisors, the independent investigating officer shall give the persons subject to investigation the opportunity to be heard on the matters being investigated. He shall also notify the parties subject to investigation that they have access to the file.[906] In case the Board of Supervisors decides that one of the infringements listed in the Annex to the 2011 Regulation has indeed been committed by the persons subject to the investigation, it shall take a supervisory measure. These supervisory measures include the withdrawal of a rating agency's registration, a temporary prohibition from issuing credit ratings, a suspension of the use of credit ratings, the requirement for a rating agency to bring the infringement to an end or issuing public notices.[907] The exact measure adopted lies with the discretion of the Board, having regard to the seriousness of the infringement in case. Before taking a decision, credit rating agencies subject to it need to be able to be heard and have their rights of defence ensured.[908] Urgent action might nevertheless require an interim decision before the rating agency has been heard. This is only possible to the extent that significant and imminent damage to the financial system should be prevented. Persons concerned should in that case nevertheless be granted an opportunity to be heard by the ESMA Board of Supervisors as soon as possible after taking its decision.[909]

Supplementary to the supervisory measures, fines could be imposed if a credit rating agency *intentionally or negligently* committed one of the infringements in the annex to the 2011 Regulation. Infringements are committed intentionally if ESMA finds objective factors which demonstrate that the credit rating agency or its senior management acted deliberately to commit the infringement.[910] Refusal to submit to an inspection measure could also result in the imposition of a periodic penalty payment.[911] The Court of Justice shall have unlimited

[901] See [2011] O.J. L145/51-56.
[902] Article 23 CRA Regulation; the same obligation goes for the Commission and any public authorities of a Member State.
[903] Article 23e(1) CRA Regulation.
[904] Article 23c-d CRA Regulation.
[905] Article 30(1) CRA Regulation.
[906] Other persons having legitimate interests in the protection of their business secrets and the right of access to the file shall not extend to confidential information affecting third parties, see Article 25(2) CRA Regulation.
[907] Article 24(1) CRA Regulation.
[908] Article 24(2) CRA Regulation.
[909] Article 23e(3) CRA Regulation.
[910] Article 36a(1) CRA Regulation.
[911] Article 36b CRA Regulation.

jurisdiction to review decisions whereby ESMA has imposed a fine or a periodic penalty payment. It may annul, reduce or increase the fine or periodic penalty payment imposed.[912]

iv. Discretionary powers in the prohibition or restriction of financial activities

172. *Short selling and the extension of ESA powers* – In addition to the extensive sanctioning powers attributed to ESMA in the CRA Regulation, a March 2012 Regulation on short selling further granted it direct market supervision powers in the realm of short selling.[913] According to the Regulation, short sale means any sale of a share or debt instrument which the seller does not own at the time of entering into the agreement to sell including such a sale where at the time of entering into the agreement to sell the seller has borrowed or agreed to borrow the share or debt instrument for delivery at settlement.[914] Persons engaging upon or intending to engage upon short sale transactions should notify the relevant national competent authority if they retain a significant short position.[915] The Regulation allows national competent authorities to require persons holding net short positions to disclose them to the public in exceptional circumstances.[916] In cases where the price of a financial instrument has fallen significantly during a single trading day, these competent authorities may restrict or prohibit persons from engaging in short selling on the following trading day. This measure can only be extended for an additional two trading days.[917] ESMA will be notified of the intention to impose such decisions.[918] Competent authorities must be able to adopt these decisions directly, in cooperation with other authorities or by application to the competent judicial authorities.[919] Member States can also impose penalties or other administrative measures.[920] The Regulation does not as such require that these decisions are amenable to an appeal before competent national courts.

The Regulation equally grants subsidiary decision-making powers to ESMA. ESMA should ensure that a consistent and coordinated approach is taken by competent authorities. Following notification of an impending national authority's decision, it shall issue an opinion 'on whether it considers the measure or proposed measure is necessary to address the exceptional circumstances. The opinion shall state whether ESMA considers that adverse events or developments have arisen which constitute a serious threat to financial stability or to market confidence in one or more Member States, whether the measure or proposed measure is appropriate and proportionate to address the threat and whether the proposed duration of any such measure is justified. If ESMA considers that the taking of any measure by the other competent authorities is necessary to address the threat, it shall also state this in its opinion'.[921] Non-compliance with the opinion will have to be publicly explained[922] and might trigger ESMA's binding decision-making powers. According to Article 28, ESMA can indeed (a) require natural or legal persons who have net short positions in relation to a specific

[912] Article 36e CRA Regulation.
[913] Regulation 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, [2012] O.J. L86/1. On short selling, see T. Búry, 'Financial Crisis – Is Short Selling to Blame?', 12 *Common Law Review* (2012), 33-36.
[914] Article 2(1)(b) Regulation 236/2012.
[915] Article 5 Regulation 236/2012.
[916] Article 18 Regulation 236/2012.
[917] Article 23(1) and (2) Regulation 236/2012.
[918] Article 26 Regulation 236/2012.
[919] Article 33 Regulation 236/2012.
[920] Article 41 Regulation 236/2012.
[921] Article 27(2) Regulation 236/2012.
[922] Via publication on the competent authority's website, see Article 27(3) Regulation 236/2012.

financial instrument or class of financial instruments to notify a competent authority or to disclose to the public details of any such position; or (b) prohibit or impose conditions on, the entry by natural or legal persons into a short sale or a transaction which creates, or relates to, a financial instrument other than [credit default swaps] where the effect or one of the effects of the transaction is to confer a financial advantage on such person in the event of a decrease in the price or value of another financial instrument.[923] ESMA shall only take action in instances where the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union are threatened, where there are cross-border implications and where no other authority has taken measures to address the threat.[924] In addition, the envisaged ESMA Decision may not create a risk of regulatory arbitrage and should not have a detrimental effect on the efficiency of the financial market.[925] It needs to be reviewed at least every three months.[926] ESMA is not able to impose fines or periodic penalty payments in this respect.

173. *Extending the operational support mandate too far?* – The Short Selling Regulation grants ESMA significant discretion in deciding whether or not to intervene in the markets. ESMA is given a wide range of options as to the measures it can impose, and as to the tests it can rely on. It remains questionable whether such broadly structured operations could be justified on the basis of Article 114 TFEU, as Regulation 236/2012 maintains. An application for the annulment of Article 28 of that Regulation for inter alia infringement of Article 114 TFEU is currently pending.[927]

4. Due process and the fine-tuning of the supranational operational support reading

174. *Introduction to this section* – The institutional upgrade triggered in the wake of crisis also enhanced the protection of fundamental procedural rights in the ESAs' decision-making process. On the one hand, the ESA Regulations explicitly recognize Member States' participation and consultation rights. Similar entitlements are extended to market participants and to individuals to whom a decision may be addressed. The establishment of expert committees seeks to contribute to the development of informed decisions in that regard (a.). On the other hand, the ESA Regulations emphasize the importance of and the need for judicial review against ESA Decisions (b.). In doing so, the operational support mandate is cloaked into due process considerations. Combined with the looming presence of Article 6 ECHR and the need for fair administrative decision-making reflected in that provision (c.), the operational support mandate provides for significant opportunities to facilitate national institutional fine-tuning and to ensure the effective participation of national authorities in the supranationally structured European System of Financial Supervision (d.).

a. Due process in ESA operations and the inclusion of national supervisory authorities

175. *ESAs as institutionally upgraded networks of national authorities* – The ESA Regulations clarify the procedural framework within which supranational operational support decisions are to be made. The Board of Supervisors and additionally established internal committees have to abide by a voting and procedurally participative framework in adopting

[923] Article 28(1) Regulation 236/2012.
[924] Article 28(2) Regulation 236/2012.
[925] Article 28(3) Regulation 236/2012.
[926] Article 28(10) Regulation 236/2012.
[927] See Case C-270/12 – Action brought on 1 June 2012 – United Kingdom v Council and European Parliament, [2012] O.J. C273/3.

decisions. The ESA Regulations also entitle addressees of decisions and Member States' to particular intervention options in the decision-making process.

The Board of Supervisors is the main decision-making body within the ESA. It adopts non-binding opinions and recommendations and binding decisions. It is composed of voting and non-voting members. The Chairperson, one representative of the European Commission and of the European Systemic Risk Board and one representative of each of the other two European supervisory Authorities are non-voting. The voting members are the heads of the competent national authorities in banking, insurance, occupational pensions and financial markets supervision.[928] In addition to the heads of the authorities, whom are required by the regulation to meet in person at least twice a year, high-level alternates will be appointed to replace them.[929] The Board is also responsible for the adoption of the budget and a multi-annual work programme.[930] It also appoints the Chairperson of the Authority. Although the Authority is a European body, national representatives will actually take the decisions outlined in the regulations.[931] The Regulations nevertheless state that the voting members of the Board of Supervisors shall act independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from Union institutions or bodies, from any government of a Member State or from any other public or private body.[932]

Decisions of the Board of Supervisors shall be taken by a simple majority of its members. Each member shall have one vote. These decisions include binding individual decisions adopted in accordance with Articles 17-19 ESA Regulations. Some decisions are nevertheless adopted on the basis of a qualified majority of its members.[933] These decisions include the quasi-regulatory decisions to adopt draft regulatory and implementing technical standards in accordance with Articles 10-15 ESA Regulations, the adoption of guidelines and recommendations in accordance with Article 16 ESA Regulations, decisions temporarily prohibiting or restricting financial activities in the interests of consumer protection as outlined in Article 9(5) and specific EU legislation[934] and decisions related to the budget. In addition, decisions related to the settlement of disputes between national authorities are adopted by a simple majority, unless the decision is blocked by a blocking minority of national

[928] Article 40(1) ESA Regulations. In addition, in Member States where more than one authority is responsible for the supervision according to the regulations, those authorities shall have to agree on a common representative. Nevertheless, when an item to be discussed by the Board of Supervisors does not fall within the competence of the national authority being represented by the common representative, that member may bring a representative from the relevant national authority, who shall be non-voting, see Articles 40(3)-(4) ESA Regulations.

[929] See also Article 40(4) ESA Regulations: In Member States where more than one authority is responsible for the supervision according to this Regulation, those authorities shall agree on a common representative. Nevertheless, when an item to be discussed by the Board of Supervisors does not fall within the competence of the national authority being represented [as a member on the Board], that member may bring a representative from the relevant national authority, who shall be non-voting.

[930] Article 43 ESA Regulations.

[931] See also N. Moloney, 'Rules in Action', note 713, 217.

[932] Article 42 ESA Regulations. A second subparagraph rephrases this obligation as a prohibition imposed on the Union bodies and Member States: Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence the members of the Board of Supervisors in the performance of their tasks.

[933] Article 44(1) ESA Regulations. A qualified majority is defined in Article 16(4) of the Treaty on European Union and in Article 3 of the Protocol (No 36) on transitional provisions, which incorporates particular changes to the relative weight of Member States' votes in a Qualified Majority Voting procedure.

[934] Article 28 Regulation 236/2012 on short selling constitutes an example of this approach.

representatives.[935] A blocking minority should in that case at least constitute four voting Board Members.[936]

Article 41 ESA Regulations additionally allows the Board of Supervisors to establish internal committees or panels and provide for the delegation of clearly specified tasks to such internal committees or panels. Within ESMA, the most notable example in that regard is the ESMA-Pol Standing Committee.[937] The ESMA-Pol Standing Committee functions to the likes of the European Competition Network and serves as a forum for the exchange of information with a view to the enforcement of the Market Abuse Directive and the prohibition on insider trading included therein. National authorities convene within ESMA-Pol to exchange information that enables coordinated prosecution and enforcement of these prohibitions.[938]

In addition, Article 54 ESA Regulations foresees the establishment of a Joint Committee of ESAs.[939] The Joint Committee shall serve as a forum in which the ESAs shall cooperate regularly and closely with a view to ensure cross-sector consistency, in particular regarding financial conglomerates, accounting and auditing, micro-prudential analyses of cross-sector developments, risks and vulnerabilities for financial stability, retail investment products, measures combating money laundering; and, information exchange with the ESRB and developing the relationship between the ESRB and the ESAs.[940] The Joint Committee shall be composed of ESA Chairpersons, the Executive Directors, a representative of the Commission and of the ESRB.[941] The Joint Committee can adopt joint positions.[942]

The ESA Regulations also formalize the roles of colleges of supervisors and attribute a particular quasi-regulatory role to the ESAs in that respect. Colleges of supervisors comprise a group of national and supranational financial market authorities that act in concert to ensure a coherent application of EU financial market law Colleges ought to ensure more efficient, effective and consistent supervision of financial market participants operating across borders.[943] The ESAs fulfil a complementary oversight and participation role in the operations of these colleges. That is most apparent from Article 21 ESA Regulations, which state that the ESAs are to foster the coherence of the application of Union law among the colleges of supervisors. Officials from [the ESAs] shall be able to participate in the activities of the colleges of supervisors, including in on-site examinations, carried out jointly by two or more competent authorities. The ESAs can also initiate and coordinate Union-wide stress tests to assess the resilience of financial market participants, in particular the systemic risk posed by key financial market participants.[944] In that understanding, the ESAs function as a *primus super pares*, supporting and monitoring the day to day operations of a college of supervisors.

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[935] Article 44(1), third subparagraph ESA Regulations.
[936] See Article 16(4) TEU, which will only apply from 1 November 2014 onwards.
[937] See www.esma.europa.eu for an overview of standing committees supporting its operations. Similar examples can also be found on the EBA and EIOPA websites, http://www.eba.europa.eu/ and https://eiopa.europa.eu/.
[938] According to its own website, ESMA-Pol works in order to enhance the efficiency and effectiveness of the market surveillance activities of national authorities, including the use of various market surveillance tools (including analysis of transaction reports). The Standing Committee also provides a forum in which national authorities may share their experiences concerning their market surveillance and enforcement activities.
[939] E. Wymeersch, 'The European Financial Supervisory Authorities or ESAs' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 288-292.
[940] Article 54(2) ESA Regulations.
[941] Article 55 ESA Regulations.
[942] Article 56 ESA Regulations. It can also establish specific sub-committees, see Article 57 ESA Regulations.
[943] Recitals 36 ESMA and EBA Regulations; Recital 35 EIOPA Regulation.
[944] Article 21(2)(b) ESA Regulations.

176. *Due process in the Board of Supervisors' decision-making framework* – The ESA Regulations directly include individual market operators – financial institutions, investors and their representative organizations – in the decision-making process of the Board of Supervisors and of Internal Committees functioning within the ESAs. Whilst the level three Committees issued informal guidelines to promote participation in decision-making[945], the ESA Regulations clearly define participation and deliberation rights. Prior to the adoption of draft technical standards and of guidelines or recommendations, the ESAs will engage in open and public consultations.[946] Specific stakeholder groups have additionally been created to provide consultations on actions taken with regard to drafting regulatory and implementing technical standards and general guidelines.[947] The opinions of the stakeholders groups shall be made public.[948]

In addition to stakeholders' input in decision-making, the ESA regulations equally provide for information duties and the obligation to state the reasons on which a decision is based.[949] According to Article 39, the authority shall inform any named addressee of its intention to adopt a decision or recommendation, setting a time limit within which the addressee may express its views on the matter, taking full account of the urgency, complexity and political consequences. The addressees shall equally be informed of legal remedies available to them. Binding individual decisions shall also be made public and state the identity of competent authority or market participant, unless this conflicts with their legitimate interests.[950]

177. *Member States' additional entitlements as institutionalized participants* – Member States directly form part of the ESAs' institutional functioning framework. In addition to being represented by their national supervisory authorities in Board of Supervisors' meetings[951], Member States themselves have two direct venues to intervene in the ESAs' decision making process. These intervention options additionally entitle Member States to be safeguarded from extensive ESA decision-making powers and the obligations these decisions impose on them.

Firstly, the ESA regulations allow Member States to implement particular safeguards against ESA decisions.[952] In cases where ESA decisions would impinge on the fiscal responsibilities of a Member State, the latter should notify both the ESA concerned and the Commission. The authority should consequentially decide to maintain or revoke its decision. To the extent that it maintains its decision, the Council will be called upon to consider whether this decision should indeed be maintained. In the context of emergency situations, ESA decisions shall be suspended prior to a final Council decision.[953] This mechanism allows Member States to assess the national fiscal implications of particular decisions. Any abuse of that procedure is

[945] See in that regard, Article 3 of (now repealed) Commission Decision 2009/77/EC of 23 January 2009 establishing the Committee of European Securities Regulators, [2009] O.J. L 25/18.
[946] Article 10(1) and 16(1) ESA Regulations.
[947] Article 37 ESA Regulations: these groups comprise the Securities and Markets Stakeholder Group, the Banking Stakeholder Group, the Insurance and Reinsurance Stakeholder Group and the Occupational Pensions Stakeholder Group.
[948] Article 37(8) ESA Regulations.
[949] Article 39(1) ESA Regulations.
[950] Article 39(5) ESA Regulations.
[951] Member States are also – obviously – represented through their participation in the decision-making processes of the Council. In that capacity, Member States retain important responsibilities in outlining, determining and shaping the legislative texts, see Article 16(2) TEU.
[952] Moloney, part I Rule-making, note 716, 79 identifies this feature as a fiscal 'get-out' clause.
[953] Articles 38(3) ESA Regulations.

considered to be incompatible with the internal market. A Member State could therefore be brought before the Court of Justice if and when it abuses that provision.[954]

Secondly, the ESA regulations propose a particular delegations regime.[955] That regime allows national authorities to delegate some of their responsibilities to the ESA or other competent authorities.[956] The ESA shall stimulate and facilitate the delegation of tasks and responsibilities[957] by identifying those tasks that can be delegated or jointly exercised. Member States may set out specific arrangements regarding delegation that have to be complied with before their competent authorities may enter into such delegation agreements. In addition, the law of the delegate authority shall govern procedure, enforcement and administrative and judicial review relating to delegated responsibilities[958], thus allowing Member States to experiment with more intense cooperative supervision initiatives within the ESAs. Article 28 ESA Regulations does not project a general delegation of powers 'downwards', whereby the ESAs would be able to entrust national supervisory authorities with competences attributed to it in the ESA Regulations. The already supplementary role played by the ESAs in the supervision of financial markets justifies the lack of such general delegations. The CRA Regulation framework on the other hand explicitly allows for such delegation, as ESMA acts as an exclusive supervisor in that regard.[959]

b. Remedies against ESA decisions

178. *Enhanced judicial and remedial protection*– The upgraded EU financial supervision system witnessed the introduction of intensified judicial review at the EU level and the recognition that ESAs can be subject to an action seeking damages incurred by the agency's infringement of EU law. Judicial review renders decisions adopted by the ESAs both justiciable and accountable. This section explores the EU legal framework and identifies inconsistencies and gaps remaining within that framework. The application of the EU action for damages to supervisory actions taken by the ESAs is not free from problems either.

179. *Appellate review of ESA Decisions* – The ESA Regulations established an intermediate administrative Board of Appeal strcuture. The Board of Appeal is a joint body of EBA, EIOPA and ESMA.[960] The ESA Regulations emphasize the Board of Appeal's role as a *de facto* first instance court rather than an additional administrative body. Members of the Board

[954] Articles 38(5) ESA Regulations.
[955] Articles 28 ESA Regulations.
[956] Member States may set out specific arrangements regarding the delegation of responsibilities that have to be complied with before their competent authorities enter into such delegation agreements, and may limit the scope of delegation to what is necessary for the effective supervision of cross-border financial market participants or groups.
[957] Delegation of tasks does not trigger the liability of the delegatee, for the latter only executes a task defined and delineated by the delegator. Responsibilities delegated do however result in the delegatee being granted more appreciation in executing its task and in being held liable for it, see E. Wymeersch, 'The European Financial Supervisory Authorities or ESAs' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 281.
[958] Articles 28(3) ESA Regulations.
[959] See Article 30 CRA Regulation. See also P. Schammo, note 1, 787. Article 30(4) states that a delegation of tasks shall not affect the responsibility of ESMA and shall not limit ESMA's ability to conduct and oversee the delegated activity. Supervisory responsibilities under this Regulation, including registration decisions, final assessments and follow-up decisions concerning infringements, shall not be delegated.
[960] Article 58(1)-(3) ESA Regulations. For the public call for interest, see [2011] O.J. C 17/2. The Commission approved a list of candidates on its meeting of 20 April 2011 and presented that list to the Management authorities of the ESAs, see for the minutes PV(2011)1957 final, ec.europa.eu/transparency/regdoc/rep/.../10061-2011-1957-EN-F-0.Pdf, 12. The members of the Board of Appeal have been appointed in November 2011, see https://eiopa.europa.eu/fileadmin/tx_dam/files/pressreleases/Board-of-Appeal-Appointment-Joint-ESA.pdf. For the current Board's composition, see http://www.esma.europa.eu/page/board-appeal.

of Appeal need to have acquired sufficient legal expertise to provide expert legal advice on the legality of the Authority's exercise of powers, in addition to having a proven record of relevant knowledge and professional supervisory experience to a sufficiently high level in financial services. They are appointed for a once renewable five year term and during their term of office, they cannot be removed unless found guilty of serious misconduct. Even in that case, a decision of the Management Board is required, following consultation of the Board of Supervisors.[961] In their decision-making practice, Board Members need to be independent and impartial.[962] Incumbent Board of Appeal members cannot be staff members of the national supervisory authorities or other national or Union institutions involved in the activities of the Authority.

180. *Board of Appeal Review* – The ESA regulations state that 'any natural or legal person (including competent national authorities) may appeal against a decision[963] of the Authority related to a breach of Union law procedure (Article 17), an emergency procedure (Article 18) or a supervisors' disagreement settlement (Article 19), or to any other decision taken by the Authority in accordance with its powers granted in specific substantive EU financial services legislation[964] which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person. In order to be admissible, the appeal has to be lodged in writing, within two months of notification or (electronic) publication[965] and should state the grounds of appeal.[966]

The Board of Appeal shall act in accordance with its own rules of procedure, which have to be made public.[967] These rules of procedure determine that a party wishing to appeal an ESA decision should file a notice of appeal in writing.[968] The respondent ESA will deliver a response to that notice[969] If appropriate, the Board of Appeal President will conduct a pre-hearing conference.[970] Copies of documents relied on shall be exchanged.[971] The Rules of

[961] Article 58(2) and (4) ESA Regulations.
[962] Article 59(1) ESA Regulations.
[963] The notion of decision is problematic in EU law. Whereas Article 288 TFEU refers to the individuality of decisions, the notion incorporates different meanings in procedural law, where it mainly serves as a synonym for reviewable act, a notion applied in Article 263 TFEU. On that discussion and the transformation from decision to act, see H.C. Röhl, 'The voidable decision of Article 230 (4) of the Treaty establishing the European Community as a form of legal protection' in O. Jansen and and B. Schöndorf-Haubold (eds.), *The EU Composite Administration* (Antwerp, Intersentia, 2011), 412.
[964] Wymeersch summarizes this as decisions referred to in Articles 9, 17, 18 and 19, see E. Wymeersch, 'The European Financial Supervisory Authorities or ESAs' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 293.
[965] On publication, see Articles 8 1)k ESA regulations, conferring on the ESAs a duty to publish on its website, and to update regularly, information relating to its field of activities, in particular, within the area of its competence, on registered financial institutions, in order to ensure information is easily accessible by the public.
[966] Article 60 ESA Regulations.
[967] Article 60(6) ESA Regulations. Rules on the use of languages have not been included among these rules of procedure. The use of languages adopted before the Board might determine the language used before a potential Court case on appeal. In principle, the case language is chosen by the applicant before the Court (Article 29 Rules of Procedure of the European Court of Justice; Article 35 Rules of Procedure of the General Court). In cases relating to intellectual property rights however, mainly appeals against Board of Appeal decisions rendered by the Office for the Harmonisation of the Internal Market or Community Plant Variety Office, the case language will generally be the language adopted in the Board proceedings (Article 131 Rules of Procedure of the General Court). A similar adaptation could also be developed in light of ESA languages.
[968] Article 5 and 7 Board of Appeal Rules of Procedure.
[969] Article 6 Board of Appeal Rules of Procedure.
[970] Article 11(5) Board of Appeal Rules of Procedure.
[971] Article 16 Board of Appeal Rules of Procedure.

Procedure also contain provisions organizing the hearing and the presentation of evidence.[972] The publication of these rules has been accompanied by a notice containing guidelines for parties who want to appeal proceedings to the Board of Appeal.[973]

To the extent that an appeal is admissible, the Board will verify whether it is well-founded, inviting the parties to the proceedings to file observations on its own notifications or on communications from other parties and to make oral representations. Time limits for interventions and oral representations will be determined by the rules of procedure. Lodging an appeal does not as such suspend the application of an authority's decision; if the circumstances so require, the authority can nevertheless suspend the decision's application.[974] The regulations provide similar Board of Appeal review in cases related to (refusal of) access to documents.[975]

The Board of Appeal shall adopt a reasoned decision that is to be made public. Its decisions shall be taken by a majority of at least four of its six composing members. At least one member appointed by the ESA to which the appeal procedure relates, should be part of that majority. The Board may confirm the decision taken by the competent body of the Authority or remit the case to that body. That body – the Board of Supervisors in most instances – shall be bound by the decision of the Board of Appeal and shall adopt an amended decision regarding the case concerned. In that particular case, the ESA body is bound to adopt a particular decision. The Board cannot (re-)adopt a particular decision itself.[976]

181. *Board of Appeal Appeals* – Decisions by the Board of Appeal, or in case no access to that Board is available, decisions taken by the Authorities or their bodies can be brought before the Court of Justice of the European Union. These proceedings occur in accordance with the action for annulment proceedings as presented in Article 263 TFEU.[977] Member States and Union Institutions can bring actions against ESA decisions, as well as natural or legal persons to whom the decision was addressed or who are directly and individually concerned by that decision.[978] The Court's Statute determines that the actions will have to be brought by individuals before the General Court. The same goes for Member States actions against ESAs' decisions.[979] The European Court of Justice would then only be able to review these decisions on points of law.[980] 'In the event that an Authority has an obligation to act and

[972] Article 17-19 Board of Appeal Rules of Procedure.
[973] See http://www.eba.europa.eu/cebs/media/aboutus/boardofappeal/BOA-2012-004---Guidelines-to-the-Parties---draft----20120907.pdf for these guidelines.
[974] Article 60(3)-(4) ESA Regulations.
[975] Article 72 states that Regulation 1049/2001 applies to the ESAs. The management boards of all authorities adopted particular access to documents decisions, see http://www.esma.europa.eu/popup2.php?id=7597; http://www.eba.europa.eu/cebs/media/aboutus/Legal%20Texts/EBA-DC-036-(Decision-on-Access-to-Documents)-FINAL.pdf and https://eiopa.europa.eu/fileadmin/tx_dam/files/aboutceiops/Public-Access-(EIOPA-MB-11-051).pdf.
[976] As had originally been conceived, see J. V. Louis, note 698, 165. See Article 60(5)-(7) ESA Regulations.
[977] The procedural provisions of Article 263 incorporate the particular grounds of review (see 4.3.2.) and the obligation to institute proceedings within a period of two months following notification or knowledge of a decision producing legal effects.
[978] Article 61(1)-(2) ESA Regulations.
[979] Combined reading of Article 256 (1) TFEU and Article 51 Statute of the European Court of Justice.
[980] Article 58 Statute of the European Court of Justice: Appeals shall lie on the grounds of lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Union law by the General Court.

fails to take a decision, proceedings for failure to act may be brought before the Court of Justice as well, in that case in accordance with Article 265 TFEU.[981]

The Court of Justice's judgment thus concludes the dispute between the Authority and the other party to the appellate procedure. Depending on the outcome of the case and the decision taken by the Board of Appeal, the ESA decision will be annulled or reinstated. Even though the Court of Justice will, in most instances, formally decide on the decision rendered by the Board of Appeal, the annulment of that decision might indeed have particular consequences for the validity or applicability of the ESA decision itself. A judgment might therefore indirectly result in an annulment or reinstatement of the ESA decision depending on the content of the Board of Appeal decision.

Article 266 TFEU requires the Union Institutions to comply with a Court's judgment. Combined with Article 263, this also goes for bodies, offices and agencies. The ESA regulations explicitly confirm this in Article 61 (4). Depending on the decision adopted by the ESA, this might result in an obligation for the ESA body to adopt a new decision.

Review based upon Article 263 TFEU is by its nature limited to a legality inquiry. The Courts are therefore not free to modify, re-adopt or alter the nature and scope of actions taken by the institutions.[982] So-called 'unlimited jurisdiction' does indeed remain an exception. According to Article 261 TFEU, only regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations. As a result, only an explicit conferral of unlimited jurisdiction in a general or sector-specific regulation would enable the Court to become a proper regulatory body. Regulation 513/2011 established this kind of review in relation to fines and periodic penalties imposed on credit rating agencies by ESMA.[983]

182. *Inconsistencies and gaps* – The supranational judicial review framework does not however present a coherent whole. Some features of the ESA remedies' system present inconsistencies in the overall scope of protection offered by the Board of Appeal and the Court of Justice. In addition to textual ambiguities and ensuing inconsistencies, the system of judicial protection inaugurated by the ESA Regulations presents gaps as well.[984] These inconsistencies and gaps demonstrate that the framework of judicial review established at the supranational level will need to rely on the Court of Justice to clarify and govern the operations of the review system established.

Firstly, the scope of individuals' access to the Board of Appeal appears to be inconsistent with the general standing requirements restricting direct access of individuals to the European Courts. In the English language version, it appears that everyone can initiate Board of Appeal review against Articles 17-19 Decisions, whilst other Decisions require direct and individual

[981] Article 61(3) ESA Regulations. The same procedural conditions apply to Article 263 and 265 actions. In the remainder of this paper, I only refer to Article 263 or annulment procedures.
[982] See among many others, Case 34/86, *Council v European Parliament* [1986] ECR 2155, para 42, in which the Court stated that it may not intervene in the process of negotiation between the Council and the Parliament resulting in a general budget. In partially annulling a measure related to that budget, the Court would directly intervene and re-adopt its own view on the general budget as binding law.
[983] Article 36e CRA Regulation.
[984] See for a full account of these inconstiencies and gaps, P. Van Cleynenbreugel, 'Judicial Protection against EU Financial Supervisory Authorities in the Wake of Regulatory Reform', 2 *Elsa Malta Law Review* (2012), 231-263.

concern.[985] Secondly, the system allows both Member States' governments and their independent national supervisory authorities to initiate judicial proceedings without considering interactions or frictions between a Member State and 'its' supervisory authority.[986] Thirdly, the scope of review entertained by the Board of Appeal does not seem to conform to the Court's scope of review projected in Article 263 TFEU.[987] Fourthly, the scope of unlimited jurisdiction attributed to the Court of Justice against ESMA fines imposed on Credit Rating Agencies further questions the ways what role the Board of Appeal should play in reviewing CRA decisions imposing monetary sanctions.[988]

In addition to inconsistencies, the ESA review system also reinstates three important gaps in the review of ESA Decisions. Firstly, guidelines and recommendations are excluded from the scope of Board and Court judicial protection, even if they affect the positions of market participants.[989] Secondly, the ESAs' roles in preparing and developing regulatory and implementing technical standards remain undervalued from a judicial protection perspective. Legitimate expectations created by market participants' involvement in an ESA consultation and their ensuing interest in initiating judicial review proceedings might be difficult to enforce before judges assessing the legality of technical standards formally adopted by the European Commission. The ESAs' preparatory role will not formally be acknowledged if the authorities are unable to participate in the review proceedings.[990] The Court has in other sectors been

[985] See Article 60(1) ESA Regulations: a]ny natural or legal person, including competent authorities, may appeal against a decision of the Authority referred to in Articles 17, 18 and 19 and any other decision taken by the Authority in accordance with the Union acts as referred to in Article 1(2) which is addressed to that person, or against a decision which, although not in the form of a decision addressed to another person, is of direct and individual concern to that person. In other language versions however, a comma has been inserted, indicating that direct and individual concern requirements apply to both types of decisions.

[986] Compare Article 60(1), referring to competent authorities as a particular category of natural or legal persons with Article 61(2) referring to Member States as distinguished from that category.

[987] Article 60 does not mention whether the Board merely conducts a legality review or whether it enjoys unlimited jurisdiction. In the latter case, the Board of Appeal would be able to re-investigate claims and re-adopt decisions even beyond the confines of what parties to the appellate procedure required. In that image, the Board of Appeal would function in accordance with a principle of administrative continuity rather than as a review court, see Case T-163/98, *Procter & Gamble* v *OHIM (BABY-DRY)* [1999] ECR II-2383, para 38; see also Case T-334/01, *MFE Marienfelde GmbH v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, [2004] ECR II-2787, para 61. A similar scope of review is presently entertained by the European Chemicals Agency's Board of Appeal in procedures relating to the so-called REACH Regulation, see part IV, Chapter 1 of the dissertation.

[988] The CRA Regulation does not refer to the Board of Appeal in its references to review, so it is unclear whether that Regulation's reference to unlimited jurisdiction relates to decisions adopted by the Board of Supervisors and approved or confirmed by the Board of Appeal or whether the Board of Appeal itself has to engage upon unlimited jurisdiction in that regard. Although Article 60 ESA Regulations only refers to 'may appeal', Article 61 makes clear that the Board of Appeal stage is in fact obligatory, so it could be argued that CRA appeals have to be lodged before the Board of Appeal as well.

[989] Article 16 ESA Regulations; see on the effects of formally non-binding legal norms in EU law, F. Snyder, 'Soft law and Institutional Practice in the EC' in S. Martin (ed.), *The construction of Europe. Essays in honour of Emile Noël* (The Hague, Kluwer, 1994), 197-226; L. Senden, *Soft Law in European Community Law* (Oxford, Hart, 2004), 533 pp. On the need for more stringent control in relation to guidelines and recommendations, see L. Senden, 'Soft Post-Legislative Rulemaking: A Time for More Stringent Control', 19 *European Law Journal* (2013), 67-68.

[990] Some possibilities exist in that regard, see Case T-326/99, *Olivieri*, [2003] ECR II-6053, para 55: 'However, in the present case the contested decision purely and simply confirms the revised opinion, to which it refers in its fourth recital. The content of that opinion, and also that of the assessment reports upon which it is based, are therefore an integral part of the statement of reasons for the contested decision, with regard in particular to the scientific assessment of deferiprone carried out by the CPMP and its rapporteurs. The content of the revised opinion must therefore be examined in the context of the application for annulment of the contested decision'. See however also the order of 5 December 2007 in Case T-133/03 *Schering-Plough* v *Commission and EMEA* (not published in ECR), para 22-23: 'in so far as Regulation No 2309/93 provides for only advisory powers for

willing to review the legality of preparatory opinions to the extent that the Commission had little choice but to rely on it.[991] The Court could adopt a similar perspective in reviewing the draft standards developed by the ESAs upon review of Commission Regulations or decisions incorporating them. These draft standards also rely on the work of experts and the Commission will be granted little discretion in adopting regulatory technical standards.[992] Thirdly, uncertainty about the scope of market participants' 'rights' to engage in stakeholder consultations[993] and standards' preparations highlights additional potential gaps in the remedies framework.[994]

183. *Additional remedies* – The abovementioned remedial framework has been complemented by an additional remedy for damages. To the extent that an ESA or Board of Appeal decision was found to have violated EU law, aggrieved parties can file an action for damages based on Article 340 TFEU. That action has been replicated in Article 69 of the ESA regulations and relies on the Article 340 TFEU case law conditions to determine liability. The fulfilment of judicially established conditions of a (sufficiently serious) breach of a superior EU law rule intended to confer rights on individuals, presence of damage and a causal connection is crucial to establish a successful claim in that regard.[995]

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the EMEA, the refusal referred to in Article 5(4) of Regulation No 542/95 must be deemed to emanate from the Commission itself. Since the contested measure is imputable to the Commission, it may be the subject of an action directed against that institution. It follows that the action must be dismissed as inadmissible in so far as it is directed against the EMEA'. See also Case T-411/06, *Sogelma*, [2008] ECR II-2771, para 55-56.

[991] See also P. Craig, 'Legal Control of Regulatory Bodies: Principle, Policy and Teleology' in P. Birkinshaw and M. Varney (eds.), note 701, 106, referring to the application of that reasoning in Joined Cases T-74/00, T-76/00, T-83-85/00, T-132/00, T-137/00 and T-141/00, *Artegodan* v Commission, [2002] ECR II-4945, para 198-200.

[992] As apparent from Article 10(1) ESA regulations, final sentence: 'The Commission may not change the content of a draft regulatory technical standard prepared by the Authority without prior coordination with the Authority, as set out in this Article'.

[993] EIOPA's decision to provide for its website information and consultations to appear only in English is presently being contested before the General Court in Case T-23/12, *Mutuelle des Architects Français assurances v. European Insurance and Occupational Pensions Authority*, Action brought on 17 January 2012, [2012] O.J. C98/22. The applicant alleges a manifest error of assessment and an error of law in so far as the defendant justifies the refusal to publish the public consultations at issue in the applicant's language, in particular on grounds of cost, whereas it is stated in Article 73(3) of Regulation No 1094/2010 that the translation services required for the functioning of the Authority are to be provided by the Translation Centre for the Bodies of the European Union. The applicant submits that that obligation applies equally to the public consultations launched by the defendant and not only to the defendant's annual report, work programme and guidelines and recommendations.

[994] See in that respect case T-122/09, *Zhejiang Xinshiji Foods and Hubei Xinshiji Foods v Council* , [2011] ECR II-22 (summary publication), para 104: 'failure to comply with a rule relating to consultation of a committee can render the final decision of the institution concerned unlawful only if it is sufficiently substantial and has a detrimental effect on the legal and factual situation of the party alleging a procedural irregularity. The consultation of a committee is an essential procedural requirement, breach of which affects the legality of the act adopted following consultation if it is proved that failure to forward certain material information did not allow the committee to deliver its opinion in full knowledge of the facts, that is to say, without being misled in a material respect by inaccuracies or omissions'. This case law could by analogy be applied to the stakeholders group, it also being a consultative committee prior to the adoption of guidelines or draft standards. The Court did not recognize these rights in the absence of legislative proclamation: Case T-13/99, *Pfizer Animal Health SA v.* Council, [2002] ECR II-3305, para 487; Case T-70/99, *AlpharmaInc v. Council,* [2002] ECR II-3495, para 388; Case C-258/02 P, *Bactria Industriehygiene-Service VerwaltungsGMbH v* Commission, [2003] ECR I-15105, para 43; *A contrario*, this would seem to imply that the introduction of consultation obligations in a legal instrument could be sufficient to recognize their participation right status, see also P. Craig, *EU administrative law* (Oxford, Oxford University Press, 2006), 321.

[995] See for a recent example, Case C-120/06, *FIAMM*, [2008] ECR I-6513, para172.

The application of non-contractual liability conditions, especially the sufficiently serious breach requirement, to the ESAs' acts remains unclear. It should first be remembered that the Court of Justice has been reluctant in finding provisions granting rights to individuals within the realm of financial supervision by Member States Authorities.[996] In the *Paul* judgment, the Court implicitly argued that financial regulatory directives should directly confer rights on depositors to have particular supervisory measures taken by a banking supervisor in order to qualify as such.[997] If that narrow approach to rights[998] were transposed to the ESA context, individual ESA decisions not conforming to superior rules of EU law would only allow for a successful damages action to the extent that the superior rule of law explicitly granted a right to the claimant to have a particular action taken by the ESA in that particular case.

In addition to a rule intended to confer rights on individuals, a sufficiently serious breach of a superior rule of EU law presupposes a lack of discretion by the authority adopting the supposedly damaging decision.[999] Annulment of a previously adopted ESA decision could in that respect provide a sufficiently serious breach, to the extent that the ESA was required to adopt that decision and the individual who was entitled to a decision has filed the indemnities claim. Cases will become more complicated once a formerly adopted decision is annulled by the Board of Appeal but subsequently reinstated by the Court of Justice. Damages suffered by these contradicting institutional actions could fall within the scope of sufficiently serious breach of EU law, but in those instances, the Court of Justice will have to draw boundaries based on the specificities of the liability case it is called upon to assess. The question to what extent financial regulatory provisions introduce rights to obtain particular actions from the ESAs will have to be clarified in that respect.

c. Institutionalizing operational support at the national level?

184. *No EU law standards for judicial review against national authorities* – The abovementioned framework only concerns the reviewability of supranational ESA decisions by European judges. Inconsistencies and gaps in that framework need to be addressed at the supranational level. At the same time, EU law is also essentially applied by national judges who act as direct enforcement agents of EU law. These national judges also have to apply and enforce directly applicable ESA decisions.[1000] In addition, national judges serve as review bodies of national supervisory decisions applying EU law in the national legal order. In the light of this quintessential EU law enforcement role played by national judges, it should be no surprise that EU law could directly or indirectly influences the outlook of judicial review mechanisms. The previous subsections outlined that such guidance has nevertheless remained rather limited in the institutional set-up of the ESA Regulations.

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[996] Case C-222/02, *Peter Paul, Cornelia Sonnen-Lütte and Christel Mörkens v Bundesrepublik Deutschland*, [2004] ECR I-9425. See also M. Tison, 'Do not attack the watchdog! Banking Supervisors Liability after Peter Paul', 42 *Common Market Law Review* (2005), 639-675, especially at 668.

[997] Case C-222/02, *Peter Paul*, paras. 40-41. See also M. Poto, *Financial Supervision in a Comparative Perspective* (Antwerp, Intersentia, 2010), 70-76.

[998] M. Tison, note 996 above, 668.

[999] As apparent from Case C-352/98 P, *Bergaderm*, [2000] ECR I-5291, para 43, the sufficiently serious breach test amounts to whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion. On discretion, see C. Hilson, 'The role of discretion in EC law on non-contractual liability', 42 *Common Market Law Review* (2005), 682. For a recent overview, see K. Gutman, 'The evolution of the action for damages against the European Union and its place in the system of judicial protection', 48 *Common Market Law Review* (2011), 695-750.

[1000] Giegold Report, 16 makes this especially clear. National judges will have to apply and enforce regulatory and implementing technical standards. It could even be argued that national judges might be called upon to enforce guidelines and recommendation with which national supervisory authorities agreed to comply.

EU guidance remains completely absent in the institutional organization of judicial review of national supervisory decisions applying (transposed) EU financial regulation. Although the Alternative Investment Fund Management Directive referred to the obligation for Member States to provide for appeals to a court in relation to national authorities' decisions adopted under that Directive, a general framework regulating Member States' institutional autonomy is lacking in that regard.[1001] Not unlike the realm of competition law supervision, the ECHR provides an alternative regulative framework within which institutional convergence can take place. The ESAs' enhanced attention to procedural guarantees and judicial review highlights the importance it attributes to enabling the right to a fair trial in the administrative and review stages. The impending accession of the EU to that framework and the EU Charter's obligation to provide effective judicial review are guiding in that regard.[1002]

185. *Article 6 ECHR* – The lack of a full-fledged regulative EU law framework determining the scope of national judicial review is compensated for by Article 6 ECHR and Article 47 of the Charter of Fundamental Rights. As outlined in the chapter on competition law supervision, the ECHR and the Charter provide a regulative framework and in doing so, places intense pressure on national authorities to operate in a more adversarial modus.[1003] Article 6 ECHR requires that any dispute concerning civil rights or criminal sanctions will be brought before a jurisdiction that complies with all requirements mandated by that provision, most notably independence and impartiality as well as equality of arms during the entire procedure. In some cases however, decisions affecting civil rights or imposing (non hard-core) criminal sanctions can be adopted by administrative bodies that do not as such comply with all Article 6 standards. Such administrative decisions should nevertheless be amenable to judicial review by a national court with sufficient jurisdiction to consider all matters of fact and law brought forward.[1004]

That scheme also applies to national (financial) supervisory authorities, as the ECtHR's judgments in *Dubus* and *Sigma Radio* demonstrate. In *Dubus*, the French Government itself acknowledged that its then-*Commission Bancaire* was a jurisdiction in the meaning of Article 6 §1, even though it functioned as a national administrative authority in accordance with French law.[1005] As a result, it had to comply with all Article 6 ECHR requirements. Accepting the argument that the *Commission Bancaire* was a 'jurisdiction' within the meaning of Article 6 ECHR, the ECtHR held that it did not comply with the required institutional conditions of independence. The administrative commission did not sufficiently distinguish between the investigative, prosecutorial and adjudicative functions.[1006] As a result, the impartiality of the members of the Banking Commission ultimately deciding on the basis of a report issued by its

[1001] See Article 49 Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, [2011] O.J. L 174/1 (AIFM Directive). On that Directive, see E. Wymeersch, 'The European Investment Fund Management Directive' in E. Wymeersch (ed.), *Alternative Investment Fund Regulation* (The Hague, Kluwer Law International, 2012), 433-496.

[1002] J. P. Jacqué, 'The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms', 48 *Common Market Law Review* (2011), 995. The ECtHR established a rebuttable presumption of sufficient fundamental rights protection in *Bosphorus v Ireland*, judgment of 30 June 2005. That presumption does not however imply that the conditions imposed by the ECHR are not guiding in the operationalization of EU fundamental rights protection in the national legal orders.

[1003] See nrs. 69, 73-74 of this dissertation for references.

[1004] See nr. 73 for references.

[1005] *Dubus v France*, judgment of 11 June 2009, para 50-51. See also ECtHR, *Vernes v France*, judgment of 20 January 2011, para 25 and 32. That case considered the similarly structured *Commission des Opérations de la Bourse (COB).*

[1006] *Dubus,* para 57 and 60.

Legal Service was not guaranteed.[1007] More fundamentally, the ECtHR held that an adjudicative body should be structured through a separation or at least functional segregation between its prosecuting and its adjudicative departments in order to comply with Article 6.[1008] The case only considered the *judicial role* directly attributed to the *Commission Bancaire*. It did not directly concern the scope of judicial *review* against supervisory authorities' decisions.[1009] In doing so however, the ECtHR made clear that supervisory authorities can indeed be considered 'jurisdictions' for the purposes of ECHR scrutiny.

Sigma Radio considered the role of the Cyprus Radio and Television Authority (CRTA). An *administrative body*, it supervised the Cyprus broadcasting rules. CRTA's investigation was carried out by an investigating officer who was an employee of the authority. The CRTA acted as a prosecuting body, and its members determined the violation of relevant legislation.[1010] The ECtHR held that the combination of different functions of the CRTA and, in particular, the fact that all fines are deposited in its own fund for its own use, gives rise to legitimate concerns that the CRTA lacks the necessary structural impartiality to comply with the requirements of Article 6.[1011] The adjudicative nature of the CRTA was therefore undisputed.[1012] Once again, the Court referred to the lack of separation between or at least segregation of prosecutorial and adjudicative functions as essentially problematic. The Court nevertheless continued that 'even where an adjudicatory body, including an administrative one as in the present case, which determines disputes over "civil rights and obligations" does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are "subject to subsequent control by a judicial body that has "full" jurisdiction and does provide the guarantees of Article 6 § 1'.[1013] The *Sigma Radio* case therefore revolved around the scope of judicial review against the authority's decision, despite that authority being an adjudicative body in accordance with Article 6 ECHR. The Court did indeed proceed with developing its notion of sufficient jurisdiction.[1014]

Both cases illustrate the implicit institutional mandate incorporated in the ECtHR judgments. In particular, the ECtHR adheres to a particular variant of institutional segregation as a way to promote a more adversarial *review* culture in sectors regulated by inquisitorial procedures.[1015] In that image, it coins market supervision authorities capable of addressing binding decisions or imposing sanctions on market operators as adjudicative bodies that are subject to the

[1007] *Dubus,* para 61.
[1008] *Dubus,* para 60, according to which the ECtHR 'croit nécessaire d'encadrer plus précisément le pouvoir de se saisir d'office de manière à ce que soit effacée l'impression que la culpabilité de la requérante a été établie dès le stade de l'ouverture de la procédure'.See also *Vernes*, para 42 and 49.
[1009] *Dubus,* para 69-70.
[1010] *Sigma Radio*, para 40 for an overview of griefs in that regard.
[1011] *Sigma Radio*, para 147-148.
[1012] *Sigma Radio*, para 150.
[1013] *Sigma Radio*, para 151.
[1014] *Sigma Radio*, para 152, see also nr. 120 of this dissertation. See also ECtHR, *Steinniger v Austria*, judgment of 17 April 2012, para 49-50.
[1015] For that position, see *Vernes*, para 42, arguing that 'qui est en cause, c'est l'impossibilité même de vérifier, du fait des dispositions de droit interne alors en vigueur, l'impartialité de la commission. En effet, la loi ne permettait pas au requérant d'avoir connaissance de la composition de la commission qui lui a infligé la sanction précitée, et donc de s'assurer de l'absence d'un éventuel préjugement de sa part ou d'un lien de l'un de ses membres avec la partie en cause, susceptibles de vicier la procédure. Dans ces conditions, et au nom des apparences, la Cour est d'avis, avec le requérant, que le défaut d'indication de l'identité de l'ensemble des membres de la COB ayant délibéré était de nature à faire douter de son impartialité'. An adversarial system presupposes equality of arms and transparency as preconditions for a meaningful debate to take place. From a criminal law perspective in particular, see R. Myers, 'Adversarial Counsel in an Inquisitorial System', 37 *North Carolina Journal of International Law and Commercial Regulation* (2011), 411-435.

requirements of Article 6 ECHR. From that perspective, the ECtHR imposes two cumulative or three alternative principles of institutional organization of these supervisory authorities. These principles determine the general framework within which national supervisory authorities function. As such, they reflect the implicit supranational constitutional framework enabling and restraining supervisory operations.[1016]

A first set incorporates *cumulative* principles. It starts from the assumption that a national supervisory authority acts as an adjudicative body for the purposes of Article 6 ECHR. To the extent that this is the case, requirements of independence and impartiality outlined in that provision mandate guarantees of independence in the appointment and functioning of the members of the authority taking sanctioning decisions and a clear separation or at least segregation of the prosecuting and adjudicative services. This *segregation* condition is supplemented by a procedural adequateness condition. In *Dubus*, the Court emphasized the importance of the *equality of arms* and the occurrence of a real debate between the prosecuting department and the market operators being subject to supervisory review.[1017] In *Vernes v France*, the ECtHR elaborated on that second condition. The Court held that the inability of a market operator to demand for public debates and the absence to know the identity of the persons adjudicating his case in a sanction procedure operated by the *Commission des opérations de bourse* (COB) – later transformed into the *Autorité des Marchés Financiers* – constituted a violation of Article 6 § 1. The Court did not deem it necessary *de s'interroger sur la différence entre la COB, autorité administrative et indépendante à l'époque des faits litigieux et les juridictions financières*.[1018] It rather required the conditions of impartiality to be fulfilled as a matter of course in a functionally adjudicative administrative authority. In addition to segregation and equality of arms conditions, the ECtHR also presented the faculty of having appellate judicial review against these adjudicative decisions. Appellate review decisions did not however have to reflect the ECtHR's own standard of full jurisdiction, or should be available as a matter of course in non-criminal proceedings.[1019] In *Dubus*, the Court mainly acknowledged national review of *Commission Bancaire* decisions by the Conseil d'Etat, without mandating their existence. As long as a national authority itself would comply with all requirements of Article 6 rights, appellate judicial review does not appear a necessity.[1020]

A second set of *alternative* principles builds upon the first, but allows the supervisory authority not *entirely* to comply with the cumulative list of principles. It is well-known that administrative authorities can impose sanctions upon individuals. These administrative authorities function as quasi-judicial authorities, but do not as a matter of course have to comply with all requirements reflected in Article 6 ECHR. To the extent that these administrative decisions can be reviewed by a judicial body that has full – i.e. sufficient – jurisdiction to re-examine the matter at hand, a national administrative authority does not itself have to inhabit all fair trial requirements read in Article 6.[1021] That is not to say however that these national authorities would not have to comply with Article 6 ECHR at all. In

[1016] They do not however reflect a singular blueprint, see R. Nazzini, note 366, 990, stating that neither the European Court of Human Rights nor the Union courts have articulated a test to balance the degree to which a first instance administrative authority complies with the requirements of independence and impartiality and the intensity of the subsequent judicial review.
[1017] *Dubus,* para 64. The ECtHR did not however proceed in investigating this grief, as the applicant already succeeded in demonstrating the lack of impartiality in the Commission Bancaire's proceedings.
[1018] *Vernes,* para 32.
[1019] *Vernes,* para 32.
[1020] *Dubus*, para 69.
[1021] For a recent example, *Steinniger,* para 49.

Dubus, the Court still expressed a preference for segregated prosecution and adjudication functions in order to guarantee more impartial decision-making practices.[1022] A lack of Article 6-proof administrative institutions in that image refers to a lack of independence of the entrusted administrative decision-makers. Judges are specifically called upon to provide additional guarantees of independence. In addition to a preference for segregated decision-making, the Court suggests the importance of the right to be heard and to enjoy public debates in sanctioning procedures. At the same time however, any deficiencies in the presence of these rights should be remedied at a judicial review stage before a court with full jurisdiction. The requirements of full jurisdiction incorporate both a segregation of functions and an equality of arms dimension. From a segregation point of view, full jurisdiction implies that a market operator should be able to contest a decision adopted by an earlier administrative-adjudicatory body in the presence of representatives of that body. This could be the body itself, or most likely, the prosecution department within that body that is once again bringing a case in front of a new, Article 6-compliant adjudicatory organ. Although the Court seems to indicate a preference for functional segregation in order to allow meaningful appellate judicial review, it does not as such mandate that situation. It merely requires a court having full jurisdiction to rule on the matter at hand. In the same vein, the Court merely suggests the organization of hearings and debates before an administrative adjudicatory body, in order to ensure meaningful decisions being taken and with a view to limit the scope of obligatory judicial review mandated by Article 6 ECHR.[1023] The following table presents these alternative choices and contrasts them with the cumulative model implicit in *Dubus*.

institutional suggestions of art 6 ECHR	segregation	equality of arms	appellate judicial review
cumulative procedural principles	mandated	public debate	optional
alternative review principles	preferred	suggested	sufficient review standard and public debate

The abovementioned table only reflects the ECtHR's case law and the suggestions that could be extracted therefrom. The binding force of the EU's Charter of Fundamental Rights will most likely bring these institutional considerations to the direct attention of the European Court of Justice as well. Since the procedural rights incorporated in the ECHR constitute minimum standards guiding the Charter's interpretation[1024], it can be maintained that these standards will also translate in the Court of Justice imposing them on national systems operating in the realm of EU law. It could be expected that the Court of Justice will more directly impose requirements of functional segregation and equality of arms on national legal orders, not just as a matter of ECHR obligations, but as a matter of primary EU law.

186. *Converging standards for national operations* – From that point of view, the ECHR regulative framework also provides a window into the EU's requirements imposed on national legal orders in their organization of judicial review against financial supervisory authorities. The following sections outline the ways in which particular financial supervision structures in

[1022] *Dubus*, para 60.
[1023] For a similar argument in EU competition law, see R. Nazzini, note 366, 990.
[1024] See Article 52(3) Charter.

different Member States reflect a functional segregation, attention to equality of arms and judicial review standards in compliance with the ECHR and the Charter. Despite these common general principles, national institutional organizations still reflect a wide institutional variety. That variety should not however distract attention from the essential organizational features that seem to converge towards a single framework of institutional organization and judicial review steered by fundamental procedural rights.

Financial market supervision is generally entrusted to different and specialized administrative authorities across the EU Member States.[1025] The internal organization of these national competent authorities generally foresees a specialized expert committee tasked with imposing fines or other monetary sanctions on financial market operators. The Belgian and French authorities are composed of specific sanction units or committees, which adopt administrative sanctions.[1026] Another department or unit within the authority is responsible for the investigation and preparation of the case file in that regard. The Dutch and German authorities do not entrust specifically established sanctioning commissions with administrative sanctioning, but also segregate the decision-making departments from the investigative and prosecutorial units.[1027] The United Kingdom's *Financial Services Authority* – which will soon

[1025] The *Belgian* financial supervisory landscape includes the National Bank of Belgium and the Financial Services and Markets Authority (FSMA). See Wet 22 February 1998 tot vaststelling van het organiek statuut van de Nationale Bank van België, *Belgisch Staatsblad* 28 March 1998, 9377 (NBB Act) and Wet 2 July 2010 tot wijziging van de wet van 2 augustus 2002 betreffende het toezicht op de financiële sector en de financiële diensten en van de wet van 22 februari 1998 tot vaststelling van het organiek statuut van de Nationale Bank van België, en houdende diverse bepalingen, *Belgisch Staatsblad* 28 September 2010, 59140 (Twin Peaks Act) and Koninklijk Besluit 3 March 2011 betreffende de evolutie van de toezichtsarchitectuur voor de financiële sector, *Belgisch Staatsblad* 9 March 2011, 15623 (Twin Peaks Royal Decree). *France* divides supervisory competences between an *Autorité des Marchés Financiers* and an *Autorité de Control Prudentiel.* See Ordonnance n° 2010-76 du 21 janvier 2010 portant fusion des autorités d'agrément et de contrôle de la banque et de l'assurance, *Journal Officiel de la République Française* du 22 Janvier 2010, 1392 and Article 1 Loi No. 2003-706 du 1 août 2003 de sécurité financière, *Journal Officiel de la République Française,* 2 août 2003, 13232, available at www.legifrance.gouv.fr, modifying Article L621-1 Code monétaire et financier. In *Germany*, the Bundesbank and the Bundesanstalt für Finanzleistungsaufsicht or Bafin share responsibilities, see §2 Gesetz über die Deutsche Bundesbank of 22 October 1992, *Bundesgesetzblatt* (1992) I. 1782 and §1(1) Gesetz über die integrierte Finanzdienstleistungsaufsicht of 22 April 2002, *Bundesgesetzblatt* (2002), I. 1310 (*Findag). The Netherlands* entrusts the National Bank (DNB) and the Financial Markets Authority (AMF) with these tasks, see Article 4 Wet van 26 Maart 1998, houdende nieuwe bepalingen inzake De Nederlandsche Bank N.V. in verband met het Verdrag tot oprichting van de Europese Gemeenschap*, Staatscourant* (1998), 200 (DNB Act) and Article 1:1 Wet van 28 september 2006, houdende regels met betrekking tot de financiële markten en het toezicht daarop (WFT), *Staatscourant* (2006), 507 (WFT). The *United Kingdom* presently still relies on its integrated *Financial Services Authority (FSA)* to supervise financial markets and transactions. The FSA's responsibilities will from 1 April 2013 be divided between a *Prudential Regulatory Authority (PRA)* and a *Financial Conduct Authority (FCA)*. See Financial Services and Markets Act 2000, 2000 c. 8, http://www.legislation.gov.uk/ukpga/2000/8/. See section 2 for the Authorities' general duties. For the adapted 2012 Financial Services Act, see http://www.hm-treasury.gov.uk/fin_financial_services_bill.htm.

[1026] For *Belgium,* see Article 48bis §1 Belgian WFT and Article 36/8 §1 NBB Act. The Belgian WFT only attributes the sanctioning commission the powers to impose administrative fines, whilst the NBB Act refers to both administrative fines and periodic penalty payments. See for an overview of the legislative provisions at play, A. Van Cauwenberghe, 'De sanctieprocedure van de FSMA na de *Twin Peaks* hervorming van het financieel toezicht' in Instituut voor Financieel Recht (ed.), *Financiële regulering in the kering* (Antwerp, Intersentia, 2012), 566-571. For *France,* Article L621-15 for AMF and Article L612-23 to L612-29 for ACP. See also Articles L621-15 and L612-38: the investigation will be conducted by AMF or ACP officials who will report to the AMF or ACP College. That College will decide whether or not to initiate sanctioning procedures. If it decides to do so, it will transfer the case to the sanctioning commission.

[1027] For *Germany,* see See for a concise overview in that regard *IMF Staff Country Report 11/247*, International Monetary Fund, 2011, 36. The imposition of fines occurs in accordance with §35-39 of the Gesetz über Ordnungswidrigkeiten (OWiG) of 19 February 1987, *Bundesgesetzblatt* (1987), I 602. Ordnungswidrigkeiten comprise punitive monetary sanctions imposed by an administrative body and reviewable by a (criminal) court.

be replaced by a new *Financial Conduct Authority* – comprises a Regulatory Decisions Committee that adopted all kinds of supervisory decisions (warnings, notices to market operators) except for fines, which were adopted by the FSA Board itself.[1028]

At the appellate review stage, the Belgian, Dutch, French and German legal systems provide for a full review of administrative sanctioning decisions with the ordinary courts[1029] and for legality review of other decisions involving the suspension or revocation of licenses.[1030] The ordinary courts have full jurisdiction to re-adopt a new decision in cases where sanctions have been imposed.[1031] German and Dutch courts can additionally opt to remit the case to the authority.[1032] The United Kingdom entrusted its specialized and non-judicial *Upper Tribunal* with the task of reviewing authority's sanctioning decisions. The Tribunal holds public hearings. It cannot adopt a new decision but is able to remit the case to the FSA with such directions as the Tribunal considers appropriate for giving effect to its determination.[1033] Appeals on points of law can be lodged with the Court of Appeal.[1034]

d. Towards more intense due process-oriented judicial interaction?

See for examples §44(6) Gesetz über das Kreditwesen and §39 Gesetz über den Wertpapierhandel.. For *the Netherlands*, Article 1:88 WFT determined that the internal organization of a supervisory body should be such as to reflect a separation between the official who establishes an infringement of the WFT and the official(s) determining whether or not a fine should be imposed. The Administrative Appellate Court (*College van Beroep voor het Bedrijfsleven* or *CBB*) determined in a 2006 judgment that this provision should be interpreted to allow the AFM's Board of Directors to adopt the sanctioning decision, based on a file composed by one of its officials. Only to the extent that Directors would immediately be involved in concrete investigations, would Article 1:88 be frustrated. As a result of that judgment, the separation of investigative/prosecutorial and adjudicative functions is now considered an institutional precondition for the administrative organization for market supervision bodies. CBB 9 february 2006, *Fortis v AFM*, LJN: AV2682, www.rechtspraak.nl, 4.3. See also Article 10:3 AWB which incorporates a prohibition to delegate particular functions outside of the the *bestuursorgaan*. As a result, institutional separation should be necessary to maintain (the impression of) a fair administrative decision-making procedure.

[1028] Section 3.1. DEPP Rules in the binding FSA Handbook, http://fsahandbook.info/FSA/html/handbook/D43.. The RDC is part of the FSA. It exercises certain regulatory powers on behalf of the FSA and is accountable to the FSA Board for its decisions generally. On fines, see Section 6.5A DEPP Rules.

[1029] For *Belgium*, see Article 121 Belgian WFT and Article 36/21 NBB Act. According to Article 121§6, the appeal does not suspend the decision, except in instances where an administrative sanction or periodic penalty payment has been imposed. Article 36/21§6 generally suspends the implementation of NBB decisions against which an appeal to the Brussels Court of Appeal has been initiated. For *Germany*, see §46 OWiG, on the need to initiate an objection procedure first §40-44 OWiG. For *France*, see Article L621-16(IV) and Article R621-45(I, second subparagraph) and Article R621-46(VI, second subparagraph) Code Monétaire et Financier. For *the Netherlands*, see Article 1:110(1) WFT.

[1030] For *Belgium*, see Article 122 Belgian WFT and Article 36/22 NBB Act. For *Germany*, see §46 OWiG. For *France*, see Article L621-30 *juncto* Article L621-9(II) and Article R621-45(II).

[1031] For *Belgium*, the legal framework does not refer to the intensity of judicial review, nor does it explicitly entrust the Court of Appeal with full or annulment jurisdiction. The Court of Appeal itself nevertheless interpreted the legal framework as reflecting a full jurisdiction mandate... For *France*, see Article R621-46(VI, second and third subparagraphs). For *the Netherlands*, see for examples T. Duijkersloot, 'Do Courts engage in lawmaking in relation to the supervision of the insurance industry? Reflections on supervision in the Netherlands and Germany' in F. Stroink and E. Van der Linden (eds.), F. Stroink and E. Van der Linden (eds.), *Judicial Lawmaking and Administrative Law* (Antwerp, Intersentia, 2005), 229-231.

[1032] For *Germany*, see §79(6) OWiG referring to this type of jurisdiction in the appellate stages. For *the Netherlands*, see Art. 8:72(4)(a) AWB.

[1033] See Section 2 of The Transfer of Tribunal Functions Order 2010, 2010 No. 22, http://www.legislation.gov.uk/uksi/2010/22/. See for a general schematic overview, M. Elliott, 'Tribunal Justice and Proportionate Dispute Resolution', 71 *Cambridge Law Journal* (2012), 301. For its predecessor Tribunal, see Former Schedule 13(7)(1) Financial Services and Markets Act 2000. Its procedures were not open to the public, to safeguard confidentiality.

[1034] See Notice 2008 No. 2834, http://www.justice.gov.uk/downloads/tribunals/tax-and-chancery-upper-tribunal-/si-court-appeal-order-2008.pdf, which states so explicitly.

187. *Converging tendencies* – The previous subsection highlighted how the national institutional structures of supervision and review reflect a common thread of ECHR-proof principles. All analyzed legal orders reflect some format of institutional separation or segregation at the supervisory level, especially in cases monetary sanctions are being imposed. Whilst Belgium and France prefer quasi-independent sanction commissions, the Dutch, German and United Kingdom frameworks foresee a format of institutional segregation within the authorities. These independent sanction commissions could be deemed to function as courts or tribunals within the meaning of Article 6 ECHR. To the extent however that these commissions are not considered Article 6-compliant, the organization of judicial review across the different Member States also reflects the conditions of appellate review read into that provision. In all Member States investigated, some format of 'sufficient jurisdiction' seems to prevail, oftentimes even full jurisdiction.

It is clear that national supervisory authorities function under the umbrella of the supranational ECHR framework. In that regard, it could be argued that the national structures provide necessary guidance for the supranational system in search for operational coherence. As the previous sections outlined, the system of judicial review reflected in the ESA Regulations is currently fraught with uncertainties that have yet to be addressed by either the Board of Appeal or the Court of Justice. In particular, the exact scope of review needs to be determined and clarified. The national systems, operating in the shadow of the ECHR framework, could thereby serve as examples for a new supranational system in search for operational principles.

188. *Towards more intense institutional interaction* – That perspective presupposes that national and supranational systems of supervision and judicial review operate in concert and influence each other's operations. Since the EU will accede to the ECHR system, the principles extracted from the ECtHR's case law and their application in the national legal orders might indeed serve as benchmarks for the evolution of supranational review standards in even more direct ways, comparable to their influence on national review structures. At the same time, the evolving supranational system might equally serve to fine-tune and converge national standards. More specifically, the necessary involvement of the national legal orders in ensuring the review of EU soft law guidelines and recommendations may necessitate the imposition of particular institutional conditions required to ensure the effective application of EU law. The Court of Justice could in that case ensure the development of standards governing national review procedures of EU soft instruments. In doing so, the Court would establish itself as an important standard-setter in the realm of judicial review against financial supervisory actions at both the supranational and the national levels. The Court has at present not yet had an opportunity to consider the design of such institutional standards, but such developments cannot *per se* be excluded in the near future.

5. Conclusion to part A of this Chapter

189. *Institutional proxies of financial market supervision summary* – This part outlined how EU law structures the institutional framework of financial market supervision. The overview of these evolutions and mechanisms allows to provide an answer to the first set of research sub-questions that underlie the analysis developed here.

Firstly, the *locus* of supervision in EU financial markets predominantly remains with the Member States' national authorities. National authorities are responsible for the supervision of EU-wide activities of national credit institutions, investment firms and insurance undertakings. In accordance with the principle of home country supervision, home states are responsible for the day-to-day supervision of financial market operators. Host states'

authorities play a subordinate role in that regard. The establishment of European Supervisory Authorities did not alter this day-to-day home state supervision model. ESA intervention predominantly centres on *supplementary* intervention powers in instances where national authorities refrain from applying or misapply (transposed) EU financial regulation. Newly adopted EU financial regulation confirms the *supplementary* nature of ESA intervention. The short selling Regulation provides an example. Although ESMA has been granted a significant amount of discretion in that regard, it can only intervene in instances where a home or host country authority refrains from taking appropriate action.

In addition, the ESAs serve to structure different national authorities within a European System of Financial Supervision. The ESAs serve as convening bodies in which national authorities develop and structure EU-wide supervision strategies. In addition however, the ESAs have been granted direct primary market supervision powers in the realm of credit rating agency authorization and supervision. In this field, ESMA is able to authorize and impose sanctions on credit rating agencies. National authorities no longer have supervisory powers in that regard. The proposals to entrust the *European Central Bank* with full-fledged primary market authorization and supervision powers in the realm of credit institution supervision in the Euro-zone Member States would directly transform the *locus* of supervision from the national to the supranational level with regard to these institutions.

Secondly, the *object* of supervision largely determines the predominantly decentralized and subsidiarily centralized structure of EU financial market supervision. EU financial regulation serves to open and integrate nationally structured financial markets. In doing so, financial regulation serves to address financial market operators' *behaviour* within an integrated market place. The specific structure of a single European passport and mutual recognition serves as a complement to the EU competition law rules, which also seek to regulate market participants' behaviour. At the same time however, EU financial regulation also directly *product and activities'* conditions. EU financial law regulates how financial products should be presented to investors and the conduct of business rules supporting the sales and promotions of such products. The focus on market products and activities requires a dense regulatory framework that replaces diverging national legal traditions. That focus also justifies reliance on EU Directives, which require implementation in national legal orders with a view to replace existing and diverging national rules and practices. In that understanding, national supervisory authorities are necessary to ensure that nationally incorporated financial market operators comply with these new standards that have been transposed into national law. These national authorities have a more in-depth knowledge of local practices and market structures and therefore serve as enablers of transposed EU law in the national legal orders. The supranational level will only intervene to the extent that the national levels do not adequately regulate market behaviour, products or activities.

Thirdly, the *institutional cooperation* mechanisms underlying supranationally structured financial market supervision confirm and frustrate the supplementary role the EU level should play in accordance with the object of supervision identified. On the one hand, the establishment of the ESAs and the role played by national supervisory authorities convening in their Boards of Supervisors attests that national authorities play a signficant role in supranational market supervision. The Board of Supervisors is responsible for the adoption of draft technical standards and for the imposition of binding decisions. As such, national supervisory authorities convening in a supranational setting determine the possibilities and boundaries of supranational intervention. In doing so, the ESAs serve as devices to provide *supranational operational support* to national supervisory authorities. The proposal to entrust the ECB with Euro-zone banking supervision does not neglect that approach. In that regime,

the ECB would replace national supervisory authorities in conducting micro-prudential credit institution supervision. At the same time however, the EBA would be called upon to continue providing supplementary support and intervention to both the ECB and to non-Eurozone countries. On the other hand however, direct decision-making powers attributed to the ESAs in the realm of credit rating agency supervision demonstrate that the supranational level is willing to be involved more intensely in the direct supervision of financial market participants. National supervisory authorities lose their individual decision-making power in that image. They only retain a role as co-equal and full-fledged decision-makers within the ESAs' Boards of Supervisors. The resulting loss of national autonomy is supposedly justified in the service of more intense market integration and coordination in the wake of global crisis.

Fourthly, the *review* proxy confirms the incremental role the ESAs play as supranational supervisory bodies. The ESA Regulations outlined a detailed framework of appellate review. They established a joint Board of Appeal and an elaborate procedural framework regulating access to that Board and – subsequently – the Courts. Whilst that framework reflects particular inconsistencies and gaps in the light of the EU's constitutional commitment to ensure complete judicial protection, the creation of review mechanisms demonstrates a commitment to accountable and reviewable decision-making procedures at the supranational level. The ESA framework did not as such mandate a similar review framework to be established at the national level. The ECHR framework – and more specifically Article 6 ECHR – did nevertheless provide an alternative converging tool to structure national judicial review evolutions. The role of Article 6 ECHR in the ESA review structure has not however been considered, despite the EU's impending access to the ECHR framework. The inconsistencies and gaps reflected in that framework might indeed pose particular problems of Article 6 ECHR compliance. At the national levels, Article 6 ECHR served as a framework for organizing judicial review against financial supervision decisions and for structuring the institutional organization of national supervisory authorities. It offers particular cumulative or alternative principles of institutional organization that determine the institutional outlook of national supervisory structures. The incorporation of national supervisory authorities within an ESA framework that emphasizes the importance of judicial review might result in convergence among national systems directly coordinated at the EU level and structured by the European Court of Justice.

190. *An institutional mandate structuring suprational supervision* – The institutional proxies of market supervision demonstrate that the supranational framework has been designed to play a *supplementary* role in the supervision and enforcement of EU financial market regulation. At the same time however, national supervisory authorities have been *included* in a supranationally structured framework. National supervisory authorities are constitutive decision-makers in the ESAs' Boards of Supervisors and can as such be outvoted by other members of that Board adopting a decision as a matter of EU law. The inclusion of these national authorities into a supranationally structured body therefore implies that Member States have agreed to subordinate the operations of national supervisory bodies to a supranational structure operating within the constitutional confines of European integration.

These institutional arrangements have only materialized because the EU's constitutional framework allowed them to emerge. This part of the chapter already identified the *supranational operational support* mandate read into Article 114 TFEU with a view to justify the establishment of the ESAs. Building upon that analysis, the second part of this chapter expounds on the constitutional contours structuring and operationalizing the institutional structure underlying the supranational market supervision regime identified in this part. It will argue that Article 114 TFEU incorporates – by virtue of the Court's case law on the scope of

harmonization covered by that provision – an institutional delegation mandate that equally reflects and promotes elements of institutional heteronomy structuring the interaction between the EU and national governance levels.

B. Constitutional transformations underlying indirectly mandated financial market supervision

191. *Introduction to part B*– The upgraded system of EU financial market supervision operationalizes an underlying constitutional mandate enabling its creation. The Treaty framework did not directly mandate the establishment of the ESAs.[1035] Indirectly however, different Treaty provisions could be read to encapsulate an 'institutional delegation' mandate, which enables and restrains the operations of a supranationally structured institutional framework. This part coins the 'supranational operational support' mandate read into Article 114 TFEU in the EU's constitutional framework.[1036] It particularly investigates how reliance on that mandate presents a constitutional technique to overcome particular constitutional hurdles that have plagued the design and empowerment of regulatory agencies in EU law, to structure supranational and national authorities in a cooperative framework and to enable judicial commandeering to police that framework in the service of due process. Identifying these constitutional techniques additionally allows to explain the institutional framework of financial market supervision as an additional example of *institutional heteronomy*, albeit adapted to the specific post-crisis circumstances in which the present system took shape.

6. Article 114 TFEU as a constitutional instrument of institutional design

192. *The transformable understanding of Article 114 TFEU* – The establishment of the ESAs has been justified on an extensive reading of Article 114 TFEU.[1037] In order to enable such reading, the Commission, Council and European Parliament identified a specific institutional operational support mandate into Article 114 TFEU. This section argues that this 'operational support' reading presents a constitutional technique to justify and extend the powers of regulatory agencies at the EU level to the detriment of long-standing regulatory discussions. That mandate allows to delegate significant – but not unlimited – competences away from the *Member States* to the *supranational level*. This section discusses how the operational support mandate underlying Article 114 TFEU reflects a preference for an inclusive constitutionalism mandate. It subsequently argues that this operational support reading brings about significant (un-)intended consequences that allow for EU supervisory powers to extend beyond the generally accepted constitutional status-quo. The impact of an operational support understanding on the infamous *Meroni*-doctrine will particularly be considered in that regard.

a. Operational support as inclusive constitutionalism mandate

[1035] One notable exception in this regard can be found in Article 127(6) TFEU, which allows the European Central Bank to be involved in prudential supervision. According to that provision, 'the Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings'. The scope of that provision is obviously limited. It only allows for – and does not mandate – the involvement of the European Central Bank in banking supervision. Additionally, it only covers credit institutions, without providing a definition of these institutions. The provision establishes that insurance undertakings are to be excluded from its scope but does not as such highlight whether investment service providers that have not been conceived as credit institutions fall within that realm. More fundamentally, the provision only allows for the involvement of the *European Central Bank*. It does not therefore envisage the creation of new supervisory bodies capable of addressing national authorities and financial market operators.
[1036] See for that obligation Article 19(1) TEU, Article 47 Charter of Fundamental Rights and Article 6 ECHR.
[1037] See nrs. 159-160 of this dissertation.

193. *Operational support and the extension of decision-making powers* – The *Enisa* judgment imposed particular conditions limiting the scope of a supranational body to mere information-gathering and –dissemination. In the ESA creation process, the Council and European Parliament stretched this understanding to allow for the establishment of agencies with binding individual decision-making powers, albeit in exceptional and limited circumstances.[1038] The extension of the *Enisa* reasoning to actual decision-making agencies still remains untested before the Courts.[1039] It would however seem improbable that the Court would not be able to fit the ESA Regulations' justification within the *Enisa* framework of operational support. As outlined above, the ESAs serve to supplement the system of day-to-day national financial supervisory authorities. Their role first of all serves to procure and process information from the national authorities and to facilitate its transmission within the European System of Financial Supervisors. At the same time, they serve as reviewing bodies of national supervisory authorities. Their decision-making intervention is limited by this supporting role. Secondly, the ESAs constitute networks to enable the development of common guidelines, recommendations, regulatory and implementing technical standards. In that function, their role is once again merely supportive. They do not adopt these standards, but rather prepare them. Since these supplementary roles are encapsulated in an already elaborate regulatory framework and since they serve to enable the adoption of new regulatory standards, it could indeed be maintained that the ESAs contribute to the functioning of the Internal Market in financial services.[1040]

The Credit Rating Agencies (Amending) Regulation offers a somewhat dramatic extension of this perspective. In granting the ESMA discretionary powers to impose monetary sanctions on credit rating agencies, the Council and Parliament instrumentalized Article 114 TFEU significantly to move beyond the limits enshrined in *Enisa* and underlying the founding ESA Regulations. The amended CRA Regulation proposed a particular methodological framework of imposing fines on credit rating agencies to the liking of the European Commission's fining approach in the realm of competition law. Whilst that framework aims to circumscribe ESMA's sanctioning powers[1041], it nevertheless leaves significant executive decision-making powers and accompanying discretion in the hands of a body established on the basis of the delegation mandate of Article 114 TFEU. In relying on Article 114 TFEU to justify these powers, the EU institutions implicitly read into Article 114 a mandate to equip supranational institutions with discretionary powers to impose sanctions on private market operators. It additionally moved beyond ESMA's powers of *subsidiary* intervention present in the AIFM and Short Selling regulatory frameworks.[1042]

194. *Institutional mandate mirrors substantive expansion* – It could be argued from the abovementioned examples that new national or supranational institutions with some discretionary powers mirror the substantive harmonization mandate read into Article 114 TFEU. The institutional mandate of operational support reflected in the Court's case law on Article 114 indeed reflects the broader operational support mandate governing substantive harmonization initiatives. In order for Article 114 TFEU institutional competences to be

[1038] *Enisa*, see references in nr. 243 of this dissertation. On the limits of creating new Union bodies or rights, see Case C-436/03, *European Parliament* v *Council of the European Union (European Cooperative Society)*, [2006] ECR I-3733, para 44-45.
[1039] See in that regard in particular, V. Randazzo, 'Annotation of Case C-217/04, *United Kingdom* v. *European Parliament and Council of the European Union*, judgment of the Grand Chamber of 2 May 2006, nyr', 44 *Common Market Law Review* (2007), 167.
[1040] See Recitals 17 ESA Regulations.
[1041] See Recital 18 Regulation 513/2011.
[1042] See among other provisions Article 25(5) AIFM Directive and Article 28 Regulation 236/2012.

triggered, the Union legislature will have to demonstrate that a particular substantive law framework is already in operation, in which a particular institutional structure would fit (justification dimension). At the same time, the case law also requires that the particular institutional structure is necessary and proportionate to the aims set out by the substantive framework (fit dimension). In doing so, issues regarding subsidiarity and proportionality of the institutional framework envisaged will also be governed by the requirements of Article 114 TFEU itself.[1043]

From that perspective, the constitutional justifications for the establishment of the ESAs clarify the fundamental preconditions for supranational institutional regimes to be created on the basis of Article 114 TFEU. EU constitutional law can only be considered to delegate powers to establish supranational supervisory institutions to the extent that a substantive legal framework exists that falls within the 'object-related' ambit of Article 114 TFEU. In other words, the institutional framework will have to contribute to the removal of genuine (future) obstacles to trade or appreciable (future) distortions of competition. In addition, the institutional supervisory framework needs to present a *means* to attain harmonized national legislation. As such, the mere establishment of a supervisory body in addition to, on top of and operating in concurrence with national supervisory authorities cannot be justified on the basis of Article 114 TFEU. In that instance, Article 352 TFEU presents an appropriate legal basis.[1044] The creation of supranational supervisory bodies on the basis of Article 114 TFEU therefore needs to justify the *ends* of Internal Market functioning. These bodies support the 'operational support' mandate of substantive harmonization read into Article 114 TFEU. To the extent that the substantive operational support mandate will be interpreted more broadly, the scope of institutional delegation supporting it equally increases.

195. *Beyond dual federalism* – The perspective sketched here demonstrates that the institutional delegation mandate is predominantly viewed as supporting the substantive operational support mandate of Article 114 TFEU. In that constellation, the EU and national regulatory regimes are commonly contrasted against one another. The EU's harmonizing intervention results in the replacement of national rules by supranational alternatives. The establishment of supranational supervisory institutions aims to fasten or support that replacement. From that perspective, EU and national law are presented as inherently dual and mutually exclusive. Although techniques such as 'targeted' harmonization[1045] may result in the co-existence of harmonized and unharmonized legal provisions, EU and national law continue to be presented as distinct and different legal orders.

Conceptions of 'agencification' and 'centralization' of supervisory structures equally refer to that duality. The establishment or growing creation of EU agencies not only present a delegation of competences away from the Commission or other Institutions[1046], it also indicates the creeping nature of agencies overtaking particular roles formerly attributed to national legal orders.[1047] The very idea of centralization refers to a similar situation.

[1043] See for an example, *Vodafone*, para 77.
[1044] Case C-436/03, para 44-45.
[1045] On targeted harmonization, especially in the realm of EU consumer law, see S. Weatherill, 'The Consumer Rights Directive: how and why a quest for "Coherence" has (largely) failed', 49 *Common Market Law Review* (2012), 1268.
[1046] M. Chamon, note 30, 1055; S. Griller and A. Orator, note 30, 3-4; E. Chiti, 'The Emergence of a Community Administration: The Case of European Agencies', 37 *Common Market Law Review* (2000), 309-343 for an overview and conceptualization.
[1047] See M. Busuioc, 'Accountability, Control and Independence: The Case of European Agencies', 15 *European Law Journal* (2005), 600; most notably E. Chiti, 'Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies', 10 *European Law Journal* (2004), 402-438.

Centralization implies the removal of dispersed – i.e. national – competences and their replacement with a singular supranational alternative. If and to the extent one considers the institutional mandate as providing more room for these centralizing tendencies, old discussions on the EU's competence creep in the national realm will easily be revived.[1048]

The ways in which *Enisa* and the ESA Regulations have been phrased however point towards a regulatory approach that moves away from this dual image.[1049] Supranational supervisory institutions or agencies have come to serve as facilitators for supranational harmonization, supporting the functioning of substantive harmonized frameworks. In doing so however, these supranational supervisory bodies also present a formalized network structure in which national authorities can convene, discuss and enable future regulatory initiatives at the supranational level. In doing so, the supranational legal framework grants these national authorities necessary policy room to co-determine the areas of law supervision and enforcement that should remain at the national level. From that point of view, supranational supervisory institutions operating in conformity with the *Enisa* criteria serve as mediating institutional instruments allowing for national and supranational interests to be balanced against each other.[1050] In doing so, national and supranational law are no longer considered to be two separate spheres of legal intervention. They rather present distinctive parts of a larger singular framework of market regulation, in which both national and supranational regulatory interests emerge from and interact within a specific institutional context allowing for the balancing of these interests.[1051]

196. *Inclusive constitutionalism* – From that perspective, the interpretation of Article 114 TFEU as a legal basis enabling supranational supervisory bodies can also be read as providing an inroad to 'inclusive constitutionalism'. Inclusive constitutionalism refers to a system of legal norms that encapsulates regulatory activity at different levels of decision-making. The constitutional provisions in a federal system – regulating the intensity with which federal and defederated rules engage and interact – is an example of such inclusivity. The federal constitution provides a framework, not merely for policing a plurality of legal suborders, but also for ensuring the mutual co-existence and engagement of defederated and federal rules and principles.[1052] Such a constitutional framework includes both federal and defederated rules within its scope of application and understanding. The EU Treaty framework – though formally presenting an international Treaty concluded between sovereign nation states – equally showcases a taste for inclusivity by directly providing for supranationally structured supervision in the realm of credit institution prudential supervision by the ECB. To the extent that a provision regulating the Internal Market is equally read as enabling the establishment of

[1048] See for a stylized account of that discussion, S. Weatherill, note 765, 24.

[1049] For a general account of such movement away from dualism underlying the EU's constitutional framework, see R. Schütze, note 10.

[1050] See for a similar role attributed to agencies in general, E. Chiti, note 1047, 438: it is precisely because of administrative pluralisation, the establishment of the aforementioned integration techniques, and the creation of 'European agencies', in addition to the combination of these elements in an institutional context, together offer numerous opportunities for the development of a sophisticated model for administrative action. This model, in particular, could be capable of providing a positive response to the challenges posed by the various problems connected with the current state of development of the Community order, as well as the many questions connected with the exercise of modern administrative activities.

[1051] The proposals to establish a 'Banking Union' and to entrust the ECB with direct prudential supervisory activities over Eurozone financial institutions in accordance with Article 127(6) should equally be captured in that light. Although the extension of ECB prudential supervision powers immediately goes against the model in which day-to-day supervision remains with the Member State authorities, the proposals point towards an inclusion of formerly independent national supervisory authorities into a system in which the latter will act as agents of the ECB in the national legal orders.

[1052] On the role of a federal constitution in that regard, see A. Von Bogdandy and J. Bast, note 753, 228.

supervisory institutions that aim to structure the interaction between and engagement of supranational and national rules, that provision reflects a federal inclusivity. That federal inclusivity in turn justifies a particular cooperative framework taking shape.

The identification of a 'federal' turn in reading Article 114 TFEU is hardly novel.[1053] Its extension to Member States' institutional autonomy in the organization and structuring of supervisory bodies is. By explicitly 'constitutionalizing' the creation of supranational supervisory bodies within the scope of the establishment and functioning of the Internal Market, the EU institutions read into Article 114 TFEU a mandate to govern the interactions between supranational and national rules. That mandate allows for national rules and institutional structures to remain autonomous within the constitutional confines of a supranational legal framework. This taste for inclusive constitutionalism has nevertheless been given a particular shape in the institutionalization of the ESAs. The EU institutions projected the ESAs to function as intermediate organs between national supervisory authorities and the EU institutions responsible for adopting supranational financial regulatory standards. In doing so, the ESAs involve the operations of national supervisory authorities within their framework and determine the ways in which the institutional framework at the national level will be structured. Article 114 TFEU allows for the effective creation of inclusive supranational market supervision structures.

b. (Un-)intended consequences of operational support

197. *Operational support: (un-)intended consequences* – The inclusive constitutionalism narrative underlying the establishment of ESMA, EBA and EIOPA projects an open-ended constitutional reading of the providing and supporting EU law implementation requirement identified in *Enisa*. At the time of writing, the narrative remains untested in Court. The operational support narrative has nevertheless been subject to further extension in the realm of CRA and Short Selling supervision. This subsection demonstrates that the operational support narrative allows for a potentially unbridled extension of the need for operational support in the current testing framework. That extension nevertheless also serves effectively to circumvent some *Meroni*-delegation limits that have problematized the establishment of the ESAs. Both extension and circumvention reflect the *(un-)intended* consequences of an operational support narrative implied into Article 114 TFEU.

198. *Extension: justifying CRA enforcement powers* – The operational support narrative serves to justify any *subsuming, guiding, protecting and safeguarding* supranational structure aimed at the coherent implementation and application of EU law. As a result, the supranational supervision of credit rating agencies entrusted to ESMA could also be identified as an example of supranational operational support. The regulation and supervision of credit rating agencies has indeed also been justified on the basis of Article 114 TFEU and on the operational support narrative reflected therein. This is most directly relevant from the attribution of authorization and enforcement competences to ESMA and the inclusive and supporting role national courts have gained in the CRA enforcement framework. In so justifying however, the supranational operational support mandate is significantly extended and even transformed into a *national operational support mandate*.

Firstly, ESMA's role in authorizing credit rating agencies has been argued to reflect a new regulatory paradigm.[1054] It could nevertheless also be considered to reflect an essential supporting mechanism for an effectively operating integrated financial market. Within an

[1053] See for a particular example the contribution of D. Wyatt, note 754; see also S. Weatherill, note 752.
[1054] T. Tridimas, note 736, 58.

integrated market, the national regulation and supervision of credit rating agencies would tend to neglect the impact credit ratings might have on cross-border capital streams.[1055] A supranational authorization and regulation of such agencies would therefore better enable national supervisory authorities to focus on priorities related to their national territories. This *economies of scale* argument translates the EU's authorization role into a matter of operational support to the effective day-to-day supervision of financial markets. The supranational authorization of CRAs nevertheless also implies that Article 114 TFEU directly allows for supranational binding decision-making in cases where *ex ante* supporting action is deemed necessary. Such action is no longer subsidiary but antecedent to effective day-to-day supervision.

Secondly, the enforcement provisions allow ESMA directly to intervene and act against CRAs that infringe EU law.[1056] ESMA is thereby allowed directly to authorize the establishment of a credit rating agency [1057] and to impose monetary sanctions on them.[1058] The imposition of fines by ESMA directly replaces the home country supervision system with a supranationally determined one-stop supervisor. In doing so, operational support is interpreted as allowing for the replacement of day-to-day national supervision[1059] in a particular market sector as a *means* to enable more efficient national supervision in other sectors. Supranational enforcement thus supports the operations of decentralized supervision in other sectors of financial market regulation.

Thirdly, the involvement of national courts in CRA inspection procedures[1060] and in the enforcement of ESMA decisions[1061] demonstrates the importance attached to EU-national cooperation. Operational support justifies such image. In this instance however, national courts are called upon to justify the operations of supranational intervention. Such national operational support reminisces the competition law enforcement mandate read into Article 103(2) TFEU. In that understanding, Article 114 TFEU could also be read to mandate national judicial institutions to support supranational supervision and enforcement operations. The operational support narrative reflected in Article 114 TFEU is thereby flipped into justifying full-fledged supranational supervision supplemented by national supporting institutions. Article 114 TFEU has in that regard been read as a constitutional mandate to establish a national operational support mandate in a specific sector of financial market regulation.

[1055] See Recital 9 Regulation 513/2011.
[1056] Article 23(b)-(d) CRA Regulation.
[1057] Case C-359/92, *Germany v Council*, [1994] ECR I-3681, para 37 held that [t]he measures which the Council is empowered to take under that provision are aimed at "the establishment and functioning of the internal market". In certain fields, and particularly in that of product safety, the approximation of general laws alone may not be sufficient to ensure the unity of the market. Consequently, the concept of "measures for the approximation" of legislation must be interpreted as encompassing the Council' s power to lay down measures relating to a specific product or class of products and, if necessary, individual measures concerning those products. The Court built upon that line of case law in *Smoke Flavourings*, para 60-61, which sanctioned a Commission authorization procedure to be established on the basis of Article 114 TFEU. That judgment served as a basis for supranational authorization of CRAs. At the same time however, the Court only allowed for the *Commission* to engage upon authorization and not for an independent agency to complete the same task. On this role limited to the Commission, see R. Schütze, note 586, 1396.
[1058] Article 23(e) CRA Regulation.
[1059] P. Schammo, note 1, 785, arguing that ESMA also supervises smaller CRAs that operate on a more domestic scale.
[1060] Article 23(d)(8) CRA Regulation.
[1061] Article 36(d)(3) CRA Regulation.

199. *Operational support and Meroni* – The identification of supranational operational support powers also serves to circumvent the limits read into the *Meroni* judgment.[1062] *Meroni* consistently limited EU policymaking. The White Paper on European Governance[1063], its preparatory documents[1064] as well as subsequent initiatives[1065] continued to reflect the *Meroni* principles. The political discourse emphasizing *Meroni* has impeded the creation of truly self-standing European regulators capable of promulgating binding regulatory standards.[1066] *Meroni* limited the delegation of regulatory powers to private bodies in two ways. Firstly, it limited the *delegation* of powers. The delegation prong held that delegation of powers must be expressly provided for, that only powers retained by a delegating body could be delegated, that the exercise of these powers was subject to the same limits and procedures as they would have been within the delegating body and that such delegation is necessary for the effective functioning of the delegating institution.[1067] Secondly, it limited the *scope of powers* delegated. This discretion prong maintained that the powers delegated could only include

[1062] See note 689 for references.

[1063] The White Paper refers to agencies as a valuable alternative compared with other structures of Comitology and even Networks, specifically in order to attain the goals set within the "good governance" definition. The White Paper, after hailing the implementation and application improvement capacities of EU Agencies, clearly considers those agencies should not be mere advisors. Nevertheless, their actual role should only consist in taking individual decisions in application of regulatory measures. The White Paper even admits the creation of agencies will be discussed upon on a case by case basis. A general Administrative Procedure Act does not fit in that presentation. See White Paper on European Governance, COM 2001(428), 2001, see http://ec.europa.eu/governance/white_paper/index_en.htm, 24

[1064] M. Everson, G. Majone, L. Metcalfe and A. Schout, *The Role of Specialised Agencies in Decentralising EU Governance,* Report Presented to the Commission 1999, http://ec.europa.eu/governance/areas/group6/contribution_en.pdf, 54; see also White Paper on European Governance Work Area No. 4. Coherence and cooperation in a Networked Europe, "Networking People for a Good Governance in Europe (Group 4b)", http://ec.europa.eu/governance/areas/group9/report_en.pdf, 23 p. and annexes

[1065] The Commission considered the development of a general framework of operation for agencies in 'The Operating Framework of European Regulatory Agencies: Communication from the Commission', COM 2002 (718), 11 December 2002. It recognized regulatory agencies to have been created at different moments in order to meet specific requirements, justifying the claim that differences in agencies' structures and functioning outweigh similarities. Nevertheless, the conditions for the creation, operation and supervision of agencies need to be more transparent. In that respect, the Commission classified agencies into "advisors", "guardians" and "individual decision-makers". Focus had been on developing a more coherent body of independent yet accountable agencies whose decisions could be subject to judicial review if they would be binding on third parties. The latter resulted in a proposal to develop an interinstitutional agreement concerning regulatory agencies in its Draft Interinstitutional Agreement on the Operating Framework for the European Regulatory Agencies, COM 2005 (59). Recently however, the Commission decided to adapt its policies in that regard and not to continue to develop the interinstitutional agreement proposal, as the Council did not show interest in developing an interinstitutional agreement (European Agencies – The Way Forward. Communication from the Commission to the European Parliament and Council, COM 2008 (135), 11 March 2008, 6, see as well the Commission Staff Working Document accompanying the Communication, SEC 2008 (323), 23 pp.). Nevertheless, the Commission continues to stress the importance of a general agency framework. Therefore the Commission proposes a political forum in which Council, European Parliament and Commission can engage in inter-institutional dialogue concerning agencies. Again better regulation is predominant: 'As part of the governance structures of the Union, it is important that agencies apply modern principles of better regulation. This includes concentrating on their core business; factoring in the need to consult properly with and provide feedback to stakeholders; and organizing their business in such a way that transparency is assured and that performance can be effectively monitored by institutions and stakeholders alike'.

[1066] See N. Moloney, part I Rule-making, note 716, 73; P. Schammo, note 1, 783; T. Tridimas, note 736, 60.

[1067] Case 9/56, *Meroni*, at 150-151. See for a schematic overview, T. Tridimas, note 736, 61-62. See also E. Wymeersch, The European Financial Supervisory Authorities or ESAs' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 238.

clearly defined executive powers that were capable of being objectively reviewed by the delegating body.[1068]

200. *Circumventing Meroni* – A supranational operational support reading of Article 114 TFEU circumvents the limits attached to both prongs.[1069]

Firstly, it allows to overcome the delegation limits outlined in *Meroni*. The latter case dealt with the delegation of powers presumably held by the ECSC High Authority to a private body outside the institutional realm of European integration. The establishment of ESAs does not involve such a delegation 'downwards' from the Commission towards a specialized agency. It rather reflects a constitutional delegation 'upwards' from the Member States to an intermediate supranational body by virtue of an operational support mandate read into Article 114 TFEU.[1070] The Commission has never been – and was never constitutionally considered to be – the primary EU financial market supervision authority. On the contrary, the Treaty only allows the Commission to supervise the Member States in their capacities as enforcers of EU law in the national legal orders.[1071] The establishment of supranational bodies that serve to support such national enforcement structures therefore do not comprise a delegation of powers from the supranational institutional to an outside body, but rather a delegation from the Member States to a supranational body that seeks to provide more efficient cross-border coordination in the enforcement of financial regulation. In that understanding, the *Meroni* delegation limits do not apply to this particular situation. As a result, the limits on the scope of powers delegated would also not apply here. The operational support reading rather facilitates a delegation 'upwards' of national enforcement powers to the supranational level.

Secondly, the discretion prong does not in itself limit the scope of ESA powers from a supranational operational support point of view. *Meroni*'s limits on delegating discretionary powers rely on a framework in which the European Commission[1072] is constitutionally called upon to implement and execute EU law to the detriment of the Council. That framework came to being in the field of agricultural policy and gradually grew into a constitutional principle of sorts.[1073] *Meroni* maintained that the powers delegated should be *clearly defined* and *subject to review in accordance with objective criteria by the delegating authority*.[1074] To the extent that one accepts that the delegating institution comprises the Member States in this image, that condition would be fulfilled, even in the presence of powers attributing a wide margin of discretion to the ESAs. The ESAs' composition clarifies this point. ESA decisions are adopted

[1068] Case 9/56, *Meroni*, at 152.
[1069] N. Moloney, part I Rule-making, note 716, 73, argues that *Meroni* influenced the institutional outlook and limits on the powers conferred, but seems to agree that *Meroni* as such did not limit the powers attributed to the ESAs. See also P. Schammo, note 1, 783 and P. Schammo, note 861, 1893. Moloney did not however argue that *Meroni* was guiding to limit the ESAs powers overall or that the ESAs would not comply with the *Meroni* doctrine. For that argument, see T. Tridimas, note 736, 65 and M. Chamon, note 30, 1069 (in the context of the adoption of ESA draft technical standards). See in general, M. Zinzani, note 21, 56-57. For an argument that the ESAs' quasi-regulatory powers have been tailored to accommodate *Meroni*, see M. Busuioc, 'Rule-Making by the European Financial Supervisory Authorities: Walking a Tight Rope', 19 *European Law Journal* (2013), 114: '[t]he new Authorities' rule-making powers attest to the ongoing relevance of Meroni and the limits placed on rule-making by agencies, albeit they do stretch the boundaries of the legal doctrine to the maximum'.
[1070] On delegation upwards, see P. Schammo, note 1, 779 for a conceptualization of that approach. See for a similar argument in the realm of EU networks of national regulators, M. Zinzani, note 21, 60.
[1071] On the basis of Article 258-260 TFEU.
[1072] Since Meroni dealt with an ECSC situation, the High Authority was the appropriate body to consider. Meroni has nevertheless consistently been interpreted also to incorporate delegations away from the European Commission.
[1073] See K. Lenaerts and A. Verhoeven, note 686, 646.
[1074] Case 9/56, *Meroni*, at 152.

by a Board of Supervisors, which encompasses the heads or a high-level alternate of each national supervisory authority.[1075] These persons are accountable to the national institution having appointed them, i.e. the national parliament or the executive. As a result, they are supervised by these national political actors. The Board of Supervisors at the same time acts as a supranational decision-making body. Supranational decision-making power is thereby attached to a Board of national representatives supervised by national political institutions. The Commission, Council and Parliament additionally have instruments to ensure compliance with EU law standards as well.[1076] Although one national order could still be outvoted in the Board's decision-making procedures, the operational support narrative justifies this as necessary to maintain coordinated and coherent EU law enforcement across national legal orders. The EU law status of ESA decisions additionally warrants compliance from such outvoted national bodies. Member States have in that understanding agreed to supranationalize common solutions to cross-border problems with a view to avoid dissenting voices to emerge in the supervision of financial markets. As such, the establishment of operational support would justify the attribution of discretionary competences to the ESAs by national legal orders if and to the extent that these competences are limited and included as EU law standards within an EU law framework. The EU level in that image ensures that EU law is complied with and serves as a supervisory institution. The Member States – the delegating institutions – relegate their supervisory role to the EU level.

In doing so, the operational support narrative also allows to sideline the Court's judgment in *Romano*. That case limited delegation to *public* bodies by the Council to the extent that the delegated public bodies would impinge on powers attributed to the European Commission and the Court.[1077] As a supplementary administrative body, it could not replace the tasks attributed to the European Commission to supervise the application and implementation of EU law and the Court's role in overseeing the Commission's activities in that regard. According to the Court, an administrative commission 'is not of such a nature as to require [national social security] institutions to use certain methods or adopt certain interpretations when they come to apply the Community rules'.[1078] It confirmed the Commission's role as a gatekeeper and as a policeman over Member States' implementation and application of EU law. The operational support reading clarifies that the powers entrusted to supranational authorities by virtue of the operational support mandate do not belong to the Commission. These powers were rather deemed to remain at the national levels until the Member States decided to delegate them upwards. In doing so, the ESAs' powers complement the Commission's powers of supervision and enforcement. The ESAs' role in drafting technical standards makes this complementary framework abundantly clear. Supranational authorities do not adopt these standards, but rather prepare them for the Commission to consider. Whilst the limited opportunities for the Commission to amend the ESAs' draft cast doubts on whether the Commission still remains at the helm of adopting implementing or delegated standards, the ESA framework acknowledges the limits on agency operations in that respect.

In that understanding, both delegation and discretion prongs are incorporated within the operational support reading of Article 114 TFEU. As such, they do no longer serve as *institutional balance* limits on the delegation of powers to agencies. They rather serve as enabling devices to ensure an operational support delegation upwards. The case presently

[1075] Article 40 ESA Regulations.
[1076] On these accountability mechanisms as instruments of constitutional transformation, see section seven of this chapter.
[1077] M. Chamon, note 30, 1061.
[1078] Case 98/80, *Giuseppe Romano v. Rijksinstituut voor Ziekte- en Invaliditeitsverzekering*, para 20.

pending before the Court does not reflect this reading.[1079] It argues that the discretionary powers attributed to ESMA in the realm of short selling supervision violate the *Meroni* standards and – only subsidiarily – argues that Article 114 was an incorrect legal basis. The incorporation of a new understanding of the *Meroni* conditions into the supranational operational support reading of Article 114 TFEU would avoid such *Meroni*-scrutiny and would directly focus on the scope of Article 114 as a competence-enabling constitutional basis. The operational support narrative rather than the *Meroni* criteria would in that understanding determine the limits on supranational agency powers established on the basis of Article 114 TFEU.

201. *Towards a new vertical institutional balance?* – The operational support narrative cannot however operate in complete isolation from other constitutional provisions and structures in the EU Treaty framework that determine the scope of delegation from EU Institutions to specifically established regulatory agencies. Article 114 is an open-ended provision that provides for an indirect mandate to the EU institutions to establish EU agencies. Such indirect mandate cannot however frustrate the directly conferred institutional roles played by the EU Institutions in accordance with the Treaty framework. It can therefore be submitted that whilst *Meroni* does not directly restrain Article 114 TFEU agencies, the *Meroni* spirit continues to live on in other Treaty provisions that serve to limit an unfettered operational support interpretation of Article 114 TFEU.

The Treaty's principle of attributed competences itself reflects a delegation from the Member States to the EU institutions, as does Article 114 TFEU. The Treaty does not however contain a general provision on delegation of Member State powers to supranational regulatory agencies. According to Article 17 TEU, the Commission's role is to provide a general oversight and monitoring role, except where it has been granted a more general mandate. Member States on the other hand have been constitutionally mandated by Article 291 TFEU to implement EU law and to establish national institutions guiding and enforcing such implementation. Article 290-291 TFEU allow the Council and the European Parliament to delegate particular rulemaking powers to the European Commission under the banner of delegated and implementing legislation. Article 19 TEU and Article 47 Charter of Fundamental Rights additionally confirm the essence of effective judicial protection and the role of the Court of Justice in providing such protection. This institutional balance framework serves as a background scheme within which Article 114 agencies need to be fit in order to respect the constitutional mandates reflected in these provisions.

The Article 114 TFEU mandate operates against the backdrop of and is limited by all these provisions. The ESAs' operational framework is particularly explanatory in that regard. First, the regulatory and policymaking roles fulfilled by the Commission cannot be frustrated by an implicit mandate from the Member States to the institutions. The ESA case study effectively makes this clear. ESAs cannot adopt generally applicable financial market rules. Although they can propose and develop draft regulatory and implementing technical standards, these standards are only considered to be technical and cannot therefore imply policy choices.[1080]

[1079] See note 927 for references. The case first refers to the presence of discretionary powers, to the delegation of general regulatory powers and to the adoption of technical standards prior to arguing that Article 114 TFEU served as a wrong legal basis. In doing so, the application implicitly argues that Article 114 could serve as a legal basis, but the *Meroni* doctrine would limit the powers entrusted to an agency. *Meroni* nevertheless constituted the *horizontal* division of powers. Claims about ESMA's discretionary standards essentially argue that this is an impingement on the vertical division of competences, with which the *Meroni* criteria are not concerned, as highlighted in this section.

[1080] Article 10(1), second paragraph ESA Regulations.

They cannot replace the Commission's role in regulatory decision-making as that role has effectively been recognized by the Treaty framework itself.

Article 290 TFEU grants the Commission the final and exclusive authority to adopt delegated legislation in accordance with delegation mandates reflected in particular instruments of secondary legislation.[1081] Confirming the *Meroni* judgment, Article 290 TFEU holds that non-essential rule-setting powers can only be delegated to the Commission in circumstances clearly specified and revocable by the Council and Parliament. The Commission in that image remains responsible for discretionary rule-making within the scope of delegation. It cannot delegate these powers away to regulatory agencies. As a result, Article 290 TFEU would impede EU regulatory agencies directly adopting rules that have general applicability as part of a delegation mandate in secondary legislation.

Article 291 TFEU most directly calls the generally presumed institutional balance underlying *Meroni* into question.[1082] That provision now explicitly states that *Member States* shall adopt all measures of national law necessary to implement legally binding Union acts. Only where uniform conditions are needed, such implementation will be entrusted to the Commission.[1083] The Treaty does not define the notion of 'uniform conditions' and leaves it to the Member States – participating as Council Members – to determine whether or not such uniform conditions are indeed present.

Article 291 implementing powers could either constitute powers to develop and refine EU rules into more detailed implementing 'legislation' or powers related to the coherent supervision, application and implementation of EU law in the national legal orders. The explicit attribution of implementing competences to the Member States rather than to the Council therefore allows for an enlarged implementing role for supranational regulatory bodies. These bodies would provide an intermediate implementation instrument that maintains Member States' involvement to the detriment of Commission intervention. In addition, nothing in Article 291 appears to prevent the creation of supranational regulatory agencies as an alternative to direct Commission intervention.[1084] The attribution of *discretionary powers* to supranational regulatory bodies in that image flows from the Member States' constitutional role in implementing EU law. Member States are called upon to make implementing choices in accordance with that provision and they may decide that an EU-wide agency encapsulating national regulatory authorities better serves the interests of implementing EU law than entrusting the Commission with particular supervisory responsibilities would.[1085] In doing so, Member States are effectively included into the EU implementation and supervision system. As a result, the establishment of EU-wide authorities would contribute to coordinated *Member State* implementation within a supranational constitutional framework. Both Member States and supranational authorities would in that image be called upon to cooperate sincerely in the

[1081] See references in note 856.
[1082] See fort hat argument also L. De Lucia, 'Conflict and Cooperation within European Composite Administration (Between Philia and Eris), 5 *Review of European Administrative Law* (2012), 43.
[1083] See Article 291 TFEU. It could be argued that the attribution of supranational harmonizing rules should remain with the EU Institutions on the basis of Article 114 TFEU, as Articles 10-15 ESA Regulations show. The Commission should therefore remain responsible for the adoption of harmonizing binding regulatory and implementing technical standards. Allowing the ESAs to adopt these standards would contradict the institutional roles attributed to the Commission in Articles 290-291 TFEU.
[1084] For a different opinion, see M. Chamon, note 30, 1069.
[1085] See also R. Schütze, note 586, 1398.

attainment of coordinated and effective EU law enforcement across the national legal orders.[1086]

In addition, Article 19 TEU and Article 47 of the Charter entrust the Court with ensuring that the law is observed and that effective judicial protection is provided for against all EU decisions affecting the legal positions of natural and legal persons or Member States. The Delegating such powers to outside bodies would frustrate the judicial protection mindset underlying the Treaty framework.[1087] The inclusion of regulatory agencies in the EU's system of judicial review attests to concerns that agency decision-making should not operate in the shadows of EU law. The operational support narrative identified in Article 114 TFEU confirms that position, as it foresees supranational courts' involvement in the review of supranational decisions. Building on Article 47 of the Charter, national courts' involvement in the operational support system has equally been envisioned. At the same time, judicial involvement serves to impose limits on unfettered expansions of operational support readings. It will be for the Court of Justice to determine to what extent operational support justifications can transform the European Supervisory Authorities into full-fledged market supervisors in discrete sectors of financial market regulation (such as Credit Rating Agencies or Short Selling rules) and how curbed national institutional autonomy should be allowed to remain in place. In that understanding, judicial review serves as a keystone to limit unfettered operational support extension. In doing so, it complies with *Meroni*'s proclamation that supranational judges are called upon to interpret and safeguard the boundaries of the EU constitutional framework.[1088]

202. *Conclusion* – The operational support narrative reflects an EU constitutional taste for controlled expansionism. The inherent flexibility read into Article 114 TFEU allows for the transformation of a general supranational operational support mandate into a discrete national operational support framework in the realm of Credit Rating Agency regulation. Whilst it could be argued that Credit Rating Agency regulation presents an exceptional and discrete sector of market supervision, nothing would seem to impede a continuous expansion of EU supervisory powers by virtue of its operational support mandate. That is all the more so as the operational support reading of Article 114 TFEU allows to circumvent long-standing *Meroni* limits. Whilst other Treaty provisions impose additional limitations on the exact scope of action undertaking by operational support-structured European Supervisory Authorities, such circumvention allows the European Union to further expand its institutional reach in the realm of market supervision. The Court of Justice will be called upon to identify and clarify the limits of such expansive operational support mandate. The currently pending case on the constitutionality of ESMA discretionary powers in the realm of Short Selling might prove a first test case to identify and enforce such limits.[1089]

7. Institution-building in the shadow of supranational rights

203. *Article 114 TFEU as a basis for the establishment of cooperative rights* – ESA and ESFS operations are structured in accordance with the inclusive operational support logic read into

[1086] Article 4(3) TEU. On the two-sidedness of sincere cooperation in that regard, see J. Temple Lang, 'The Development by the Court of Justice of the duties of cooperation of national authorities and Community institutions under Article 10 EC', 31 *Fordham International Law Journal* (2007-2008), 1502. See also J. Temple Lang, 'The Core of the Constitutional Law of the Community – Article 5 EC' in L. Gormley (ed.), *Current and Future Perspectives on EC Competition Law* (The Hague, Kluwer Law International, 1997), 41-72. See also Case C-2/88, *Zwartveld,* [1990] ECR I-3365, para 17 for that reading.
[1087] Case 9/56, *Meroni*, at 151.
[1088] Case 9/56, *Meroni*, at 152.
[1089] See for references, note 927.

Article 114 TFEU. That provision in addition constitutes a basis for the development of suprantionally recognized rights. This subsection outlines how the language of supranational rights pervades the framework of interaction between national and supranational market supervisors. It particularly outlines how the supranational operational support logic enables the emergence of supranational *cooperative* rights. These rights entitle supranational and national authorities to act within the institutional framework of financial market supervision. At the same time, cooperative rights also contribute to the institutional design of an integrated market supervision system. From that point of view, cooperative rights essentially shape the institutional architecture in which different actors operate.[1090] This section identifies two types of supranationally coordinated cooperative rights in the present institutional framework governing ESA and ESFS operations.

Firstly, cooperative accountability rights ensure that conflicts between supranational and national supervisors can be resolved and enable control mechanisms to be developed. Within the framework of accountability rights, *conflict* rights aim to structure the operational intertwinement between and potential disruptions among supranational and national actors within a multi-level institutional framework. Conflict resolution mechanisms vary between hierarchical and heterarchical resolution instruments and allow for an EU-wide system of conflict governance to take shape. *Control* rights establish regulatory spaces in which different actors hold each other to account. Given the extensive attention paid to both types of rights in the ESA framework, conflict and control rights will be treated in separate subsections.

Secondly, the establishment of supranational authorities and the ensuing systemic adaptations gave rise to nascent 'institutional adaptation' rights. These rights entitle supranational authorities to mandate national institutional adaptations with a view effectively to ensure a supranationally structured enforcement environment. Institutional adaptation rights in particular promote a supranationally induced movement towards *Twin Peaks* supervisory structures at the national levels.

a. Cooperative conflict rights in the ESA framework

204. *Hierarchical conflict resolution* – The ESA Regulations incorporate hierarchical conflict resolution mechanisms.[1091] These mechanisms allow for a direct and binding supranational decision to resolve the actual or potential conflict governing the operations of the supervisory system. The 'breach of EU law' and supervisory 'dispute settlement' mechanisms outlined in Article 17 and Article 19 ESA Regulations present a hierarchical mechanism to govern actual conflicts between EU and national law. Article 17 provides for an elaborate procedure on the establishment and addressing of infringements of EU law by national supervisory authorities. The responsible ESA remains the ultimate decision-maker in that regard. Its direct intervention actions are nevertheless restricted to situations where national authorities do not

[1090] On the institutional role of supranational cooperative rights, see nr. 109 of this dissertation. The framework developed there can also be applied to the cooperative mechanisms underlying the ESA framework. Its conceptualizations will as a result also be relied on here.

[1091] Conflicts should in that regard be distinguished from 'disputes'. According to De Lucia, conflict generally refers to disagreements between national administrative authorities or between the national and supranational levels. A dispute refers to a particular disagreement regarding an administrative act already issued that requires settlement on the basis of equality between conflicting parties. Conflicts encompass disputes, but also refer to disagreements in the implementation and enforcement of supranational commands or in the refusal to comply with a particular request for information provided by a fellow national or supranational authority. In these instances, national authorities refuse to fulfil their specified role within the supranational administrative system, see L. De Lucia, note 1082, 48-49.

comply with Commission formal opinion. In that case, it can address a binding decision requiring a financial market operator to comply with EU financial regulation. In the case of 'dispute settlement', EU law serves as a hierarchically superior instrument to determine which national authority will be called upon to deal with the matter.[1092] At the same time, the determination of competent supervisory authority is predated by a conciliatory stage. That stage ensures a framework in which national authorities, guided by supranational mediation, can decide on how to proceed. In that instance, national authorities cooperate in the shadow of the supranational authority's ability to adopt a binding decision on the matter which conclusively settles the dispute in the case at hand.

The Regulations also address *potential* conflicts in an equally hierarchical way. Once the Council determines that an emergency situation might indeed be emerging or has emerged, the ESAs gain new powers to address individual decisions to national authorities or to financial institutions.[1093] Although dependent on a particular political agreement on the nature and existence of such emergency conditions, the framework envisages a supranational solution ensuring cooperation and structured interactions between different national authorities. The flip-side of that structure can be found in Article 38 ESA Regulations.[1094] These provisions allow Member States to react against measures imposed on them by the ESAs if and to the extent that these measures impinge on their fiscal responsibilities.[1095] In that instance, the matter is brought before the Council which will decide on a potential revocation of the contested decision. In doing so, an additional hierarchically superior actor is called upon to settle a dispute between the competent ESA and the national authority. The latter – represented by its Member States – is thus entitled to react against allegedly interfering ESA decisions.

205. *Heterarchical conflict resolution* – At the same time, conflict resolution is not always perceived as fundamentally hierarchical in scope. Heterarchical conflict resolution mechanisms allow for a resolution of conflicts without reliance on direct binding supranational decision-making powers. The adoption of guidelines or recommendations on the basis of Article 16 ESA Regulations reflects that tendency. Guidelines and recommendations are non-binding, but do require implementation in the national legal orders. The non-binding nature of these guidelines does not also impede the establishment of a procedure 'naming and/or shaming' addressees that do not comply with these guidelines or recommendations. The 'naming and/or shaming' procedure does not however directly establish a hierarchical relationship in which the ESA imposes its will on a national authority or on a financial institution. It can only result in a formal ESA statement of non-compliance. That statement of non-compliance is not directly supported by the (threat of) sanctions being imposed.[1096] It rather incorporates a right for the ESA concerned to express its disagreement with the position taken by the national supervisory authority, just like the latter is entitled to express its disagreement with the guidelines and recommendations emerging from the ESAs. The ESAs could nevertheless indirectly engage upon hierarchical action, through the initiation of 'Breach of Union law' procedures in accordance with Article 17 ESA Regulations.[1097]

[1092] See Article 19 ESA Regulations; for conceptualization, see L. De Lucia, note 1082, 54.
[1093] Article 18 ESA Regulations.
[1094] E. Wymeersch, 'The European Financial Supervisory Authorities or ESAs' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 275.
[1095] Article 38 ESA Regulations. Note that this provision only refers to Articles 18-19 ESA Regulations. Member States cannot invoke any fiscal responsibilities in the light of a breach of EU law procedure initiated in accordance with Article 17 ESA Regulations.
[1096] Article 16(3) ESA Regulations.
[1097] See nr. 164 of this dissertation for an overview.

The ESA framework provides for conciliatory procedures. To the extent that a conciliatory procedure engaged upon by national authorities suffices to end the perceived conflict, a final and binding decision is no longer necessary.[1098] The ESA Regulations provide a specific heterarchical mechanism for the resolution of conflicts. Article 54 ESA Regulations envisages the establishment of a joint committee in which all three ESAs will closely cooperate to conflicts of competence. The Committee comprises representatives of all three authorities and is able to adopt non-binding joint positions that outline how to proceed in cross-sector situations.[1099] Since no binding hierarchical decision on the division of competences – e.g. by the Commission – is imposed on the ESAs, they effectively function as a heterarchical network of supranational supervisory authorities.

206. *Integrated administration in action?* – These concrete conflict mitigation rules reflect particular principles of administrative cooperation. As de Lucia rightly remarks, in their interactions with Member States' authorities and Union institutions, the ESA structures remain encapsulated in a particular hierarchical framework.[1100] Article 30 ESA Regulations builds upon this hierarchical model by organising peer reviews of some or all of the activities of competent authorities, to further strengthen consistency in supervisory outcomes. To that end, the Authorities are to develop methods to allow for objective assessment and comparison between the authorities reviewed. When conducting peer reviews, existing information and evaluations already made with regard to the competent authority concerned shall be taken into account. A similar taste for hierarchy can also be found in Article 31 ESA Regulations, which attributes a general coordination function in the hands of the ESAs. According to that provision, the [ESAs] shall fulfil a general coordination role between competent authorities, in particular in situations where adverse developments could potentially jeopardise the orderly functioning and integrity of financial markets or the stability of the financial system in the Union. More specifically, the Authorities shall centralize information received from national competent authorities. In both instances, heterarchical coordination mechanisms are included into a hierarchically structured framework of EU-Member State coordination.

The hierarchical nature of the conflict mitigation rules in the ESA framework does not detract from a more general integrated or composite administration understanding presently in vogue in EU administrative law.[1101] A system of integrated or composite administration presupposes an inherent co-dependency of national and supranational authorities in order to implement and apply supranational law.[1102] Within that co-dependent system, both national and supranational authorities enjoy particular 'rights' or entitlements through which they can develop their claims. These rights do not always put national and supranational authorities in a direct hierarchical relationship, but may also contribute to the creation of a heterarchical level-playing field ensuring the cooperation between different administration levels.

207. *Overview* – The cooperative framework incorporates both supranational and national authorities. As a supranational framework, it operates in accordance with a set of principles governing actual and potential conflicts. The principles governing these conflicts either propose a hierarchical or heterarchical solution. The ESA Regulations incorporate all

[1098] See Article 19(1) ESA Regulations in the case of supervisory disputes.
[1099] See Article 54 ESA Regulations.
[1100] L. De Lucia, note 1082, 56. ESAs only function as truly heterarchical counterparts to the extent that the authorities deliberate on cross-sector or competence issues during the conciliatory stages projected in Articles 19 and 20 ESA Regulations.
[1101] See on that framework, R. Schütze, note 586, 1421-1422, referring to mixed administration or administrative mixity. For a focus on judges' roles in that regard, see M. Eliantonio, note 587, 287-307.
[1102] E. Schmidt-Assmann, 'Introduction: European composite administration and the role of European administrative law' in O. Jansen and and B. Schöndorf-Haubold (eds.), note 963, 2.

characteristics of a composite administration approach. The following table graphically outlines these particularities and applies them to the ESA framework:

conflict resolution	hierarchical	heterarchical
actual conflict	dispute settlement (art 17 and 19)	pre-decision making (art10-15); cross-sector (art 54)
potential conflict	emergency situation (art18); fiscal effects (art 38)	guidelines and recommendations (art 16); peer review and coordination (art 30-31)

This table confirms the importance for a system of integrated conflict resolution to rely on a particular background hierarchical framework that allows conflicts to be resolved in an orderly and predictable manner. That framework is structured in accordance with supranational law. Relying on the language of 'rights' or 'entitlements' governing national and supranational authorities' actions, the ESA framework highlights a constitutional preference for a rights-based cooperative framework in which national and supranational authorities are considered co-equal participants in a supranationally structured system of market supervision.

208. *Future integrated administration initiatives: institutional delegations* – The emergence of a rights-based cooperative framework also appears through the institutionalized delegation framework expressed in Article 28 ESA Regulations. According to that provision, the ESAs shall stimulate and facilitate the delegation of tasks and responsibilities between competent authorities by identifying those tasks and responsibilities that can be delegated or jointly exercised and by promoting best practices.[1103] Competent authorities may, with the consent of the delegate, delegate tasks and responsibilities to the Authority or other competent authorities.[1104] These delegations can thus take place from the national to the supranational level or among national supervisory authorities. As a result of such delegation, the law of the delegate authority shall govern the procedure, enforcement and administrative and judicial review relating to the delegated responsibilities.[1105] Although that law could indeed be the national law of another Member State, the delegation itself is regulated by EU law. The Regulations do not regulate the revocation of such delegation. According to the ESA Regulations' preambles, the ESAs 'should be informed in advance of intended delegation agreements, in order to be able to express an opinion where appropriate. It should centralise the publication of such agreements to ensure timely, transparent and easily accessible information about agreements for all parties concerned. It should identify and disseminate best practices regarding delegation and delegation agreements'.[1106] Once again, the supranational framework grants a central and overseeing role to the supranational level. In

[1103] Article 28(2) ESA Regulations. See also already Article 8(1)(c) ESA Regulations, identifying an ESA task to stimulate and facilitate the delegation of tasks and responsibilities among competent authorities.
[1104] Article 28(1) ESA Regulations.
[1105] Article 28(3) ESA Regulations.
[1106] Recital 39 ESA Regulations

that image, the supranational framework itself structures – and could potentially limit – the delegations taking place in that respect.

b. Cooperative control rights: establishing regulatory spaces

209. *Control rights* – Cooperative conflict rights constitute only one structural feature in the establishment of a supranational market supervision framework. These rights have in particular been complemented by *control* rights. Control rights allow both suranational institutions and national actors to hold the newly established supranational authorities to account, with a view to control and monitor their activities. This subsection identifies the accountability mechanisms accomanying the ESAs' functioning. It subsequently aruges that these mechanisms create 'regulatory spaces' within whichh the ESAs can function as constitutionally sanctioned quasi-autonomous entities.

210. *Control rights and accountability* – A preliminary reflection on the notion of 'accountability' is essential to structure the cooperative control rights regime established by the ESA system. Accountability is a vexed concept that reflects many definitions and conceptions.[1107] In essence however, it implies that one institution or person is called upon to assess the operations ('the bookkeeping') of another person or institution.[1108] Accountability in particular expresses a '*dual relationship (operationalized through norms and procedures) between the public and a body, through which the latter 'takes account' of the interests, opinions and preferences of the former prior to making a decision (responsiveness), and through which it 'renders account' a posteriori of its activities and decisions, with the possibility of facing sanctions (control)*'.[1109] In doing so, the assessing institution aims to determine whether or not the accountable institution acted in accordance with 'good accounting' standards. A logical extension of that approach implies that the assessing institution might intervene in the operations of an accountable institution. Accountability, in one way or another, could therefore imply the subordination to higher regulatory standards.[1110] In practice, it often translates into an obligation to file reports with the competent assessing institutions and/or in control over the budget of the accountable institution.

At the same time however, the essence of accountability in the European Union also lies in *the ways in which* policy room is granted to an accountable institution. Since the traditional

[1107] See among others on accountability in general, see C. Harlow, *Accountability in the European Union* (Oxford, Oxford University Press, 2002), 6: public bodies are forced to seek to promote the public interest and are compelled to justify their actions in those terms. See also M. De Visser, note 23, 337; E. Fischer, 'The European Union in the Age of Accountability', *Oxford Journal of Legal Studies* (2004), 495; D. Curtin, 'Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability', in D. Geradin and N. Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Cheltenham, Edward Elgar, 2005), 88–119; Y. Pappadopoulos, 'Problems of Democratic Accountability in Network and Multilevel Governance', 13 *European Law Journal* (2007), 469-486; D. Curtin, 'Holding (Quasi-) Autonomous EU Administrative Actors to Public Account', 13 *European Law Journal* (2007), 523-541; M. Bovens, 'Analysing and Assessing Accountability. A Conceptual Framework', 13 *European Law Journal* (2007), 447-468; D. Curtin and A. Nollkaemper, 'Conceptualizing Accountability in International and European Law', *Netherlands Yearbook of International Law* (2005), 3-20; M. Busuioc, note 1047, for a focus on the accountability of EU agencies.

[1108] See also W. Van Gerven and S. Lierman, *Algemeen Deel – 40 jaar later. Privaat- en publiekrecht in een meergelaagd kader van regelgeving, rechtsvorming en regeltoepassing* (Mechelen, Kluwer, 2010), 64.

[1109] See for that definition, J. Pauwelyn, R. Wessel and J. Wouters, 'The Exercise of Public Authority through Informal International Lawmaking: an Accountability Issue?', *Jean Monnet Working Paper 06/11*, 28.

[1110] For that perspective, see M. Busuioc, note 1047, 602. See also M. Bovens, D. Curtin and P. 't Hart, 'The EU's Accountability Deficit: Reality or Myth?' in M. Bovens, D. Curtin and P. 't Hart (eds.), *The Real World of EU Accountability. What Deficit?* (Oxford, Oxford University Press, 2010), 1.

EU institutions mainly fulfil a supplementary role checking the ESAs' accounts, the latter can develop their own identity and function within the boundaries of the space created by the withdrawal of the EU institutions and Member States from acting themselves. Regulatory spaces thus created allow for a new legal framework to be constituted in the shadows of a vested institutional framework.[1111] New regulatory spaces have been established by the creation of ESAs. These spaces are situated between two existing levels of regulatory intervention, the supranational and the national. The space created by autonomous ESAs allows for abolishing the dual and distinctive institutional outlook underlying both levels and serves to bridge both levels into a composite or integrated administration setting.

211. *Overview* – This subsection will outline how the accountability prospects reflected in the ESA framework constitute an example of this particular position and how new *regulatory spaces* are taking shape. The institutionalization of dispersed accountability rights essentially contributes to that approach. The ESA Regulations explicitly state in Article 3 that the Authorities shall be accountable to the European Parliament and the Council. Throughout the regulatory framework, a particular role is also attributed to the Commission in holding the ESA operations to account. In addition, natinoal supervisory auhtorities also indirectly control and determine ESA operations.

212. *Commission accountability mechanisms* – The Commission's role in the ESA structures is threefold. First, one Commission official serves as a non-voting members of the Board of Supervisors.[1112] In doing so, the Commission ensures direct ESA accountability by observing the decision-making process on the spot. Second, the ESA operational structure leaves the Commission's supervisory powers under Article 258 TFEU unaffected.[1113] As a result, the Commission acts as a supervisory body in any instance where a Member State infringes or misapplies ESA decisions. The indirect Commission avenue thus serves as a way to promote and enforce the EU interest in cases the ESAs are themselves unable to attain that goal. Third, the Commission serves as a final gatekeeper in adopting regulatory and technical implementing standards. As outlined in part A, the ESAs effectively develop these standards and leave the Commission with only limited opportunities to intervene in the regulatory process. In particular, the constant deliberation between the Commission and the ESAs provide significant policymaking opportunities to the latter. In any instance however, the Commission remains exclusively responsible for the adoption of regulatory and implementing technical standards.[1114] As such, it retains a significant power of intervention: it could bluntly refuse to adopt a regulatory or implementing technical standard, if the interests of the EU so require.[1115]

The Commission in that image remains the gatekeeper of the Union's interests at large.[1116] Whilst the ESAs are called upon to safeguard Union's financial market integration

[1111] See L. Hancher and M. Moran, 'Organizing Regulatory Space' in L. Hancher and M. Moran (eds), *Capitalism, Culture and Economic Regulation* (Oxford, Oxford University Press, 1989), 271-301; C. Scott, 'Analysing Regulatory Space: fragmented resources and institutional design', *Public Law* (2001), 329-353. For a recent conceptualization of regulatory space, see J. Freeman and J. Rossi, 'Agency Coordination in Shared Regulatory Space', 125 *Harvard Law Review* (2012), 1145-1151.
[1112] Article 40(1)(c) ESA Regulations.
[1113] Article 1(4), 17(6), 18(4) and 19(4) ESA Regulations.
[1114] See Article 10 and 15 ESA Regulations.
[1115] See nr. 168 of this dissertation. The Commission will also be called upon to defend its position in cases involving annulment proceedings lodged under Article 263 TFEU against Regulations or Decisions incorporating regulatory or implementing technical standards.
[1116] Article 17(1) TEU: The Commission shall promote the general interest of the Union and take appropriate initiatives to that end.

interests[1117], the Commission would be able to transcend the narrow interests of the Union in financial market integration.[1118] That difference in scope of safeguarding 'general interests' also translates into different supervisory addressees. The Commission infringement procedure is addressed to Member States at large. The actual division of competences and institutional organization of Member States is considered to be outside the scope of EU law.[1119] ESA Decisions on the contrary are directly addressed to national supervisory authorities or financial market operators.[1120] As such, the ESA supervisory system directly concerns these actors. It principally takes the national legal orders' choices to establish a particular national supervisory authority for granted and supervises their actions. Only the Commission could be called upon to address the institutional organization of national legal systems directly if and to the extent the Member State would infringe rules of EU law in that respect.

213. *ECB accountability mechanisms* – In addition to the European Commission, the European Central Bank enjoys accountability powers over the ESAs. First, a non-voting representative of the European Systemic Risk Board, in which the European Central Bank plays a major role, sits on the ESAs' Boards of Supervisors.[1121] Second, the ESAs provide a crucial information feeding function to the ESRB.[1122] Formal legal tools to hold the ESAs to account are nevertheless non-existent. The proposed *banking union* supervision system for Euro-zone Member States would even make the ECB accountable to the European Banking Authority.[1123]

214. *Council accountability mechanisms* – The Council's role in the Treaty framework lies predominantly in preserving the interests of the Member States adopting decisions on a supranationally organized scale.[1124] The Council's role in safeguarding Member States' interests has been translated into the ESA accountability framework in a five ways. First, the Council is responsible for the interpretation of the scope of Treaty legal bases, allowing for the adoption of Regulations or Directives granting powers of decision-making to the ESAs. In doing so, the Council effectively determines whenever the ESAs will be able to intervene. This provides Member States with at least some decision-making power to countenance excessive attribution of powers to the ESAs. Second, the Council decides on whether or not to acknowledge an emergency situation in accordance with Article 18 ESA Regulations. The acknowledgement of an emergency situation triggers new emergency powers. As such, these emergency powers allow the ESAs to adopt more intrusive decisions. Third, the Council is called upon to determine whether or not an ESA decision impinges upon a Member State's fiscal responsibilities. In the instances of Article 38 ESA Regulations, the Council will be called upon to determine whether or not to retract a particular ESA decision in relation to a particular Member State. Fourth, the Council plays a role in revoking regulatory or technical implementing standards. Although it technically oversees the Commission's adoption of these standards, it effectively supervises the ESA operations as well. Fifth, the Council plays an

[1117] Article 1(5) ESA Regulations.
[1118] Except in cases concerning the adoption of draft regulatory technical standards, see nr. 168 of this dissertation.
[1119] See R. Schütze, note 586, 1425.
[1120] See nrs. 164-166 of this dissertation.
[1121] Article 40(1)(d) ESA Regulations.
[1122] Article 36 ESA Regulations.
[1123] Proposal for a Regulation of the European Parliament and the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards its interaction with Council Regulation (EU) No…/… conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, available at http://ec.europa.eu/internal_market/finances/committees/index_en.htm.
[1124] Article 3 ESA Regulations. See on the Council's role, Article 16(1) and (2) TEU.

important role in overseeing the ESAs' budget. The ESA Regulations do not however specifically determine what sanctions the Council could take in case of transgression of the proposed budgetary figures.[1125]

From that point of view, the Council serves as an additional accountability structure called upon to intervene in the operations of the ESAs or enabling the course of such operations in emergency or fiscal impingement cases.[1126] At the same time however, the Council does not intervene in any instance and grants the ESAs particular room to develop their own supervisory agendas. The intervention of national authorities in the ESAs' constitutive bodies therefore serve as an additional and more direct accountability standard for Member States. The Council's role is mainly to enable at least some additional supranational supervision over delegated supervision competences.

215. *A supplementary role for the European Parliament and Ombudsman* – Both the European Parliament and the European Ombudsman play a subsidiary role in the accountability architecture of the ESA system. Although the European Parliament is co-equally determined as the institution responsible for holding the ESAs to account[1127], it can only specifically intervene in five ways. Firstly and similar to the Council, the European Parliament is able to determine the regulatory framework that establishes the ESAs and determines their powers. As a legislative body, it effectively establishes and restrains the powers to be exercised by autonomous supranational bodies. Secondly, the European Parliament can revoke a delegation to adopt regulatory technical standards. Whilst such a revocation primarily implies that the Commission is no longer able to adopt regulations or decisions containing these standards, such action effectively blocks the ESAs drafting role as well. Thirdly, the European Parliament can object to the adoption of a particular regulatory technical standard. In doing so, it could effectively impede the adoption of this standard. Fourthly, the European Parliament can object to the designation of the selected Chairperson and may remove him from office following a decision adopted by the Board of Supervisors.[1128] It equally needs to confirm the appointment of the ESAs' executive directors. In doing so, it can effectively steer the appointments process and determine who should preside over the Member States assembled in the ESAs. From that perspective, the European Parliament could be said to represent the European Parliament voters' interest in having a Chairperson and executive director independent from the Member States assembled in the Board of Supervisors. Fifthly, the Parliament discharges the ESAs from the implementation of their budget.[1129]

The role of the European Ombudsman is even more limited. As an institution committed to addressing maladministration within EU institutions, its role equally extends to the ESA operations. That role is structured in two ways. First, Article 228 TFEU allows the Ombudsman to intervene in cases of maladministration related to EU bodies, offices and agencies. These include the ESA as well. Second, the Ombudsman can specifically intervene in access to documents disputes.[1130] The role of the Ombudsman in access to documents cases is confined by a procedure before the Board of Appeal. If and to the extent that the access to a

[1125] See Article 64(9) ESA Regulations, according to which the Council adopts a recommendation to the European Parliament to discharge the authority for the implementation of the budget. The Council nevertheless only plays a consultative role in this regard.
[1126] This is also confirmed in Article 3 ESA Regulations.
[1127] Article 3 ESA Regulations.
[1128] Article 51(2) and Article 48(5) ESA Regulations.
[1129] Article 64(9) ESA Regulations.
[1130] Article 72 ESA Regulations.

document is refused, the requesting party will first have to bring the matter before the Board of Appeal. Only if that internal procedure has been exhausted can the Ombudsman intervene and in that case only if a party is willing to forego a review before the Court of Justice.[1131]

Both the European Parliament and the Ombudsman act as supplementary assessment institutions. Since the ESAs are in essence responsible for executing policies decided upon by the European legislator – the European Parliament and the Council – the Parliament's role predominantly lies in the realm of lawmaking. The accountability functions granted to it by the ESA Regulations merely ensure that the Parliament will be able to retain such lawmaking role. The implementation and enforcement of EU law nevertheless remain with the ESAs and the national supervisory authorities.The limited accountability granted to the European Parliament and the even more side-lined Ombudsman therefore demonstrate a commitment by EU lawmakers to allow for the functioning of the ESAs in a framework of operational independence.

216. *National supervisory authorities accountability mechanisms* – Despite being European Union bodies endowed with EU legal personality[1132], the ESAs also remain formalized networks of national supervisory authorities. The structure and functioning of the ESAs enable national supervisory authorities to convene and to develop common solutions supported or sanctioned by EU law. In that respect, the ESAs constitute an upgrade compared to the former level three networks, which organized similar convening structures without direct support from EU law.[1133]

The ESA Regulations grant the Member States the important responsibility of continuing, day-to-day supervision over financial institutions and markets.[1134] That position is most firmly stated in relation to emergency situations in the ESA preambles: Member States have a core responsibility for ensuring coordinated crisis management and preserving financial stability in crisis situations, in particular with regard to stabilising and resolving individual failing financial market participants.[1135] Since Member States remain the core responsible actors in this respect, their national institutional structure is also taken for granted. EU law does not impose a particular or singular institutional format on these national supervisory authorities. Quite on the contrary, the EU system is made to fit different national arrangements, albeit without jeopardizing the effective functioning of the ESA bodies. The most salient example of this national predominance in the ESA framework is the composition of the decision-making Board of Supervisors. The Board comprises the heads of each national public authority competent for the supervision of financial market participants in each Member State. These heads shall meet in person at least twice a year. High-level alternates are appointed to participate in other Board meetings.[1136] The national representatives are also the only

[1131] Article 72(3) ESA Regulations. See on the Ombudsman's role in particular see among others, K. Heede, 'Enhancing the Accountability of Community Institutions and Bodies: The Role of the European Ombudsman', 5 *European Public Law* (1997), 587-605; A. Peters, 'The European Ombudsman and the European constitution', 42 *Common Market Law Review* (2005), 697-743; M. E. De Leeuw, 'The European Ombudsman's Role as a Developer of Norms of Good Administration', 19 *European Public Law* (2011), 349–368.

[1132] Article 5(1) ESA Regulations.

[1133] See M. Dawson, 'From Informal to Formal Networks. The Case of Economic Governance', presentation delivered at the November 2011 Utrecht Ius Commune Conference, http://www.rechten.unimaas.nl/iuscommune/activities/2011/2011-11-24/workshop5b_Dawson.pdf for an overview of that evolution.

[1134] See P. Schammo, note 1, 772. See also E. Wymeersch, 'The European Financial Supervisory Authorities or ESAs' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 242 referring to potential frictions in national and supranational interests emerging within that context.

[1135] Recital 50 ESA Regulations.

[1136] Article 40(1)(b) and 40(3) ESA Regulations.

members of the Board of Supervisors who actually have voting powers. Article 40 ESA Regulations equally aims to accommodate national institutional and organizational diversity. It states that [i]n Member States where more than one authority is responsible for the supervision according to this Regulation, those authorities shall agree on a common representative. Nevertheless, when an item to be discussed by the Board of Supervisors does not fall within the competence of the national authority being represented […], that member may bring a representative from the relevant national authority, who shall be non-voting.[1137] Member States' legal orders thus remain free to structure national institutional arrangements.

The voting power attributed to national authorities does not however imply that national interests are to govern the ESAs' operations. According to the ESA Regulations, national authorities are not supposed to act in their capacity of national representatives. Article 42 states that the voting members of the Board of Supervisors shall act independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from Union institutions or bodies, from any government of a Member State or from any other public or private body.[1138] The provision continues to hold that [n]either Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence the members of the Board of Supervisors in the performance of their tasks. As such, the independence required from Board members equals the independence requirements imposed on the Chairperson, the executive director, ESA officials and seconded national authorities' staff members temporarily functioning within the ESAs.[1139]

217. *National institutional inclusivity* – The way in which voting powers have been qualified in the ESA framework incorporates a paradoxical feature of ESA functioning. On the one hand, the national supervisory authorities assemble within the ESA to adopt decisions that transcend their own national interests. On the other hand however, the fact that national supervisory authorities comprise the voting members within the Board of Supervisors attests to the important role these supervisors play in determining the boundaries of action entertained by the ESAs. In doing so, the national supervisory authorities are able to interpret the ESAs' mandate and to adopt and prepare particular decisions that subsequently gain supranational legal status. From this perspective, national authorities are relying on the supranational legal framework to adopt common standards. Adopting these common standards implies that both national legal structures and supranational legal instruments and tools are being *instrumentalized* towards the realization of a common European supervisory system.[1140] That system, although taking the format of supranational law, at the same time reflects the distinctive role of national supervisory authorities, and on a larger scale even national legal orders.

A similar reflection can be developed with regard to the European Systemic Risk Board. Whilst that Board aims to establish the basic features of an EU-wide macro-economic supervision infrastructure, it also incorporates the national legal orders into a seemingly even more complex institutional structure. The ESRB includes as voting members the president and Vice-President of the European Central Bank, the Governors of all national Central Banks, a member of the Commission, the Chairpersons of the three ESAs, the Chair and two vice-

[1137] Article 40(4) ESA Regulations.
[1138] If and to the extent that these Member States act in the interest of the Union when adopting ESA decisions, they are not themselves implementing EU law within the meaning of Article 291 TFEU, see L. De Lucia, note 1082, 56.
[1139] Compare with Articles 46, 49, 52 and 59 ESA Regulations.
[1140] The ESA Regulations confirm this approach by referring to the emergence of a common supervisory culture in Article 8(b) and 29 ESA Regulations.

Chairs of the ESRB's Advisory Scientific Committee and the Chair of its Advisory Technical Committee.[1141] National interests could be promoted through the governors of national central banks and – to a more limited extent – through the ESAs' Chairpersons who might have been instructed to act in a particular way by the ESA Board of Supervisors. In addition to the ESRB Members endowed with voting power, one high-level representative per Member State of the competent national supervisory authorities will enjoy observer status in the ESRB general board.[1142] In doing so, EU law allows national authorities to participate – albeit to a limited extent – in the ESRB decision-making process.

218. *Establishing intermediate regulatory space* – The remarkable inclusion and intertwinement of two separate spheres of legal authority aimed at the establishment of new supervisory structures described above can be captured by the idea of EU law and governance enabling the creation of new regulatory spaces *between* established legal orders. These new spaces do not in themselves establish a new legal order, but rely on the instruments of authority reflected in these orders.[1143] The inclusion of Member States' authorities as voting members in the ESA framework precisely accomplishes that aim. It enables EU law to interact with national legal structures in the creation and establishment of specialized EU-wide supervisory standards or decisions.

The creation of a sphere of governance through supranational law by means of an institutional body that mediates between interests is hardly unknown throughout the EU's existence. The establishment of ESAs as institutional mediating bodies in the realm of financial market supervision nevertheless presents a novelty in two ways. First, it directly weaves techniques and tools of EU law into the operations of financial market supervision. This interweaving was specifically denied by the Lamfalussy Report as a strategy of financial market integration.[1144] Second, in relegating both the Union Institutions and the national supervisory authorities to a mere accountability role and in differentiating the intensity of accountability from mere supranational control to national-induced decision-making, the new system 'constitutionalizes' a supranationally structured set of control rights aimed at bringing about independent regulatory space for supranational authorities.

c. Institutional adaptation rights and the rise of *Twin Peaks*

219. *Institutional adaptation rights* – The previous subsections determined that the perceived duality between national and supranational law and institutions gives way to a dynamic playing field allowing national authorities to cooperate within a supranationally structured framework. That dynamic playing field not only emerges from the interaction between the national and the supranational legal order, it also mandates adaptations to the national and supranational orders to enable the proposed interactions. From a supranational vantage point, the institutional mandate read into Article 114 TFEU has been most salient in allowing for such an approach. From a national vantage point, national authorities have directly been involved in the operational framework of EU financial market supervision. At the same time, this involvement does not preclude national institutional adaptations. Whilst the ESA framework naturally focused on supranational adaptations, it also provided a groundwork for indirect modifications and transformations of national structures. These national modifications are no longer directly mandated by EU constitutional law, but nevertheless constitute an important part of the EU's constitutional design. This subsection illustrates the

[1141] Article 6(1) ESRB Regulation.
[1142] Article 6(2)(a) ESRB Regulation.
[1143] C. Scott, note 1111, 330.
[1144] Lamfalussy Final Report, 41.

pervasive effects the emergence of a new regulatory space can have on the very institutions that structure and support it. It argues that recent initiatives to transform formerly diverging national supervisory regimes into a *Twin Peaks* institutional framework are essentially motivated by institutional changes at the EU level.[1145] These institutional changes highlight a shifting constitutional framework capable of imposing a particular institutional structure on national supervisory authorities. As a result, the scope of national institutional autonomy has significantly diminished in the new institutional framework, which reflects a taste for supranationally determined institutional adaptation rights.

220. *Institutional adaptation and Twin Peaks* – A movement towards functional *Twin Peaks* models of financial market supervision is presently taking place in the organization of Member States' financial market supervisors. Twin Peaks refers to an organizational model that structures financial supervision along the functions or lines of the objectives pursued by different regulatory apparatuses.[1146] In that model, more than one supervisor is entrusted with the supervision of financial institutions and markets. The organization of financial market supervision is functionally split out between two peaks, each requiring and justifying a different supervisory authority and approach.[1147] A first 'peak' relates to financial stability and prudential supervision and a second 'peak' institutionalizes conduct of business supervision.[1148] Prudential supervisors are responsible for monitoring compliance with prudential rules. Prudential rules are structural provisions determining the markers for sound and solvent financial market operations.[1149] They determine the structural conditions necessary for a financial institution when offering financial services. Prudential rules concern the wholesale operations of financial institutions and aim to ensure the observance by financial institutions of their promises to depositors and policyholders.[1150] Conduct of business supervisors on the other hand monitor compliance with particular conduct of business standards, i.e. rules determining how financial institutions should engage with their clients. These rules focus on consumer protection and are attuned to financial institutions as retail service providers.[1151] As a result, at least two supervisory bodies will be called upon to ensure financial market supervision. In order to avoid overlap or conflict between the two bodies, a framework of conflict rules or, in the alternative, a third general market supervisory body, is necessary in this system.[1152] A *Twin Peaks* model of financial supervision is contrasted with a single or integrated supervisory structure that embodies all supervisory

[1145] This has not always been acknowledged in legal scholarship, see T. Incalza, 'Toezicht op de financiële sector volgens het twin-peaks model: ander en beter?', 24 *Tijdschrift voor Rechtspersoon en Vennootschap* (2012), 185 who argues that no conclusive efficiency-oriented reasons for the Belgian Twin Peaks reform have been offered. The author nevertheless refrains from considering the EU institutional architecture as having incited national regulatory reform in this respect.

[1146] E. Wymeersch, 'The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors', 8 *European Business Organisation Law Review* (2007), 257.

[1147] See for a general conceptualization of that approach, M. Taylor, ' "Twin Peaks": a regulatory structure for the new century', (London, Centre for the Study of Financial Innovation, 1995), 18 pp.

[1148] E. Wymeersch, note 1146, 258. See also M. Taylor, 'The Road from "Twin Peaks" – and the way back', 16 *Connecticut Insurance Law Journal* (2009), 78.

[1149] See F. S. Mishkin, 'Prudential Supervision: What Works and What doesn't?' in F. S. Mishkin (ed.), *Prudential Supervision: what works and what doesn't?* (Chicago, University of Chicago Press, 2001), 1.

[1150] As a result, a distinction between macro-prudential and micro-prudential should equally be recognized, see European Central Bank, *The Role of Central Banks in Prudential Supervision*, available at http://www.ecb.int/pub/pdf/other/prudentialsupcbrole_en.pdf, 3 (hereinafter referred to as ECB Prudential Supervision Memorandum).

[1151] E. Wymeersch, note 1146, 258; M. Taylor, note 1148, 78; ECB Prudential Supervision Memorandum, 3.

[1152] Taylor, note 1147, 14 proposed a more general market surveillance agency. A Commission comprising representatives of both supervisory authorities could equally address the problem, see for such solution as a mere temporary structure in Belgium, T. Incalza, note 1145, 179.

functions.[1153] It can also be contrasted with supervision organized along 'institutional' lines, distinguishing between the status of financial services providers: banks, investment service providers and insurance companies.[1154]

221. *Nudging Twin Peaks* – Prior to the crisis, EU Member States reflected a wide variety of institutional alternatives in the organization of market supervision. Single or integrated supervisors and 'institution-specific' supervisory bodies seemed to prevail in most Member States. Only the Netherlands explicitly adhered to a *Twin Peaks* model.[1155] The crisis witnessed a significant shift towards *Twin Peaks* across different national legal orders.[1156] The pervasive force of the *Twin Peaks* alternative was considerably hard to justify on the basis of national law in itself.[1157] The EU financial restoration programme does however provide some hints for this newfound institutional preference. As such, the institutionalization of *Twin Peaks* across the Member States could be explained as an operationalization of supranationally determined institutional adaptation entitlements.[1158]

Twin Peaks did not however appear as a mandated national institutional format imposed by EU law. The European System of Financial Supervisors does not aim to take a position in that matter. The De Larosière Report explicitly stated that the European system should be neutral with respect to national supervisory structures. National supervisory structures have been chosen for a variety of reasons and it would be impractical to try to harmonize them.[1159] At the same time however, the Report hints at the on-going national evolutions, stating that it may well be that the current trend could continue towards the emergence of a dual *Twin Peaks* system (banks, insurance companies and other financial institutions being covered by the same authority and markets/conduct of business by another one).[1160]

[1153] E. Wymeersch, note 1146, 251.
[1154] E. Wymeersch, note 1146, 259-260.
[1155] See ECB Prudential Supervision Memorandum, 1-3 for an overview of then twelve Eurozone countries.
[1156] In *Belgium*, a national Lamfalussy Committee also projected an overhaul of the supervisory regulation into a 'twin peaks' structure, see 'High Committee for a new Financial Architecture', http://www.dekamer.be/kvvcr/pdf_sections/comm/common/eindrapport_NL.pdf, which divides supervisory responsibilities between the National Bank of Belgium and the Financial Services and Markets Authority; in *France*, a 2010 reform witnessed the division of supervisory responsibilities between the *Autorité de Control Prudentiel* and the *Autorité des Marchés Financiers*, see D. Fairgrieve, 'Twin Peaks à la Française: Reforming Financial Services Regulation in France' in M. Andenas and Y. Avgerinos (eds.), note 678, 381-395; in *Germany*, legislative reform is currently in progress, see German Macroprudential reforms. Beware of Teutonic Caution', *The Economist*, 5 May 2012, also available at http://www.economist.com/node/21554198. For additional information, see http://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/Financial_markets/Articles/2012-05-02-cabinet-adopts-reform-of-banking-supervision.html. The proposal refers to the establishment of a Financial Stability Commission, which will monitor the stability of Germany's financial market. The Commission will be composed of representatives from the Bundesbank, the Finance Ministry and *Bafin*; in the *United Kingdom*, The Turner Review. A Regulatory Response to the Global Banking Crisis. March 2009', http://www.fsa.gov.uk/pubs/other/turner_review.pdf, 91-92. In response to the review, see HM Treasury, *A new approach to financial regulation: the blueprint for reform* (Cm 8083 June 2011), 15-19 (hereinafter referred to as New Approach 2011). For the recently adopted Financial Services Act, see For the adapted 2012 Financial Services Act, see http://www.hm-treasury.gov.uk/fin_financial_services_bill.htm.
[1157] T. Incalza, note 1145, 185.
[1158] Outlining the contrast between the 'institutional' approach taken at the EU level and the Twin Peaks evolutions at national levels, see C. Di Noia and M. C. Furlò, 'The new structure of financial supervision in Europe: what's next?' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 188. At 190, the authors design a completely new and upgraded supervisory model.
[1159] De Larosière Report, para 189.
[1160] De Larosière Report, para 189.

222. *Supranational institutional preferences for Twin Peaks* – The De Larosière Report could be read as welcoming the evolution towards *Twin Peaks* in the national legal systems. In so stating, it could nevertheless also be argued that these national evolutions are not merely welcome, but rather necessary under the banners of the supranational financial supervision framework as envisaged by the ESA and ESRB Regulations. Three arguments sustain that position.

Firstly, the European System of Financial Supervisors (ESFS) serves as a network for information gathering in support of a larger macro-economic supervision framework. According to the ESA and ESRB Regulations, the ESFS comprises all three ESAs, the ESRB, the joint committee established among them in accordance with Article 54 ESA Regulations and the competent or national supervisory authorities in the Member States.[1161] Although the 'System' remains a network devoid of EU legal personality[1162], it is in itself structured in a particular macro-*Twin Peaks* mode. Rather than making the traditional distinction between prudential and conduct of business supervision as two peaks of institutional supervision, the EU system distinguishes macro-prudential and micro-economic supervision. Macro-prudential supervision concerns the stability and soundness of the EU financial system as a whole. Micro-economic supervision on the other hand encapsulates the prudential and conduct of business supervision of specific financial institutions operating within the EU internal market.[1163] The ESRB is primarily concerned with monitoring the stability and soundness of the financial system and with addressing warnings and recommendations to Member States or even financial institutions. In order to obtain meaningful macro-prudential or systemic information, the ESRB requires the input from the micro-level, i.e. predominantly the ESAs but also the national supervisory authorities, which enjoy observer status in the ESRB.[1164] The ESAs, supported by a joint committee that aims to address supervisory overlaps between the EBA, EIOPA and ESMA, are responsible for coordinating the day-to-day supervision in the micro-prudential and conduct of business fields. In doing so, they directly liaise with national supervisory authorities called upon to provide information. The two 'peaks' of European financial organization therefore require information on prudential supervision in order to take meaningful supranational action. Conduct of business information would only appear relevant to the micro-supervision realm. Since information on respect for prudential standards matters in both the macro-prudential and micro-economic fields of supervision, a distinction between prudential and conduct of business supervision might be deemed relevant to facilitate the flow of 'prudential'-related information to the supranational macro-prudential supervisors. In itself however, that structure does not justify the full-fledged emergence of a *Twin Peaks* supervisory model.

Secondly, the establishment of a *Twin Peaks* model at the national levels remarkably fits the institutionally separated supervisory structure at the supranational level. The ESAs operate in accordance with an institutional separation understanding. Different European authorities for banking, insurance and occupational pensions and investment services would at first sight seem to hint at a re-introduction of institutionally separated financial market supervisors, a model common in many EU Member States. The institution-specific nature of the ESAs nevertheless can be attributed to their specific information-gathering function in the operations of the ESFS. The institutional split allows for a targeted collection of information related to both the prudential status of particular financial institutions and a Member State's

[1161] Article 2 ESA Regulations
[1162] An *a contrario* reading of Article 5 ESA Regulations.
[1163] See that distinction in the De Larosière Report, 57 for a schematic distinction.
[1164] Article 15(2) ESRB Regulation.

market at large as well as information related to the conduct of business standards entertained by these institutions. The information assembled within particular banking, insurance or securities' context enables the competent ESA to take appropriate actions. At the same time, it allows the ESA to assess and distinguish the information most relevant for the functioning, stability and soundness of the system at large and transfer that information to the ESRB for further deliberation or action.[1165] The ESAs thus constitute a bridge between a functionally structured Twin Peaks model at the national level and the macro-prudential role ascertained at the EU level. The national distinctions between prudential and conduct of business supervision enable a more structured flow of information to the ESAs. Since the competent ESAs would be able to receive information on prudential and conduct of business matters from different national supervisory bodies, they would also be able more easily to extract the relevant macro-prudential information therefrom and transfer it to the ESRB.

Whilst national Twin Peaks structures would once again facilitate such an approach, the system as it is set does not immediately compel such national organization. Indeed, it is uncertain whether the efficient flow of information to a supranational body in and of itself justifies the adoption of a Twin Peaks model at the national level. In addition, national Twin Peaks structures create problems of representation of national authorities in the ESAs' Boards of Supervisors. As these Boards are composed of only one high-level national representative, that representative could be required to bring a non-voting representative of the other authority to the meetings. As such, the organization of Twin Peaks at the national level effectively complicates the workings of the ESAs.

Thirdly, both previous situations considered the implementation of *Twin Peaks* from a top-down EU perspective. Whilst there might indeed be good reasons to promote the emergence of *Twin Peaks* from an EU law point of view, the operations of national law with a view to ensure the effective functioning of the ESFS most directly justify a transformation to *Twin Peaks*. National supervisory systems are confronted with the emergence of new structures of both macro-prudential and micro-economic EU-wide supervision. In order to maintain a particular role as day-to-day supervisors and to remain guardians of financial stability in the Member States, meaningful participation in the ESFS is necessary. In order to effectuate this participation however, the smooth transfer of information to the macro-prudential supervisor is necessary. Authorities that focus exclusively on prudential supervision would seem to be better placed to develop an authoritative role in devising, assessing and transfering this information in an appropriate format. From that point of view, it would seem that national supervisory authorities would benefit from a *Twin Peaks* structure supporting the ESFS.

Although EU law does not impose *Twin Peaks* structures on national legal orders, current national transformations exemplify the ways in which the institutional structures at the EU and national levels interrelate and interact. National adaptations could indeed particularly be explained in the light of the establishment of a supranational system and to the national authorities' perceptive role within that system. Although no Court-imposed assimilation standards have completed the framework of institutional convergence[1166], the constitutional framework itself appears to serve as a potential trigger for national institutional adaptations converging around a singular *Twin Peaks* model. From that perspective, EU law indirectly structures, enables and determines the organizational frameworks of national market supervision.

[1165] Article 36 ESA Regulation
[1166] Contrary to the realm of EU competition law enforcement, see nr. 69 of this dissertation.

223. *No full-fledged Twin Peaks adaptation 'rights'* – It would nevertheless be too far-fledged to recognize hard core *national institutional adaptation rights* underlying the present system of financial market supervision. At present, EU law does not mandate these national institutional adaptations. It rather supports and enables them. The availability of such enabling opportunities in the EU competition law enforcement system nevertheless allowed the Court to identify EU-wide principles of adequate national institutional organization with which national supervisory authorities had to comply.[1167] It is not therefore unlikely that a similar evolution will take place in the realm of financial market supervisory bodies.

d. Conclusion: supranationally structured rights-based cooperation

224. *Concluding overview* – The previous subsections demonstrated that the functioning of the institutional framework in which the delegation mandate of Article 114 TFEU has been translated operates in supranationally structured rights-based modus. In that modus, EU law includes and determines the operations of national supervisory authorities and national law. As a result, national institutional arrangements are mandated to comply with the EU system. In the operations of the ESAs and more generally the ESFS, this institutional intertwinement has not directly taken a particular constitutional shape. Contrary to the field of EU competition law, in which the emergence of fundamental procedural rights enabled the convergence of national and supranational institutional structures, no such emphasis on judicially established rights is – as of yet – apparent here. That is not to say however that supranational law would be unimportant in that regard. This section demonstrated that the ESA Regulations contain a bundle of conflict and control rights. These rights ensure that national and supranational authorities have the opportunity to resolve conflicts of supervision as a matter of supranational law. As a result, supranational law effectively includes the operations of national supervisory authorities when implementing, applying and enforcing harmonized provisions of EU financial regulation.

The intertwinement of supranational and national institutions resulted in the establishment of new regulatory spaces, in which national authorities grow directly integrated into an EU-imposed system of supervision.[1168] This section argued that the different mechanisms of accountability structuring the ESA regime establish such spaces, allowing for both national and supranational legal orders to overcome their dual existence and shape a new field of law relying on proxies of both. The ways in which the movement towards a *Twin Peaks* model of supervision have taken shape demonstrates the pervasive force of such a new regulatory space. In the wake of supranational reforms outlining and refining the system of financial market supervision, national authorities adapted their structures and turned themselves into primary information feeders emboldening macro-prudential supervision.

8. Judicial review and commandeering as constitutional techniques underlying operational support

225. *Towards more extensive judicial commandeering?* – The institutional functioning of the EU supervision framework not only relies on supranational rights, but also on EU-controlled judicial protection to structure and maintain the operational integrity of the projected framework. The ESAs introduced new access routes to the EU's judicial review regime. The

[1167] On such principles in the realm of EU competition law enforcement, see nr. 93 of this dissertation.

[1168] Identifying such intertwinement, see M. Zinzani, note 21, 41. See also H. Hofmann and A. Türk, 'Conclusions: Europe's integrated administration' in H. Hofmann and A. Türk (eds.), *EU administrative governance* (Cheltenham, Edward Elgar, 2006), 580: 'Both EU and national administrations are subject to EU policy as well as responsible for creating it. National actors are affected by the outcome of the European policy process but the EU is also dependent on the reality and capability of national administrative structures'.

national systems of judicial protection against supervisory authorities' decisions have converged around a set of institutional principles extracted from the ECHR framework. This setup allows for more extensive opportunities for judicial commandeering and the nudging of national institutional frameworks into a judicially sanctioned supranational operational support framework. This kind of commandeering role played by the Court of Justice is hardly novel. The case law on the provision of *financial services* nevertheless illustrates a similar commandeering approach in the realm of substantive law. That approach could nevertheless also be translated to the *institutional* framework of EU-Member State cooperation The Court's recent case law on Article 47 Charter of Fundamental Rights provides additional guidance in that respect.

a. Operational support and judicial commandeering

226. *Facilitating judicial commandeering* – The ESA Regulations encapsulate a developed procedural system, aimed at complete judicial review against ESA Decisions. That system not only promotes a substantive law review of the decisions adopted by the Authorities, it also envisages a complex and nuanced interaction between legal orders. In that interactive sphere, national supervisory authorities play a particular role, as do the rules of procedure governing their operations. These authorities and rules do no longer function as independent or autonomous actors. Quite on the contrary, they grow incorporated in an integrated and supranationally determined framework. The ESA framework does not foreclose future judicial commandeering and judicially imposed adaptations to the *modus operandi* of the national supervisory authorities. Whilst the field of EU financial market regulation does not yet showcase a similarly intrusive approach as the competition law supervision system structured by Regulation 1/2003 and the Court's case law on that Regulation, some similar elements can at the very least be detected.

Firstly, the establishment of a Board of Appeal composed of legal experts and functioning as a *de facto* administrative court foresees the intervention of a body of specialists well-versed in the legal framework of financial services to rule on the ways in which the ESAs have used their powers. The legal experts comprising that review body are legitimized – by virtue of their legal expertise – directly to assess the legal principles underlying the organization of national supervisory bodies and the ESAs by pinpointing at problematic organizational and procedural standards or structural shortcomings. The Court, acting as a review body of the Board of Appeal, could in that constellation indeed feel supported by the legal framework more directly to intervene in and to curtail national institutional autonomy in the realm of market supervision.

Secondly, the direct and specified role of national supervisory authorities as participants in the ESA review system means that they more easily become the subject of Board of Appeal and judicial attention. Whilst the Board of Appeal is only concerned with ESA decisions, the fact that national supervisory authorities assemble within the confines of the ESFS and the ESAs provides ample room for assimilation or coordination initiatives enabling the effective operations of that system. The Court's case law regarding Regulation 1/2003 is a case in point and could serve as an illustration of how the Court has been willing to determine the boundaries and operational principles governing such a network.[1169] The operational rules governing EU networks have in that image justified a more intensive scrutiny of the institutional organization of national authorities.

[1169] See nr. 88 of this dissertation.

227. *Limited operationalization* – Both elements reflected in the ESA judicial protection system do not in themselves warrant firm conclusions on the ways in which the Court will 'commandeer' national authorities to comply with or integrate into the system of EU financial market supervision. The presence of a network and the emphasis on judicial institutions overseeing the operations of that network nevertheless present significant structures allowing for the General Court or the Court of Justice to intervene in the operations of such network. At the same time however, that commandeering role derived from the abovementioned structures should not be overestimated. Both the Board of Appeal and the Court will act as review bodies of ESA decisions. In doing so, they will not immediately be called upon to rule on the organization and functioning of national supervisory authorities. They will more easily be able to do so if and to the extent that a national authority's decision will be challenged before a national court referring the matter to the European Court of Justice. From that point of view, the existence of a judicial protection framework at the supranational level only constitutes a vague and indirect basis for the enabling of supranational intervention in the organization of national authorities in the realm of competition law supervision. National judges' roles in reviewing national supervisory procedures should not therefore be underestimated.

b. Towards regulatory guidance by the European Court of Justice in the realm of financial services

228. *Free movement commandeering in financial services* – The previous section outlined particular elements of the ESA judicial protection framework that could enable the Court to engage upon direct interventions in and proposed assimilations of national legal structures. The Court's projected role in this realm – through the language of complete judicial protection – is not entirely speculative. In the past, the Court already had the opportunity to rule – often indirectly – on the division of competences between the EU and its Member States in supervising and maintaining the free movement provisions in the internal market and more specifically in financial services. The image that appears from those judgments supports the argument that the Court could also develop a more intrusive *institutional organization* jurisprudence.

The free movement case law serves as an instructive inroad into the competence-allocating role attributed to the Court of Justice.[1170] The most salient example in the realm of financial services remains the 1995 *Alpine Investments* judgment. That judgment concerned national rules restricting the marketing or advertising of financial products by the home country authority in both the home Member State and in other states where a financial firm would be active.[1171] Alpine Investments engaged in cold-calling potential investors offering them to engage in investment transactions in contravention of Dutch law on that matter.[1172] It argued that the Dutch rule limiting its cold calling activities from the Netherlands to other Member States impinged upon the freedom to provide cross-border services recognized in the Treaty. In particular, it was argued that the Dutch rules restricted the access to markets of neighbouring Member States through service provision, especially where national rules of such Member States did not impose similar prohibitory conditions.[1173]

[1170] See in general J. Snell, 'Who's got the power? Free Movement and Allocation of Competences in EC law', 22 *Yearbook of European Law* (2003), 323-351.
[1171] Case C-384/93, *Alpine Investments BV*, [1995] ECR I-1141 (hereinafter referred to as *Alpine Investments*).
[1172] *Alpine Investments*, para 4-6.
[1173] *Alpine Investments*, para 13 and 26.

The Court indeed held that the Dutch rules restricted the free provision of services from the Netherlands into other Member States.[1174] In doing so, it first and foremost held that national rules restricting the advertising of services fall within the ambit of the Treaty framework. Contrary to the *Keck* approach regarding goods, rules containing 'selling arrangements' such as advertising are not *prima facie* excluded from the scope of EU law.[1175] Rules on services would always constitute a restriction if they reflected an actual or potential, direct or indirect distortion of trade between the Member States. In the words of Advocate General Jacobs, these rules required EU attention if and to the extent that they adversely affected the project of European market integration.[1176] From that point of view, EU law directly encapsulated restrictions on the freedom to provide services within its scope, allowing both the Court and the legislature to adopt regulatory solutions to disparate service rules. In the case of *Alpine Investments*, the Court nevertheless accepted that the national rules could – in the absence of prevailing EU harmonization initiatives – be justified within a rule of reason framework. The Court stated that the fact that recipients' Member States had less stringent rules in this regard did not immediately render the scope of the Dutch prohibition incompatible with the Internal Market.[1177] Moreover, 'even if the receiving State wishes to prohibit cold calling or to make it subject to certain conditions, it is not in a position to prevent or control telephone calls from another Member State without the cooperation of the competent authorities of that State'.[1178] Finally, the Court held that the prohibitory rules at issue were limited in scope, since they only considered the contacting of potential clients by telephone or in person without their prior agreement in writing and only in the commodities futures market.[1179] The Dutch rule was thus held to be a proportionate detraction from the EU law requirements.[1180]

Alpine Investments is significant for the purposes of identifying an emerging preference for judicial commandeering in the realm of financial market integration in at least two respects. First, the judgment firmly places services within the realm of EU law's attention. In doing so, it projects a supranational playing field in which both the Court and the EU legislature will have a role to play. The Court's willingness to intervene in the ways in which national rules on the advertising of financial services are structured demonstrates at the very least a preference for uniform or centralized lawmaking in this field.[1181] Second, the Court recognizes but equally constrains Member States' regulatory autonomy. Member States do remain free to develop disparate rules on the advertising or marketing of financial services. These rules may indeed impose particular restrictions on market participants willing to

[1174] *Alpine Investments*, para 39.
[1175] *Alpine Investments*, para 35. The Keck conditions can be summarized as follows: the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment (Case 8/74 [1974] ECR 837), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States, see Joined Cases C-267/91 and C-268/91, *Keck and Mithouard*, [1993] ECR I-6973, para 16. On the principal non-applicability of *Keck* to services but on the emergence of other varieties in the case law, see generally W.-H. Roth, 'The Court of Justice's Case Law on Freedom to Provide Services: is *Keck* relevant?' in M. Andenas and W.-H. Roth (eds.), note 633, 1-24.
[1176] Opinion of AG Jacobs to *Alpine Investments*, para 48. J. Snell, note 1170, 327.
[1177] *Alpine Investments*, para 51.
[1178] *Alpine Investments*, para 48.
[1179] *Alpine Investments*, para54
[1180] *Alpine Investments*, para 56.
[1181] J. Snell, note 1170, 337.

provide these services in other Member States, but only to the extent that these rules justifiably reflect one or more 'mandatory requirements' sanctioned by EU law.[1182]

The *Alpine Investments* judgment incorporates a particular vision on free movement of services as a field in which the regulatory autonomy of the Member States remains in place, but only within the confines of boundaries determined by EU law. From that perspective, the Court's role is two-fold. On the one hand, it interprets and shapes the scope of supranational harmonization initiatives. On the other, it serves as a regulatory standard-setter enabling the development of both supranational and national rules operating within an integrated sphere. That particular approach allows for a system of regulated regulatory competition.[1183] Member States can still attract service providers by means of differential regulatory standards, but also have to accept the operations of these standards in a European internal market framework. That framework at the same time relies on supranational rules, standards and institutions as well as Member States' ability to design particularly tailored regulatory regimes. Such a regime has been considered to be grounded in 'trust' among different Member States or regulatory spheres.[1184]

229. *EU fundamental rights as comparable trigger for institutional commandeering* – Whilst the abovementioned system particularly relied on the language of fundamental economic rights to design a system of regulated regulatory competition, an equally similar development could be witnessed in relation to fundamental procedural rights and more specifically the right to effective judicial protection. The fundamental right to effective judicial protection, as outlined in Article 47 of the Charter and in Article 6 ECHR equally presents the Court of Justice with a benchmark within which national remedial and procedural rules will be confined by emerging judge-made standards of adequate procedure. The Court's approach in judgments like *Alpine Investments* showcases that the realm of financial services is a field that can be captured by such judicial reasoning. Moreover, it demonstrates that fundamental rights, including the right to effective judicial protection, could increasingly be relied on to establish and justify the emergence of a sphere of interaction, in which national procedural and organizational rules will have to succumb to supranational standards or principles.[1185] At the same time, national regulatory standards and principles would remain in place and would be increasingly confined by the operations of these supranational standards.

In other sub-fields of EU law, such an approach has indeed been relied on.[1186] The October 2011 *Boxus* judgment relied on the 1998 Aarhus Convention to justify national procedural modifications in the realm of EU environmental law. The Aarhus Convention, to which both the EU and all Member States are parties[1187], directly refers to requirements of access to justice in Article 9. As all parties to the Convention are required to implement that provision,

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[1182] On the general good in financial services legislation, see in particular M. Tison, 'Unravelling the General Good Exception: The Case of Financial Services' in M. Andenas and W. H. Roth (eds.), note 633, 321-382.

[1183] A similar assessment can be made in relation to the rights of establishment of corporate legal entities in Member States, see recently A. Johnston and P. Syrpis, 'Regulatory Competition in European company law after Cartesio', 34 *European Law Review* (2009), 378-404. See also J. Snell, note 1170, 334-335; see also A. Khan, 'Corporate Mobility under Article 49 TFEU: A Question of Means, not Ends', *European Business Law Review* (2011), 847-870.

[1184] I. Lianos, note 756, 759.

[1185] See on the role of the Charter in that regard, S. Iglesias Sanchez, note 514, 1605-1608.

[1186] See for an overview, P. Van Cleynenbreugel, 'The Confusing Constitutional Status of Positive Procedural Obligations in EU law', 5 *Review of European Administrative Law* (2012), 81-100.

[1187] See for an overview of Members, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en.

both the EU and its Member States have taken action to accommodate for judicial review.[1188] That also follows from Article 216(2) TFEU, which states that agreements concluded by the Union are binding upon the institutions of the Union and on its Member States. The Court relied on these binding characteristics directly to infer positive obligations on Member States' legal systems within the scope of harmonized EU legislation.[1189] The Court's judgment in *Lesoochranárske* even went beyond the scope of harmonized legislation in that regard. In that judgment, the Court mandated national courts to 'interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of [the Aarhus] convention and the objective of effective judicial protection of the rights conferred by European Union law'.[1190] National courts had to entertain this interpretation as a matter of EU law in order to enable an environmental protection organisation to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.[1191] EU law imposed such an obligation, even though the particular Aarhus Convention – Article 9(3) – had no direct effect.[1192] The Aarhus Convention therefore provided an additional constitutional benchmark for the Court to identify new obligations. *Boxus* concerned Article 9(2), which imposes a direct obligation on Convention states to organise judicial review of the participation rights incorporated in the Convention.[1193] As that provision itself incorporates particular obligations, it most certainly served as a constitutional basis allowing the Court directly to impose particular obligations on national judges.

In other recent cases, the Court has been equally eager to couple vague fundamental rights provisions to more concrete EU law provisions reflecting the more general obligations imposed on national legal orders. In *Samba Diouf*, the Court relied on Article 47 Charter as an interpretive aid to identify the scope of review against particular national asylum application decisions projected in Directive 2005/85/EC.[1194] In the specific context of the harmonized asylum procedural framework, Article 47 CFR operationalized an otherwise vague Directive

[1188] See at the EU level, Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters to Community institutions and bodies, [2006] O.J. L 264, 13. Directive 2003/35/EEC incorporates the Aarhus Convention's principles into particular harmonized fields of environmental law. In addition, national legal orders had to adopt measures of their own in areas not covered by these instruments.

[1189] In particular, Article 9(3) Aarhus Convention states that '[i]n addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment'. As that provision mandates national systems to outline conditions for members of the public to have access, that provision cannot as such be read to incorporate specific requirements with which these conditions have to comply. The Court nevertheless read particular conditions into that provision in Case C-240/09, *Lesoochranárske zoskupenie*, [2011] ECR I-1255.

[1190] Case C-240/09, *Lesoochranárske zoskupenie*, para 52.

[1191] Case C-240/09, *Lesoochranárske zoskupenie*, para 52.

[1192] See J. Jans, 'Who is the Referee? Access to Justice in a Globalised Legal Order', 4 *Review of European Administrative Law* (2011), 85-97.

[1193] Joined Cases C-128/09, C-129/09, C-130/09, C-131/09, C-134/09 and C-135/09, *Boxus*, *nyr*, judgment of 18 October 2011, nyr, para 52-54. See also Recital 11 Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, [2003] O.J. L 156/17, which directly grounds the scope of judicial review entertained at the national levels as a matter of EU law in the Articles 9(2) and (4) Aarhus Convention.

[1194] Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, [2005] O.J. L 326/13. Case C-69/10, *Samba Diouf*, judgment of 28 July 2011, not yet reported, para 45, 46 and 70.

provision.[1195] In the previously discussed *Vebic* judgment, the Court interpreted competition law enforcement Regulation 1/2003 in such a way as incorporating an obligation for national competition authorities to participate against their own decisions. In that case, the Court did not directly refer to the Charter, but merely stated that this obligation was necessary effectively to ensure that fundamental rights were observed at the national level.[1196] The Court provided a 'constitutional' interpretation of EU law and read new obligations reflective of the Charter of Fundamental Rights into secondary EU law provisions. As a result of these interpretations, the scope of autonomy left to Member States is confined to the interpretations of these provisions. The Charter and the principle of effective judicial protection included therein indirectly enable procedural obligations reflected in secondary Union legislation to be more readily transposed into national judicial practice.

Reliance on the Charter – and in the near future the ECHR – read in combination with secondary provisions emphasizing the right to effective judicial protection thus provides the Court with significant tools to develop a system in which national procedural and organizational rules are subsumed under a particular EU law system.[1197] Whilst this system traditionally structures national rules operating in the shadow of a supranational substantive legal framework, nothing prevents the application of a similar supranational standard setting framework to a field in which the supranational level itself established supervisory institutions. In that case, the emphasis on complete judicial protection within the supranational realm aims at attaining the effective operation of the newly created system of financial supervision. That system nevertheless also incorporates national supervisory authorities. References to complete judicial protection at the supranational level could therefore equally trigger the Court to impose similar requirements on the national levels.

230. *Future outlook* – The prospects of intensified judicial commandeering should not be overstated. The *Alpine Investments* precedent in the realm of financial services law is almost twenty years old and has not triggered a particular upsurge in the Court's commandeering approach to financial services law in national legal orders.[1198] It could therefore be argued that it would be unlikely that this judgment would provide an additional trigger for the Court to engage in *institutional commandeering*.

At present, the Court has not engaged upon an institutional commandeering approach in this field. As outlined in part A, the supranational judicial protection framework itself remains fraught with inconsistencies and gaps. These inconsistencies and gaps should not however detract attention from the emphasis the new ESFS places on effectiveness and operational integrity.[1199] From that perspective, increased attention to effective judicial protection at the supranational level provides a strong benchmark for increasingly focused attention to similar concerns at the national level. It would therefore no longer be surprising for the Court of Justice to intervene in the national review operations in order to make the supranational system of supervision work. Rather than building upon its substantive law approach to commandeering in *Alpine Investments*, the Court could seek to extend this framework in the service of due process and effective judicial protection under EU constitutional law.

[1195] Case C-69/10, *Samba Diouf*, para 34 and 49.
[1196] *Vebic*, para 64.
[1197] S. Iglesias Sanchez, note 514, 1597 on the possibilities for more intense supranational intervention in the wake of the perpetual openness of fundamental rights.
[1198] See S. Enchelmaier, 'Always at your service (within limits): the ECJ's case law on article 56 TFEU (2006-11)', 36 *European Law Review* (2011), 645-646, outlining the scope of Member States' discretion.
[1199] See in that respect Article 9 ESA Regulations and the temporary prohibitions of activities or products included in that provision.

9. Delegated institutional heteronomy as the constitutional framework of understanding in EU financial market supervision

231. *Towards institutional heteronomy* – The European system of financial market supervision operates in an increasingly heteronomous environment. Not unlike the directly mandated system of competition law supervision, the institutional delegation mandate reflected in Article 114 TFEU incorporated a constitutional benchmark allowing for the intertwinement between and interaction among existing Union institutions, newly established supranational authorities and national supervisory authorities. The European System of Financial Supervisors aims to establish and create a common supervisory culture across the Member States resulting in *uniform* procedures and *consistent* approaches throughout the Union.[1200] That system, entirely grounded in Article 114 TFEU, allows for and structures the participation and interrelatedness of supranational and national authorities into a framework that encapsulates the very elements of institutional heteronomy also identified in relation to competition law supervision. These elements are nevertheless tailored to the particularities of the open-ended constitutional delegation mandate reflected in Article 114 TFEU.

232. *Four elements of institutional heteronomy* – Four elements can be distinguished in that respect: dispersed unity of policymaking, supranational coordination rights, systemic secondary supervision and quasi-hierarchical duality combined with heterarchical support.

Firstly, EU financial market law reflects a *unity of policymaking* that remains dispersed. It is well-known that contrary to competition law[1201], financial markets regulation predominantly originated in the Member States. Tucked away in the broad Internal Market competences, the field has only gradually been subject to a united policymaking image. That united policymaking image did not emerge from an exclusive competence granted in the EU's constitution, but rather sprang from the gradual relinquishment of Member States over subfields of financial regulation. The post-crisis regulatory framework, in which the (lack of national) regulation of Credit Rating Agencies and short selling has been addressed at the supranational level exemplifies this approach. The European supervision system therefore operates against the background of this gradual development of a unitary policymaking sphere. Over time, the harmonization provisions in Articles 59 and 114 TFEU have been relied on to develop a financial services sphere that leaves little general lawmaking room to the Member States. The establishment of the Financial Services Action Plan and its subsequent additions and updates have significantly contributed to a unitary policymaking image. The FSAP and the legislative harmonization initiatives taken on its basis underlie a constitutional reading of Articles 59 and 114 TFEU as enabling and promoting a unitary financial market regime in the interests of the Internal Market. A unitary policymaking mandate does not however imply a preference for *maximum* harmonization or an exclusion of Member States' regulatory roles.[1202] Quite on the contrary, Member States retain an important regulatory, implementing and supervisory role, but within the constitutional confines of a supranational regulatory framework. Such a dispersed unitary understanding also creates constitutional room for a supranational supervisory system or approach. The emergence of the ESFS in the wake of the crisis can indeed be understood as a necessary complement of this constitutionally established dispersed unitary policymaking understanding.

[1200] Article 29 ESA Regulations

[1201] That position is now confirmed in Article 3(1)(b) TFEU, attributing exclusive EU competition law competences to the European Union.

[1202] See in that regard also C. Gersten-Beuerle, 'United in Diversity: maximum v. minimum harmonisation in EU securities regulation', 7 *Capital Markets Law Journal* (2012), 317-342.

Secondly, the introduction of *cooperative rights* and supranational dispute resolution mechanisms gives the constitutional system of dispersed unitary policymaking concrete institutional shape. The Institutions interpreted Article 114 TFEU to allow for the emergence of a complex bundle of institutional arrangements that have included the establishment of ESAs as new EU legal personalities, the granting of preparatory regulation-making roles and the resolving of crisis situations and national supervisory disputes. The establishment of these cooperative rights and supranational dispute resolution mechanisms incorporates a double constitutional delegation. On the one hand, powers formerly remaining with the Member States have now partially been transferred to the EU level. At the same time, new powers of dispute resolution have been created in order to establish a well-functioning and effective EU-wide regulatory system. On the other hand, the powers attributed to or claimed by the Union have been delegated to intermediate expert bodies. The bundles of cooperative rights and dispute resolution mechanisms particularly provide for instruments through which national interests can be channeled and transformed into supranational positions contributing to the emergence of a common supervisory culture across the Member States.[1203] At the same time, the recognition and establishment of a bundle of supranational cooperation rights implies that the supranational level firmly remains the locus of authority in the supervisory field. Three translations of this approach are illustrative in that respect. First, Article 291 TFEU explicitly refers to the Member States as responsible for the implementation of EU law. That provision has nevertheless been read to incorporate the participation of the ESAs as supranational mediators facilitating such implementation. Second, Article 30 ESA Regulations makes clear that the ESAs act as 'peer reviewers' of Member States' authorities. Peer review refers to an inherently hierarchical coordination mechanism in which national authorities are invited to function within the EU framework. Third, the ESRB system includes both national and supranational authorities. National authorities operate in a hierarchical context, in which each authority has a particular information feeding role. They are in that image subordinated to the effective functioning of the EU supervisory system. As a result, national institutional adaptations could be demanded for as a matter of EU law. The development of *Twin Peaks* reforms at the national level confirms that approach. Cooperation rights reflected in the constitutional framework serve as a benchmark for the development of such hierarchical structures.

Thirdly, the ESAs reflect a *complementary systemic supervision regime*, supporting and supported by the ESRB and the Union institutions. This system constitutes a constitutional translation of the very vague institutional mandate read into Article 114 TFEU and establishes a novel hierarchy of supervisors. The European institutions are placed at the very top of that hierarchy. The system is both complementary and systemic from an EU constitutional law point of view. First, it is complementary since it creates new EU law bodies with entrenched accountability structures. These new bodies are integrated into existing national and supranational institutional frameworks. The ESAs' Boards of Supervisors comrpise non-voting representatives of the Commission and the ECB and are accountable to the European Parliament and Council. At the same time, they are composed of national authorities' representatives and act as supranational representatives of Member States' legal orders. The EU institutions are nevertheless responsible for the budgetary oversight and regulatory decision making procedures that structure the ESA operations. The ESAs complement the national supervisory systems by directly granting them the opportunity to deliberate matters in a supranational setting. Second, the system is systemic. It encapsulates national financial market interests within a singular supranational framework. The ESAs supervise and integrate Member States' authorities, but are themselves supervised by the EU institutions. The EU and

[1203] Article 29 ESA Regulations.

the EU constitutional framework thus serve as the ultimate constitutional guarantor in that understanding of supervision. EU law presents a complementary system through the lenses of which national financiam larets are regulated and supervised.

Fourthly, the institutional framework incorporates a *hierarchical quasi-duality* and translates that idea into the operations of *heterarchical support mechanisms*. Quasi-hierarchical duality refers to the continuous existence of a distinction between national and supranational legal orders. Both national and supranational legal orders are integrated into a new composite framework. This results in a hierarchical structuring of both legal orders as a matter of supranational law. Supranational law determines and confines the operations of national supervisory authorities. As such, national authorities are hierarchically subordinate to supranational law. This hierarchical structuring is not however absolute, but takes shape through heterarchical support mechanisms. The provision of dispute resolution mechanisms, the ability to hold ESAs to account, the detailed system of judicial protection and remedies all express and expound on the duty of sincere cooperation and the EU's commitment to a specific rule of law as relfected in Articles 4(3) and 19(1) TEU. The mechanisms for dispute resolution are heterarchical because they are fully integrated into the EU legal sphere. At the same time, they constitute measures aimed at the involvement of national supervisory authorities qua national authorities. The functioning of these authorities takes place in an increasingly supranational realm, which determines the conditions of such functioning.

233. *Overview* – The following table summarizes these arguments:

institutional heteronomy	constitutional basis	legal translation
dispersed unity of policymaking	art 59 TFEU; art 114 TFEU	FSAP implementation; ESFS
cooperative incentives	art 114 TFEU; art 291 TFEU	art 10-15; art 17-19; art 21, 28, 30, 38 ESA Regulations; ESRB Regulation
complementary systemic supervision	art 114 TFEU	art 3, 10(3), 13, 14, 15(3), 40(1) (c) and (d), 42, 63-64 ESA Regulations; ESRB Regulation
hierarchical quasi-duality	art 4(3) and 19(1) TEU	art 2(4), 31, 60-61 and 69 ESA Regulations

The abovementioned table demonstrates how the institutional framework of EU financial market supervision evolved into a structure of coordinated or integrated action among different national and supranational institutional actors. In particular, it outlines how vague constitutional provisions have been translated into specific institutional cooperation structures that create new regulatory spaces between the traditional supranational and the national levels. In doing so, EU law institutionalizes a supervisory system that allows for and restrains national regulatory autonomy within a particular cooperative or interactive modus. The identification and intepretation of a vague institutional mandate within Article 114 TFEU thus gave rise to a system of market supervision that is hardly envisaged within that provision. The emergence of that system in the realm of EU financial market supervision nevertheless demonstrates that the constitutional framework of EU integration has evolved precisely to allow this kind of supranational intervention in the national legal orders.

234. *Outlook* – Although the system of EU financial market supervision remains less developed compared to its directly mandated competition law supervision counterpart, different elements point towards the emergence of a similarly structured 'institutionally heteronomous' framework emerging. Whilst these elements are present in the system's design, the Court will once again be called upon to ensure the operational integrity and future functioning of the system. Compared with the system in EU competition law supervision, the Court has not developed a full-fledged 'jurisprudence' in that regard. The presence of a Board of Appeal, the emphasis on effective judicial protection and the identification of coordination rights governing actual or hypothetical administrative disputes will nevertheless serve as beacons for further developments of the system. The extent to which the Court interprets and develops these novel institutions and principles will significantly contribute to the emergence of the institutionally heteronomous framework of EU market supervision. The regulatory framework analyzed demonstrated that all elements supporting such framework are presently available for further legislative or judicial operationalization.

Chapter 3. Institutional heteronomy as constitutional convergence

1. Introduction

235. *Overview of this chapter* – This chapter provides a concluding overview of the analyses developed in the previous two chapters. Section two recapitulates the elements of institutional heteronomy identified in both directly mandated competition law supervision and indirectly mandated financial market supervision. The elements structuring and justifying the emergence of institutionally heteronomous EU market supervision regimes directly resulted from particular interpretations read into the constitutional framework. These constitutional techniques incorporated a particular reading of the scope of different legal bases, the identification and operationalization of supranational cooperative rights as instruments of institutional design and the need for complete judicial protection at both the EU and national levels. Section three summarizes and systematizes these constitutional techniques and the grounds of change they have incorporated. In doing so, it demonstrates that differently structured market supervision regimes rely on similar constitutional techniques to justify the institutional organization, design and operations of EU market supervision. The chapter therefore concludes by positing the hypothesis that commonly structured *constitutional principles* underlie and shape these constitutional techniques. The identification and conceptualization of such principles will be the subject of the third part of this dissertation.

2. Institutional heteronomy as organizational justification

236. *Elements of institutional heteronomy justifying EU-structured market supervision*– The previous two chapters outlined the institutional proxies shaping supranationally structured market supervision in competition and financial market law enforcement. These institutional proxies – together with constitutional grounds of change – allowed for the identification of four functional *elements* that connoted the emergence of an institutionally heteronomous system of market supervision.

Firstly, institutionally heteronomous market supervision structures emerged within a substantively unified policymaking field. Unified policymaking emerges from the supranational level and results in the adoption of a single rulebook governing a particular substantive field of law. Whilst the field of EU competition law reflects such unified characteristics as a matter of EU exclusive competences (Article 3(1)(b) TFEU), EU financial regulation gradually evolved into a *de facto* unified policymaking framework. In that framework, EU law is responsible for determining the key principles, structures and policies governing integrated and integrating financial markets across and within the Member States. The existence or emergence of such unified policymaking features justified the establishment of supranationally structured organizations capable of supervising and enforcing these features.

Secondly, the EU was never entirely to replace Member States' regulatory structures. It rather projected the inclusion of these structures into a supranational framework of understanding. In that image, Member States were to cooperate with the supranational level to effectuate supranational law across national legal orders. The need to structure Member State cooperation into a more institutionalized setting could therefore also justify the emergence of particularly institutionalized market supervision regimes. In that understanding, the need for cooperative incentives also justified the establishment of supranationally structured bodies. The establishment of the ECN and the ESFS specifically allowed for the inclusion of such incentives within a supranationally structured network.

Thirdly, the responsibilities entrusted to Member States in both the implementation and application of EU law necessitated an institutional framework that reflected these responsibilities. The institutional framework thus outlined reflected a preference for complementary systemic supervision. In that understanding, supranational supervisors intervene if and to the extent that national authorities do not properly deal with or are not capable of handling the case at hand. Supranational enforcement agencies only intervene if and to the extent that their intervention is necessary to maintain, support and confirm the coherence of a unified policymaking sphere. In that understanding, they serve to maintain and structure the system of EU market supervision through supplementary enforcement powers. The Commission competition law enforcement powers are less supplementary than the ESA powers, as the former is able to withdraw a case from national authorities without having to rely on breaches of EU law or emergency situations.

Fourthly, the structure of EU integration as a single framework in which diversity is reigned in by unity requirements translates into a system of hierarchical quasi-duality. In that system, supranational market regulators act as a primus super pares, structuring and regulating the interactions between and institutional organization of national supervisory bodies. In doing so, EU law intervenes in national legal orders with a view to include the latter into the supranational regulatory framework. The primus super pares function and complementary intervention options attributed to the supranational bodies can in that understanding be justified by the specific need for such quasi-duality to emerge.

237. *Overview* – The following table summarizes the elements of institutional heteronomy as detected in the market supervision systems established in EU competition law and EU financial market regulation. These elements justified the emergence of and reliance on particular techniques of institutional organization in the development of supranationally structured market supervision regimes.

elements of institutional heteronomy	directly mandated EU competition supervision	indirectly mandated EU financial market supervision
unity of policymaking	*de iure*: art 3(1)(b) TFEU	*de facto*: art 114 TFEU
cooperative incentives	ECN	ESFS
complementary systemic supervision	Commission enforcement powers	ESA enforcement powers
hierarchical quasi-duality	Commission primus super pares	ESA primus super pares

238. *Constitutional techniques underlying elements of institutional heteronomy* – The table demonstrates that the four elements identified appear in different institutional guises in both regimes. Whilst the European Commission remains a complementary systemic enforcement body and functions as a *primus super pares* by virtue of its direct constitutional mandate, the ESAs have only been attributed similar powers as a matter of institutional delegation read into Article 114 TFEU. The latter provision's open-textured nature allowed for a *de facto*

exclusivity of regulatory competences to be attributed to the EU level and for complementary supervisory structures to arise.

From that perspective, it could be argued that the heteronomous mandate read into Article 103(2) TFEU provided *inspiration* for the operationalization of the vague Article 114 TFEU mandate. In that understanding, both 'mandates' reflect a reliance on similar underlying constitutional *techniques* governing the institutionalization of supranationally structured market supervision. These techniques, identified in the constitutional grounds of change sub-questions, will be summarized in the subsequent subsection.

3. Constitutional techniques enabling institutional heteronomy

239. *Overview of this subsection* – This section recapitulates and integrates the constitutional *techniques* underlying institutionally heteronomous market supervision regimes. In order for both directly and indirectly mandated market supervision regimes to take shape, Treaty legal bases needed to be read as incorporating an operational support mandate (a.) and as enabling the identification and creation of supranational cooperative rights (b.). The particular procedural context in which these regimes operate and the attention paid within that context to fundamental procedural rights demonstrate that complete judicial protection equally serves as a technique to organize institutional arrangements of EU market supervision (c.).

a. Scope of legal basis as trigger for converging institutional innovation(s)

240. *Legal bases as operational support standards* – Although the Court of Justice maintains the final authority on the scope of a Treaty legal basis[1204], other EU Institutions have built on these interpretations to accommodate the supranationally structured market supervision regimes analyzed in the previous chapters. Both Article 103(2) TFEU and Article 114 TFEU have been read to incorporate an operational support mandate which governs the institutional interaction between supranational and national authorities. In an operational support understanding, one level of governance supports the operations predominantly carried out at a different level. The scope of both Treaty legal bases is in that regard understood to promote and enable operational support mandates. At the same time, both legal bases also restrain the institutional options underlying institutionally heteronomous market supervision arrangements. The open-textured nature of Article 114 TFEU seems to reflect lesser restraints in that regard. This is particularly exemplified by the attribution of discretionary sanctioning powers to ESMA in the realm of credit rating agency supervision.

241. *National operational support in Article 103(2) TFEU* – The evolution of the directly mandated market supervision in the realm of competition law confirms the operational support reading. Article 103 TFEU provided from the earliest days a legal basis through which the enforcement of competition law could be structured and modified in a deliberately vague constitutional context. References in that provision to the role of national competition

[1204] On the constitutional importance of a correct choice of legal basis, see for example Case C-166/07, *European Parliament v Council* [2009] ECR I-7135, para 42 and references included therein: the context of the organisation of the powers of the Community, the choice of the legal basis for a measure must rest on objective factors amenable to judicial review, including, in particular, the aim and the content of the measure. See also Advocate General Fennelly's argument that the choice of legal basis 'for a measure may not depend simply on an institution's conviction as to the object pursued, but must be based on objective factors which are amenable to judicial review', see Opinion of A.G. Fennelly to *Tobacco Advertising I,* para 61. See also among others Case C-370/07, *Commission v Council*, [2009] ECR I-8917, para 47-50. That emphasis on objective factors did not impede the emergence of a competence-enhancing case law, allowing for the open-ended scope of legal bases to be clarified and sanctioned by the Court, see S. Weatherill, 'Competence and Legitimacy' in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford, Hart, 2009), 20

authorities could be read in at least three ways. First, these references were meant to grant constitutional 'room of existence' to national competition law provisions. Article 87(2)(e) EEC Treaty (Article 103(2)(e) TFEU) determined that the Council needed to determine the relations between 'municipal law' and supranational provisions. As such, not only was room created for national initiatives, national competition rules appeared to be implicitly presupposed as necessary for the functioning of the EU market integration system. Former Article 88 EEC (now Article 104 TFEU) even more explicitly confirms that presumption. Second, Articles 87(2)(d) and 89 EEC Treaty (Article 103(2)(d) and 105 TFEU) only refer to the role of the Commission and of the Court of Justice in enforcing the newly established supranational competition law provisions. At the same time however, these provisions did not *per se* exclude national competition authorities from playing a role in the supervision and enforcement of supranational competition law. National authorities could indeed be granted a subordinate and supporting role. Third, Article 87(2)(c) EEC Treaty structured and allowed for a discretionary balance between effective supervision and simplified administrative control to be developed. Whilst Article 89 EEC Treaty only mentioned the European Commission to act as a supervisor in the enforcement of supranational competition law provisions, the legal basis of Article 87 did not however exclude a meaningful interaction between the Commission and national authorities. As such, that provision remained agnostic to the involvement of national competition authorities or courts in the exemption/excpetion process.

The aforementioned legal basis structure directly enabled institutional innovations and adaptations. Whilst the role of the European Commission as a directly mandated market supervisor was rather difficult to be altered without considering a Treaty change[1205], the involvement of national competition authorities and courts in addition to the Commission's role could not however be neglected. Regulation 1/2003 precisely interpreted Article 103 TFEU in that way. Without developing elaborate justifications as to its choice of supervision mechanism, the new Regulation confirmed the Commission's role at the top of the pinnacle of EU competition law supervision. The decentralized application of Article 101(3) TFEU reflected a new balance between effective supervision and simplified administration, whilst remaining faithful to the constitutional division of powers reflected in the Treaty. In the system, the Commission would still remain the primary enforcement agency, acting under the supervision of the Court of Justice engaging in comprehensively tailored judicial review.[1206] The role of national authorities and courts was to provide operational support by alleviating the Commission's burden. Provisions guaranteeing the exchange of information, national and supranational involvement during inspections and national court proceedings and the direct institutional assimilation mandate read into Regulation 1/2003 all reflect that newfound balance. The involvement of national authorities in the EU's institutional competition law supervision structure enabled the emergence of a composite or integrated sphere in which national authorities operated in a supportive yet subordinate function to the EU institutions.

[1205] For another position, see C.D. Ehlermann, 'Reflections on a European Cartel Office', 32 *Common Market Law Review* (1995), 481, who rather remarks the need for collegiate decision-making. He does not however refer to the need for a Treaty change or any legal basis at all. The requirement that all Member States will wish to be represented seems to indicate that Ehlermann would consider Article 352 TFEU an appropriate legal basis in that regard, although that argument is not made explicit.

[1206] As apparent from Case C-272/09 P, *KME Germany*, para 104; Case C-386/10 P, *Chalkor,* para 64 and 99; Case C-389/10 P, *KME Germany*, para 131; on the notion of comprehensively tailored review reflected in these judgments, see P. Van Cleynenbreugel, 'Constitutionalizing comprehensively tailored judicial review in EU competition law', 18 *Columbia Journal of European Law* (2013), 519-546. For a similar perspective, see R. Wesseling and M. van der Woude, 'The lawfulness and acceptability of enforcement of European cartel law', 35 *World Competition* (2012), 573-598. See also more recently, Case C-89/11 P, *E.ON Energie v Commission,* judgment of 22 November 2012, nyr, para 76.

The vague wording of the different subparts of Article 103 TFEU made such a reading not only constitutional, but also exemplary for other fields of market supervision.

242. *Operational support as non-exclusive supervisory powers* – That posture also explains why the exclusive competence proclamation of competition law in Article 3(1)(b) TFEU does not apply to the supervisory powers enabling the application ofEU competition law. Competences exclusively attributed to the European Union can in principle be delegated to the national legal orders.[1207] A delegation presupposes the grant of exclusive legislative or regulatory authority by the Treaties to the European Union and the subsequent conditional regrant of that authority to the Member States.[1208] National legal systems would in that image function as *mere agents* of an exclusively competent Union.[1209] Such delegation is not only conditional, its very constitutionality has raised questions[1210], as it would frustrate the balance among national authorities.

The delegation of exclusive competences narrative does not adequately capture the competition law supervision framework reflected in the Article 103 TFEU legal basis. According to that narrative, delegated competences are retransferred to the Member States. They would retain de facto *exclusive* regulatory competences by virtue of a supranationally revocable delegation mandate. Article 103 TFEU directly incorporates national authorities' involvement within the balance of effective supervision and simplified administration of Article 101(3) TFEU. That posture is directly confirmed by Article 105 TFEU, in which the Commission's enforcement function is said to take place in cooperation with the competent authorities in the Member States. Article 103 TFEU can thus be said to outline the precise scope of exclusivity reflected in Article 3(1)(b) TFEU.[1211] Article 103 in that understanding mandates or at least allows national operational support mechanisms to complement rather than replace supranational supervision mandates. National authorities are no longer mere delegated agents, but present directly mandated players in the constitutional enforcement system which can only be granted supplementary supervision powers. The determination of the scope of such supplementary powers is attributed to the Council when striking a balance between effective supervision and simplified administration.

243. *Supranational operational support in Article 114 TFEU* – The field of financial market supervision as a subset of Internal Market supervision exemplifies a non-mandated extension of supranationally created supervision structures. Compared to the competition law supervision mandate, the establishment of 'integrated' financial market supervision structures took shape against a constitutionally more contested constitutional background. Article 114 TFEU has in that understanding been read as reflecting a broad delegation mandate to regulate the Internal Market, at least to the extent that actual or potential impediments to the free movement or genuine distortions of competition could be detected. Whilst the

[1207] On such delegation, see R. van Ooik, note 487, 15.

[1208] R. Schütze, 'Dual Federalism constitutionalised: the emergence of exclusive competences in the EC legal order', 32 *European Law Review* (2007), 4, referring to a logic that inverts the very idea of shared competences governing the establishment of exclusive competences. See for a similar argument on the shared nature of presumably exclusive competition law enforcement competences, P. Craig, note 1235, 328.

[1209] On Member States' agency roles especially in the realm of EU telecommunications law, see also M. De Visser, note 23, 68-70.

[1210] For an overview, R. van Ooik, note 487, 15.

[1211] On the limits of general objectives' clauses in the Treaty framework (albeit in a different context), see among others case Case 229/83, *Leclerc*, [1985] ECR 1, para 8; Case C-341/95, *Bettati,* [1998] ECR I-4355, para 75: 'Article 3 of the Treaty determines the fields and objectives to which the activities of the Community are to relate. It thus lays down the general principles of the common market, which are to be applied in conjunction with the respective chapters of the Treaty devoted to their implementation'.

harmonization powers in Article 114 TFEU had been considered an exclusive competence prior to the cataloguing exercise in the Lisbon Treaty[1212], it is now accepted that the provision projects a framework of shared competences.[1213] The necessities of establishing or maintaining an internal market allow for the establishment of a variety of 'measures for the approximation' of national laws. These measures include the creation of maximum standards that transform a specific subfield of EU internal market law into an exclusively EU regulated framework.[1214] At the same time, Article 114 TFEU also incorporates an institutional delegation mandate. That mandate allows for the establishment of supranational institutions contributing to the functioning of the Internal Market. From that perspective, regulatory agencies supporting a particular substantive law harmonizing instrument could be established.

The constitutional interpretation of Article 114 TFEU allows for the development of composite or integrated administrative structures. Whereas the Court only sanctioned the establishment of a supporting supranational agency with mere information collecting and dispersing competences in the realm of information security[1215], the Commission, Council and European Parliament read into that judgment a broader 'operational support' argument. In that reading, the Court allowed for the creation of supranational bodies with limited binding decision-making powers.[1216] These supranational bodies could directly bind national authorities and even financial market participants if and to the extent that the conditions of subsumption, guidance, protection and guarantee as identified in the previous part had been complied with.[1217] In doing so, the institutions read into Article 114 TFEU a mandate to

[1212] See for that position, Opinion of A.G. Fennelly in *Tobacco Advertising I*, para 139: 'I have already explained that Articles 57(2) and 100A of the Treaty create a general Community competence of a horizontal, functional character'. See for a similar earlier reasoning, Opinion of A.G. Léger to Case C-233/94, *Germany v European Parliament and Council*, [1997] ECR I-2405. In para 80, the Advocate General confirms that Article 114 competences can be shared if and to the extent that the Treaty indicates as such, e.g. in para 4 of that provision. In other instances however – particularly para 1 of that provision- such sharedness is not mentioned. The same goes for then Article 57 EEC Treaty. At para 82 of his opinion, the Advocate General stated that 'at no time does Article 57 refer to the competence of the Member States. It entrusts the Community alone with the responsibility for the coordination of national legislation in this field, which shows that, from the very outset, the authors of the Treaty considered that, as regards the taking-up and pursuit of activities as self-employed persons, coordination was better achieved by action at Community rather than national level'. As a result, para 85 qualifies the Member States' powers operating within this 'exclusive' realm: 'When the exclusive competence of the Community is limited to the harmonization of laws, as it is in this case, it does not thereby deprive the Member States of their power to enact new rules in the relevant field. Of course, harmonization necessarily entails some amendment of the substantive rules in force in certain Member States. However, those States still retain complete freedom as long as the Community authorities have not taken action to harmonize national laws. Nor is there anything to prevent them from enacting rules drafted from the outset so as to take account of those enacted by other Member States. Furthermore, once Community harmonization has been completed, the Member States can once again intervene provided that they do not undermine the harmonized rules; their scope for action in that regard therefore depends naturally on the degree of harmonization'. In stating so however, the Advocate General acknowledges that Member States remain at liberty to act and that the harmonization provisions do not amount to a competence that would imply that Member States can no longer act by virtue of the supranational provision (see for that definition of exclusive powers, A. Von Bogdandy and J. Bast, note 753, 241. See also T. Konstadinides, note 46, 193.

[1213] See explicitly *BAT*, para 179 and *Vodafone*, para 75.

[1214] Von Bogdandy and Bast refer to this phenomenon as the emergence of secondary exclusivity in EU law, see A. Von Bogdandy and J. Bast, 'The Federal Order of Competences' in A. Von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Oxford, Hart, 2nd Edition, 2009), 291.

[1215] See the discussion of Enisa at nr. 243 of this dissertation.

[1216] For an argument that the Court allows such deviations from original intentions in the wake of evolutions having taken place in a particular policy field, A. Von Bogdandy and J. Bast, note 1214, 292: 'Long term change in the understanding of a policy area may well lead to a construction of a legal basis that does not reflect the views of the original framers of the Treaties'.

[1217] See nr. 160 of this dissertation.

transform the shared nature of internal market competences into a mandate to create integrated or composite supranational bodies. These bodies, though supranational in nature, comprise national authorities, regulate these authorities and provide for coordinated information gathering among these authorities. As such, Article 114 provides a basis for the establishment of supranational authorities that readily complement the existing structures at the national level. The creation of such structures twarts a clear-cut and dual line of separation between the supranational and the national levels. Both levels cooperate and converge within a supranational framework.

Article 114 TFEU does not *per se* limit the role of supranationally structured supervisory bodies to supplementary intervention. The CRA Regulation directly entrusted ESMA with discretionary sanctioning powers and downplayed the role of national authorities and national courts in that regime.[1218] The apparently boundless extension of the institutional delegation mandate structured in Article 114 TFEU comprises a direct consequence of the supranational operational support reading reflected in that provision. If and to the extent that full-fledged first-line EU supervisory intervention is necessary to support the operations of a supranational substantive law framework, the institutional mandate of Article 114 would allow for such mandate to emerge.

244. *Comparison between both operational support mandates* – A major difference between Article 103 TFEU and Article 114 TFEU lies in the 'delegatory' nature of the latter. Whereas Article 103, read in combination with Article 105 grants the European Commission a particular supervisory and enforcement role, a similar concrete institutional designation is lacking in the general provision allowing for 'measures for the approximation' of national law in the service of the establishment and functioning of the Internal Market. Whilst no explicit institutional choice against the involvement of the Commission in particular Internal Market supervision tasks is reflected in that provision, the scope of 'measures for the approximation' of national laws has been interpreted as justifying the establishment of *intermediate* supervisory bodies at the supranational level. The Court's judgment in *Enisa* limited the scope of institutional action taken on that legal basis to the establishment of such bodies.

In addition to the lack of a specific Commission designation, the institutional mandate in Article 114 TFEU is structured in a reversed way compared to Article 103, yet results in a similarly integrated or composite outcome. The premiss underlying Article 114 TFEU is a delegation away from national regulatory autonomy and competences to a supranational alternative. That alternative can arise only to the extent that the supranational level enables the establishment and functioning of the internal market and in conjunction with existing national regulatory structures. More specifically, Article 114 TFEU refers to provisions laid down by law, regulation or administrative action in Member States. Attached to these national provisions, national enforcement mechanisms and structures could also be harmonized or integrated to the extent necessary for the effective supervision and enforcement of supranational rules. At the same time, Article 114 does not directly mandate the inclusion of national authorities within its realm. The institutional delegation mandate reflected in that provision could therefore theoretically be read as allowing for the replacement of national authorities with a single supranational regime. The Court's *Enisa* judgment can nevertheless be understood to express a clear preference for the integration of national authorities into supranationally structured 'networks'. In doing so, the institutional delegation mandate read into Article 114 TFEU expresses a preference for supranationally structured integration of national authorities in an integrated supranationally determined structure.

[1218] See nr. 198 of this dissertation.

In both instances, the legal bases incorporate a message of operational support. Whilst Article 103 projects support provided by national authorities and Article 114 TFEU enables support by supranational intermediate bodies, both approaches are remarkably similar. In both instances, legal bases are read to empower the supranational level to structure the operations of national authorities with a view to fit them into a supranationally determined substantive and institutional framework. As such, both national and supranational operational support enable the development of similarly structured supranational market supervision arrangements.

d. Supranational 'cooperative' conflict, control and adaptation rights

245. *Supranational cooperative rights* – Whilst the scope of legal basis allowed for the establishment of supranationally structured market supervision regimes, the very same legal bases also enabled the emergence of supranational 'cooperative rights' governing the institutional operations of these regimes. As mentioned above, these rights are often not indicated as such, but nevertheless present entitlements for both national and supranational actors to function within that framework. In doing so, they serve to define the relative powers of EU institutions and Member States' bodies.[1219] Both regimes directly incorporated conflict and control rights. At the same time, a preference for 'national institutional adaptation rights' could also be detected in the realm of competition law supervision and projected in the realm of financial market supervision.

246. *Cooperative rights in EU competition law supervision* – Although set by supranational legislation, cooperative rights grant both supranational and national supervisory authorities intervention possibilities in the supervisory systems' functioning. In doing so, bundles of rights established aim to guarantee for a coordinated enforcement of EU law. Regulation 1/2003 incorporates all three kinds of cooperative rights.

Firstly, it establishes a system of multi-level interaction and provides tools to resolve conflicts within these multi-level operations. The supranational supervision framework grants both direct intervention rights to the European Commission and to national judges and authorities. Whereas the latter only play a predominantly subordinate and supporting role[1220], Regulation 1/2003 effectively obliges national authorities to apply EU competition law.

Secondly, the increased scope of interaction between the supranational and the national levels resulted in the increased importance of indirect intervention tools. The roles of national courts, the Advisory Committee and the European Competition Network all reflect rights attributed to both the supranational and national levels to engage upon meaningful interaction and mutual control of each other's activities. These intervention tools are more or less indirect because they do not as such incorporate direct accountability obligations.[1221] They provide entitlements, not to the application of particular supranational norms in the interest of the Member States, but to the incorporation of particular national accountability tools in the operations of EU competition law supervision.

Thirdly, the institutional functioning of the EU competition law supervision scheme equally reflects tools that indirectly mandate the emergence of a converging organizational market

[1219] J. Mendes, note 61, 25.
[1220] Especially when the Commission withdraws a case or allocates it to the supranational level, see Article 11(6) Regulation 1/2003 and nr. 82 of this dissertation.
[1221] See e.g. the Advisory Committee, which has an advisory and consultative role, but does not as such have direct tools to keep Commission action within legally circumscribed boundaries, see Article 14 Regulation 1/2003.

supervision blueprint. The provisions of Regulation 1/2003 and more specifically Article 35 confirm the autonomy of Member States to designate competent administrative authorities or courts to undertake EU competition law supervision tasks. That provision is not however as neutral as might *prima facie* appear. The Court of Justice did indeed read into that provision a mandate to assess the operations of national supervisory authorities, relying on the 'effectiveness' of EU competition law supervision underlying that provision.[1222] From that perspective, Regulation 1/2003 includes 'institutional adaptation' rights, that allow a supranational review body to make recommendations, suggestions or even oblige national supervisory authorities to adapt part of its institutional structure. The institutional functioning of the integrated or composite supervisory structure in EU competition law thus enables the rise of an institutionally assimilated national competition law enforcement framework. Specific attention in that regard has been paid to the rise of an adversarial procedural framework in which national competition law supervisors can effectively be held to account for their actions.[1223] A similar continuous refom towards more adversarialism has also been noted at the Commission level through the gradual extension of the Hearing Officer's role.

247. *Cooperative rights in EU financial market supervision* – The ESA Regulations adhere to a similar cooperative institutional functioning logic. Whilst the ESAs formally constitute new supranational authorities, their functioning showcases that they actually constitute formalized networks of national supervisors. Those networks are structured in accordance with EU-wide cooperative rights. Not unlike the institutional functioning of the EU competition law supervision system, these rights are threefold.

Firstly, the ESA system and the information-providing structures of the ESFS reflect direct intervention rights for the European Union institutions, the European Supervisory Authorities and the national authorities. In particular, these intervention rights allow for the direct addressing of supervisory decisions to national supervisory authorities, for the delegation of tasks to the ESAs, for a procedure safeguarding national fiscal interests etc. The ESAs function as indirect rule-making bodies in the development of regulatory and implementing technical standards. The ESAs in that regard effectively structure national debates on the extent of supranational technical standards and allow for a concerted regulatory procedure structuring these standards. National authorities, convening within the ESAs thus enjoy preferential access to intervene in the determination of supranational substantive law.

Secondly, different accountability mechanisms ensure the involvement of both supranational and national institutions. By phrasing these accountability mechanisms as rights to be informed or rights to participate, the structure of the ESAs effectively bridges a formerly dual regime between national and supranational into a more complex and multifarious bundle of accountability rights.

Thirdly, the institutional operations of national supervisory authorities have been attuned to the new framework governing the ESFS. Although the regulatory framework does not directly address the institutional functioning of national financial supervisors, the emergence of the ESFS system nevertheless nudged the national supervisors into a 'Twin Peaks' mode. Whilst at present the Court did not yet mandate or propose such national institutional alignment, national institutional adaptations are at the very least reflecting a shift in institutional functioning.[1224] This national institutional alignment is structured as a supranational adequateness blueprint which serves to modify the structures and operations of national

[1222] See for the role of *Vebic* in that understanding, nr. 119 of this dissertation.
[1223] P. Van Cleynenbreugel, note 526 for a conceptualization of that approach.
[1224] See nr. 220 of this dissertation.

supervisory systems. At present however, the scope of directly enforceable 'institutional adaptation' rights remains doubtful, as the Court did not directly recognize the potential and scope of such 'institutional adaptation' entitlements.

248. *Procedural adversarialism as trigger for supranational cooperative rights* – The institutional functioning narrative and reliance on cooperative rights is facilitated by the emergence of an 'adversarial' procedural framework in EU law. According to Kelemen, 'EU lawmakers have an incentive to create justiciable rights and to empower *private parties* to serve as enforcers of EU law'.[1225] Justiciable rights allow private parties to invoke EU law in their disputes with fellow private parties.[1226] The adversarial posture reflected in that approach nevertheless also applies in relation to public authorities enforcing EU law. Adversarialism is indeed understood as emphasizing the enforcement of legal norms 'through transparent rules and procedures and broad access to justice, empowering private actors to assert their rights' against both fellow private actors and against public authorities impinging on those rights.[1227] Public enforcement adversarialism thus understood comprises the opportunity for a market operator to contest the allegations made by a market supervision authority in the context of a formalized procedure in which a neutral third party allows both sides to make their claims before comprehensively reviewing the merits of these claims. Not only do EU lawmakers recognize such rights, the Court of Justice directly contributes to the emergence of more adversarial public enforcement regimes.[1228]

The EU's legal and constitutional structures promote – or even mandate – this type of 'public enforcement' adversarialism as a constitutional value of integrated market supervision. In the context of the institutional functioning of supranational market supervision regimescalls for public enforcement adversarialism have been most directly been developed in the *Vebic* judgment.[1229] The case law of the European Court of Human Rights on the right to a fair trial contributes to the emergence of such public enforcement adversarialism in the realm of market supervision.[1230] The increased call for remedies and the procedures envisaged before the ESAs' Board of Appeal equally reflects this taste for adversarialism. In addition, the Court's case law on effective judicial protection adopts a similar position in other subfields of EU law.[1231] In doing so, the Court functions as an enabler for increased participation in EU (procedural) policymaking through the Courts.

Although adversarialism presents an institutional functioning principle, its scope is mainly set by the EU judiciary. By reading adversarial obligations into the EU's constitutional and fundamental rights frameworks, the Court is increasingly influential in the developments of institutional cooperative systems grounded in adversarial public enforcement. The Court therefore not only interprets legal bases or determines the framework in which they can be relied on, it also structures the ways in which institutional functioning principles can indeed be attached to that legal basis.

e. The Court's judicial protection mandate as overempowering constitutional keystone

[1225] R. D. Kelemen, note 278, 8.
[1226] See also W. Van Gerven, 'Of Rights, Remedies and Procedures', 37 *Common Market Law Review* (2000), 502.
[1227] R. D. Kelemen, note 278, 6; P. Craig, note 350, 446, referring to fundamental rights as essential in that image.
[1228] See for that image already F. Bignami, note 278.
[1229] See P. Van Cleynenbreugel, note 36.
[1230] See nrs. 73-74 and nr. 185 of this dissertation.
[1231] See nr. 229 of this dissertation.

249. *Complete judicial protection* – Both market supervision frameworks studied emphasized the need for complete judicial protection as a matter of EU law. Complete judicial protection in that image provided a tool to structure and converge different constitutional mandates. The Court of Justice's role is essentially similar in both directly and indirectly mandated market supervision frameworks. The Treaty's judicial protection mandate allows the Court to intervene in the organization and structure of market supervision regimes for the sake of ensuring effective judicial protection. Interpreted as a bundle of positive obligations imposing minimum adequateness standards on national supervisory regimes, the principle of effective judicial protection allows for a direct judge-made intervention. The movement towards more adversarial supervision and review structures does indeed provide a clear example of the ways in which the European Court of Justice is capable of structuring the institutional operations of the new supervisory regimes within the confines of EU constitutional law. At the same time, the provision of effective or adequate judicial protection constitutes the keystone in ensuring that national supervisory authorities engage upon a proper role in the EU system of market supervision.

The principle of effective judicial protection is directly enshrined in Article 47 CFR. The Court has been willing to read into that provision a mandate to impose particular procedural obligations on national authorities and on national judges.[1232] The Court can review Commission decisions and adopts a somewhat comprehensive review stance in that regard. At the same time, the Court is called upon to scrutinize ESA Board of Appeal decisions and thus to develop a coherent framework of judicial protection against EU financial market supervisors.

The Court's obligation to ensure that the law is observed now more than ever includes fundamental rights that serve as benchmarks for the institutional operations of market supervision bodies.In both fields, the shadows of the ECHR loom large, as that court's case law on Article 6 ECHR provides for a framework through which the Court of Justice can indeed accommodate particular concerns on the structuring and operations of national and supranational market supervision structures. Whilst the Court's jurisprudential approach continues to develop in this field, it is by now clear that judicial protection serves as a structural device to oversee the operations of market supervision at both the EU and national levels and in all systems of market supervision reflected in the EU's constitutional framework.[1233]

250. *Facilitating convergence* – The constitutional obligation to ensure effective judicial protection provides the groundwork for the similarly structured constitutional operations underlying the diverse legal bases supporting the establishment of supranational market supervision structures. The Court is able not only to enforce the effective judicial protection provisions reflected in the different institutional frameworks, it is also able directly to modify the institutional outlook of national supervisory systems at large, all for the sake of effective application of EU law. This tendentious reliance on effectiveness confirms the Court's elevation of that principle to an important constitutional standard of European integration.[1234] Relying on the effectiveness of EU law allowed the Court more intrusively to scrutinize the institutional operations of the existing supervisory regimes. The banner of effective judicial protection thus serves as an inroad for court intervention and as a bridge between direct and

[1232] See P. Van Cleynenbreugel, note 1186.

[1233] In contrast, systems that operated in the shadow of EU law, such as the pre-ESA Level three Committees, did not as such allow for direct EU level judicial protection. See nr. 142 of this dissertation.

[1234] See M. Ross, 'Effectiveness in the European legal order(s): beyond supremacy to constitutional proportionality?', 31 *European Law Review* (2006), 476-498.

indirect Treaty mandates governing the establishment of supranational market supervision systems. In so doing, it allows the Court to design particular features of a supranational market supervision framework across differently structured legal bases.

f. Converging constitutional techniques

251. *Overview* – The following table summarizes the constitutional techniques relied on in both directly and indirectly mandated market supervision structures studied in the previous chapters. It shows a particular similarity in the constitutional techniques relied on to structure these market supervision arrangements.

constitutional techniques structuring institutional heteronomy	directly mandated EU competition supervision	indirectly mandated EU financial market supervision
scope of legal basis	art 103 TFEU: (national) operational support	art 114 TFEU: (supranational) operational support
cooperative rights	conflict and adaptation rights; indirect control rights	conflict and control rights; nascent adaptation rights
complete judicial protection	art 47 Charter; art 6 ECHR	art 47 Charter; art 6 ECHR

At the same time, both regimes reflect different emphases in the operationalization of these techniques. The different features of national and supranational operational support mandate and the lack of formal recognition of institutional adaptation rights in EU financial market supervision have already been mentioned in this respect. In addition, the Regulation 1/2003 framework devotes less attention to accountability of national and supranational authorities compared to the ESA framework. The latter framework provides for direct control rights for both supranational institutions and national authorities. The latter comprise voting Board of Supervisors' members and can effectively block or at least delay the adoption of Commission decisions related to EU financial regulation. The EU competition law framework on the other hand appears to grant only direct control rights over national authorities. The latter cannot effectively control the Commission's operations, as the Advisory Committee's role is rather limited in that regard. Overall however, both constitutional mandates rely on similar constitutional techniques to justify the operations of supranationally structured market supervision regimes.

4. From constitutional techniques to constitutional *principles*

252. *Constitutional bases underlying institutional convergence* – Despite differently structured legal bases, similar constitutional techniques justify the operationalization of these legal bases towards a supranationally structured market supervision regime. The similarities between these constitutional techniques are not directly related to the existence of different legal bases, but to the institutional structures underlying them. These structures incorporate constitutional principles that determine the interactions between and integration of supranational and national legal orders as a matter of supranational law. As principles governing the *exercise* of supranational competences, they effectively outline the ways in which supranationally structured market supervision regimes will operate. They constitute the principles shaping the similar characteristics of differently structured mandates. In doing so,

these principles provide a constitutional basis for the institutional organization of supranationally structured market supervision. They effectively serve as tools enabling and restraining EU governance initiatives.

253. *Towards operationalized constitutional principles?* – The argument that these constitutional techniques refer to a set of similarly structured constitutional principles provides a window through which the inquiry engaged upon in this dissertation can further be structured. If and to the extent that the institutional features and constitutional techniques underlying both market supervision regimes reflect a similar set of constitutional principles, these principles can also serve to explicate and delineate future supranationally structured market supervision initiatives in different sectors and structured in accordance with different constitutional mandates. It is therefore necessary to identify and conceptualize these principles in order to understand the institutional architecture of supranationally structured market supervision presently taking shape in EU law.

254. *Outlook to part III* – The following part of this dissertation will indeed identify these principles and the ways in which they have been operationalized to structure supranational market supervision mechanisms. The analysis of both directly and indirectly mandated market supervision categories demonstrates that these principles effectively structure and delineate the *division* of supervisory powers between the supranational and national levels. In that understanding, it can be hypothesized that EU constitutional principles governing the *existence and exercise* of *shared competences* could provide guidance on how the constitutional structures underlying supranationally structured market supervision have been operationalized.

It has indeed been argued that both directly and indirectly mandated supervision mechanisms structure a particular shared institutional sphere in which market supervision is conducted. Constitutional principles determining and operationalizing shared competences can provide insight in how these shared institutional spheres can be structured in the constitutional framework of European integration. In that image, the following research hypothesis will guide the following part of this dissertation:

The institutional features and constitutional techniques underlying the establishment of constitutionally directly and indirectly mandated market supervision regimes reflect a particular operationalization of EU Treaty principles governing the existence and exercise of shared competences. These operationalized principles give shape to a particular kind of EU federalism underlying the institutionalization of supranational market supervision.

The following part will identify what principles could be guiding in that image and the extent to which particular legal and economic considerations of federalism contribute to the operationalization of these principles.

Part III. Constitutional principles structuring institutionally heteronomous market supervision

255. *Towards third-generation operational principles: overview of this part* – The previous part identified the institutional features of supranationally structured market supervision in the realm of directly mandated competition law supervision and indirectly mandated financial market supervision. These institutional features allowed to identify converging elements of institutional heteronomy underlying both systems and justifying the emergence of supranationally structured interventions into national institutional autonomy. The previous part also expounded on the constitutional techniques relied on to bring about these institutional features. These constitutional techniques proved remarkably similar in both constitutional mandates. It has therefore been hypothesized that they reflect a particular application and operationalization of common constitutional *principles* governing the exercise and existence of shared competences in EU law. This part seeks to identify and conceptualize these principles as third generation principles of European integration (see nr. 27).

The part develops that claim in four chapters. A first chapter identifies the structures of competence division in EU law and the principles underlying its operations. In doing so, it particularly pays attention to the idea of subsidiarity underlying the entire field of shared competences. On the basis of that idea, the second chapter proceeds to contextualize the specific legal and economic context in which these principles are shaped. It identifies economic and legal theories of 'federalism' that structure the existence and exercise of shared competences. A review of these theories allows to conceptualize a framework of *reflexive regulatory coopetition* underlying EU-Member State administrative integration. That framework provides an inroad in the ways in which constitutional principles governing shared competences have been operationalized. The third chapter outlines how that framework allows to reconfigure principles governing shared competences into operational principles structuring the institutional organization of supranational market supervision. It equally argues that these reconfigured principles allow to explain the emergence of institutionally heteronomous elements identified in the previous part. A fourth chapter outlines how these reconfigured principles reflect an institutional 'settlement', in accordance with which different supranational and national actors are granted particular roles in the design and operations of a supranationally structured market supervision system. It also outlines how this settlement projects a particular image of legitimate EU intervention in national legal orders onto supranational market supervision.

The 'reconfigured shared competences' analysis developed in this part will subsequently be applied to three 'control' cases of supranationally structured market supervision in part IV of this dissertation.

Chapter 1. The constitutional framework of shared competences in EU law

256. *Overview of this chapter* – This chapter analyzes the regime of competence division in EU law as an inroad into identifying the operationalized constitutional principles structuring market supervision convergence. It proceeds in two sections. A first section recapitulates the pre- and post-Lisbon framework of competences and the regulative and operational principles underlying them. The second section restructures these principles as giving shape to the 'idea of subsidiarity' structuring EU shared competences. The idea – and not the principle – of subsidiarity allows to identify a particular structural flow in the constitutional principles governing shared competences in EU law.

1. The Treaty framework of conferred competences

257. *Three categories of EU competences* – The institutional system of European integration is structured in accordance with a principle of attributed or conferred competences.[1235] The Lisbon Treaty confirmed and explicated that principle. Article 5 TEU now states that '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. Competences not conferred upon the Union in the Treaties remain with the Member States'.[1236] Three categories of conferred competences can be distinguished in that regard: exclusively supranational, shared supranational and national and complementary supranational competences. The principles governing the regulation and operationalization of shared competences constitute a residual category that determines the extent to which exclusive and complementary structures are being structured.

258. *Judicially developed categories* – The Court of Justice explicitly distinguished exclusive from non-exclusive competences.[1237] Exclusive competences represented a small sample of conferred competences that – given their nature – precluded any Member State intervention.[1238] The Court identified the conservation of marine biological resources under the common fisheries policy[1239] and the development of a common commercial policy[1240] to be exclusively supranational in that understanding. In addition, competences to conclude international agreements could equally fall within the Community's exclusive competences.

[1235] P. Craig, 'Competence: clarity, conferral, containment and consideration', 29 *European Law Review* (2004), 324. Article 5(1) TEU states that the limits of EU competence are governed by the principle of conferral. In particular, conferral implies that 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. Competences not conferred upon the Union in the Treaties remain with the Member States (Article 5(2) TFEU). See also A. Von Bodgandy and J. Bast, note 753, 227-268.

[1236] See G. Bermann, 'Competences of the Union' in T. Tridimas and P. Nebbia (eds.), *European Union Law for the Twenty-First Century. Rethinking the New Legal Order Volume I Constitutional and Public Law External Relations* (Oxford, Hart, 2004), 66

[1237] See on the Court's role in that regard, R. van Ooik, note 487, 13.

[1238] K. Lenaerts, 'Regulating the regulatory process: "delegation of powers" in the European Community', 18 *European Law Review* (1994), 30; R. Schütze, note 1208, 6.

[1239] Opinion 1/75 [1975] ECR 1355; Case 41/76, *Donckerwolcke*, [1976] ECR 1921, para 31-35; Opinion 1/78, [1979] ECR 2871, para 44-45; Opinion 2/91, [1993] ECR I-1061, para 8, Opinion 1/94, [1994] ECR I-5267, para XIII; Case C-347/03, *Regione autonoma Friuli-Venezia Giulia*, [2005] ECR I-3785, para 75.

[1240] Joined Cases 3/76, 4/76 and 6/76, *Kramer* [1967] ECR 1279, para 39-41; Case 804/79, *Commission v United Kingdom,* [1981] ECR 1045, para 17-18; Opinion 2/91, note 1239, para 8; Case C-25/94, *Commission v Council*, [1996] ECR I-1469, para 40.

This was particularly the case if any steps taken outside the Community legal framework would be incompatible with the unity of the Common Market and the uniform application of Community law.[1241]

Within a specific *area* of exclusive competences, Member States lost all powers to lay down rules. The determination of the boundaries of such exclusivity areas therefore delineated exclusive EU competences from permissible Member State intervention. Two additional caveats governed the operations of exclusive competences. First, the scope of exclusivity generally remained limited to instances where interstate trade would be affected without supranational remediation.[1242] Member States could in that image theoretically regulate matters that did not affect interstate trade. Second, the supranational legislator was allowed explicitly or implicitly to delegate exclusive competences back to the Member States.[1243] As a result, exclusive competences could *de facto* remain shared in their concrete implementation and execution.

As a general rule, conferred competences have remained shared between the Union and its Member States.[1244] Non-exclusive competences appeared in many guises and formats. Two reasons explain that variety. First, different regulatory powers[1245] attached to specific Treaty competence bases directly or indirectly limited the scope of measures adopted at the supranational level and the resulting scope for Member State action.[1246] The establishment of maximum harmonization directives or directly applicable regulations could leave the scope for additional national provisions virtually inexistent.[1247] Second, the process of European integration increasingly relied on softer techniques of cooperation and differentiated integration at the supranational level.[1248] Over time, EU law distinguished between shared regulatory competences and shared coordinating competences.[1249] The latter enveloped competences where EU action could only result in coordinating, supporting or supplementing Member States' actions.[1250] In those instances, powers attached to particular conferred competences impeded direct harmonization or supranational regulatory intervention.[1251] Both shared regulatory and shared coordinating competences grew into separate categories of non-exclusive competences.

259. *Regulative and operational principles underlying judicially established competence categories* – The vertical division of competences at the EU level cannot solely be approached from dual exclusive versus non-exclusive and regulatory versus coordinating non-exclusive

[1241] See among other cases, Case 22/70, *Commission v Council* (*AETR*), [1971] ECR 263, para 28-31; See also Opinion 1/76, [1977] ECR 741 para 5. For a nuanced overview of constitutional problems in that regard, see G. De Baere, *Constitutional principles of EU external relations* (Oxford, Oxford University Press 2008), 43-51.
[1242] R. van Ooik note 487, 15.
[1243] See references in note 1208.
[1244] Also concurrent or parallel, see R. van Ooik, note 487, 20.
[1245] On the difference between competences and powers, see A. Gil Ibañez, note 1, 46.
[1246] On the difference between powers and competences, see A. Von Bogdandy and J. Bast, note 753, 229.
[1247] Opinion 2/91, note 1239, para 9. On the emergence of maximum harmonization as a regulatory technique, see R. Sefton-Green, 'Multiculturalism, Europhilia and Harmonization: harmony or disharmony?', 6 *Utrecht Law Review* (2010), 50-67.
[1248] On the technique of differentiated integration in EU law, see in general F. Tuytschaever, *Differentiation in European Union Law* (Oxford, Hart, 1999), 256 pp.
[1249] See for that account, R. Schütze, 'Cooperative federalism constitutionalised: the emergence of complementary competences in the EC legal order', 31 *European Law Review* (2006), 167-184.
[1250] R. van Ooik, note 487, 27-29. See also R. Schütze, note 1249.
[1251] R. Schütze, note 1249, 183.

perspectives.[1252] The inherently dynamic nature of shared competences particularly builds upon constitutional principles of operation that seek to capture the multitude of institutional intereactions envisaged in that regard.[1253] Two sets of principles can be distinguished in that regard.

Firstly, a system of shared regulatory competences presupposes a constitutional set of conflict rules capable of addressing potential conflicts between multiple governance levels.[1254] In federal systems recognizing shared regulatory competences, principles of federal supremacy and pre-emption have traditionally sought to avert these conflicts.[1255] A combination of these principles presents the *regulative framework* in which shared regulatory competences could be exercised. The EU's constitutional system poses no exception in that regard. The Court of Justice accepted that EU law cannot only produce direct effect in national legal orders[1256], but that direct effect also implies the primacy of EU law over national law in the case of conflicts between a supranational and a national norm.[1257] In a system of shared competences, the emphasis on primacy also almost naturally implies a principle of federal pre-emption.[1258] Since federal – or in this case supranational– law reflects the supreme law of the land, the scope of national law diminishes in accordance with the emergence or recognition of supranational decision-making powers.[1259] A principle of pre-emption denotes whether and to

[1252] See also S. Weatherill, 'Competence Creep and Competence Control', 23 *Yearbook of European Law* (2004), 3. See also A. Von Bogdandy and J. Bast, note 1214, 287-288; T. Konstadinides, note 46, 81.

[1253] Arguing that a clear delimitation of competences often appears impossible in itself, U. Di Fabio, 'Some Remarks on the Allocation of Competences between the European Union and its Member States', 39 *Common Market Law Review* (2002), 1296.

[1254] On that issue, G. Conway, 'Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ', 11 *German Law Journal* (2010), 967-1005. One could also consider the interaction between public and private actors in that regard. For these issues, see most notably J. Freeman, 'Collaborative Governance in the Administrative State', 45 *UCLA Law Review* (1997-1998), 1-98; J. Freeman, 'The Private Role in Public Governance', 75 *New York University Law Review* (2000), 543-675. This dissertation does not directly address that point.

[1255] Schütze refers to supremacy and pre-emption, see R. Schütze, 'Supremacy without Pre-emption? The very slowly emergent doctrine of Community Pre-emption', 43 *Common Market Law Review* (2006), 124. The principle of loyal cooperation ensures a similar connection in an ever more integrated institutional realm and therefore could serve as both a regulative principle determining the extent of competence division from an institutional deliberation perspective as well as an operational principle governing its exercise, see L. Gormley, 'Some Further Reflections on the development of General Principles of Law within Article 10 EC' in U. Bernitz, J. Nergelius and C. Cardner (eds.), *General Principles of EC law in a Process of Development* (Alphen a/d Rijn, Kluwer 2008), 310.

[1256] Case 26/62, *Van Gend & Loos*, [1963] ECR 3 (English Special Edition, 1).

[1257] Case 6/64, *Costa Enel*, [1964] ECR 585; Case 11/70, *Internationale Handelsgesellschaft mbH*, [1970] ECR 1125; Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*., 1978 ECR 629; Case 102/79, *Commission v. Belgium*, [1980] ECR 1487, para 15, Case 149/79, *Commission v. Belgium*, [1980] ECR 3903, para 19, Case C-473/93, *Commission v. Luxemburg* [1996] ECR I-3255, para 26, Case C-285/98, *Tanja Kreil v Bundesrepublik Deutschland*, [2000] ECR I-105, para 23; Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA, formerly Lucchini Siderurgica SpA*., [2007] ECR I-6199. See also B. De Witte, 'Retour à "Costa" - La primauté du droit communautaire à la lumière du droit international', *Revue trimestrielle de droit européen* (1984), 425-454.

[1258] For an introductory overview of pre-emption as a principle of federal law in the U.S., see M. D. Rosen, 'Contextualizing Preemption', 102 *Northwestern University Law Review* (2008), 781-810. See also D. Farber, 'Federal Preemption of State Law: The Current State of Play', *UC Berkeley Public Law Research Paper No. 1740043,* available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1740043&rec=1&srcabs=1778363. In the EU, see the pioneering work of M. Waelbroeck, 'The emergent doctrine of Community Pre-emption – consent and redelegation' in E. Stein and T. Sandalow, *Courts and Free Markets: Perspectives from the United States and Europe* (Oxford, Clarendon, 1982), 458-480.

[1259] On the political dimension of that process, see A. Arena, 'The Doctrine of Union Preemption in the EU Single Market: Between *Sein* and *Sollen*', *Jean Monnet Working Paper 3/10, http://centers.law.nyu.edu/jeanmonnet/papers/10/100301.pdf* , 33-55.

what extent[1260] national law will be set aside when supranational legislation is enacted.[1261] Schütze distinguished between three typologies of pre-emption in that regard: field pre-emption, rule pre-emption and obstacle pre-emption. Field pre-emption refers to an explicit veto by a federal legislative or regulatory body for States to enact norms in a given policy field. By virtue of legislative or regulatory action taken in a field, supranational or federal law is considered to have a jurisdictional monopoly to the detriment of federated entities, irrespective of whether these entities' norms directly conflict with the enacted supranational rules.[1262] Field pre-emption technically establishes exclusive competences at the supranational or federal level. Rule pre-emption on the other hand takes the existence of shared competences as its starting point.[1263] Although jurisdiction remains shared, rule pre-emption presupposes national rules will be trumped by directly conflicting supranational rules.[1264] From that perspective, the determination of 'direct conflicts' will be crucial to determine the regulatory scope granted to both supranational and national rules.[1265] Obstacle pre-emption finally allows Member States to adopt rules, but only to the extent that they do not impede the full effectiveness of supranational rules. National law could in that regard be pre-empted even when these national rules do not directly conflict with, but merely impose obstacles to the implementation of supranational provisions.[1266] These three typologies can all be identified within the EU system.[1267]

Secondly, a federally structured system incorporating shared regulatory competences also relies on *operational principles* supporting the dynamic division of shared competences.[1268] These principles determine how existing competences should be exercised *in concreto*. Both primacy and pre-emption principles presuppose a principle of sincere cooperation supporting their operations. Sincere cooperation presupposes that both the federal or supranational level and the federated levels engage in cooperation and consultations with a view to allow a workable division of competences to emerge from regulatory practice.[1269] Additional operational principles include subsidiarity and proportionality.[1270] These principles – to some extent constitutionalized in a foundational text and refined in judicial practice[1271]–determine the extent to which shared competences will result in specific supranational action.

[1260] R. Schütze, note 1255, 1039. See also A. Goucha Soares, 'Pre-Emption, Conflicts of Power and Subsidiarity', 23 *European Law Review* (1998), 132-145; E. Daniel Cross, 'Pre-Emption of Member State Law in the European Economic Community. A Framework for Analysis, 29 *Common Market Law Review* (1992), 447- 472.

[1261] R. Schütze, note 1255, 1033.

[1262] J. Weiler, note 9, 277; R. Schütze, note 1255, 1035.

[1263] Konstadinides refers to this kind of pre-emption as implied pre-emption always solved in favour of EU law, at least in the absence of clarifying secondary Union legislation, see T. Konstadinides, note 46, 170.

[1264] R. Schütze, note 1255, 1037.

[1265] For the nascence of a pragmatic framework in that regard, J. Weiler, note 1262, 278.

[1266] R. Schütze, note 1255, 1036.

[1267] R. Schütze, note 1255, 1040.

[1268] On that dynamism in EU law, see R. Bieber, 'On the Mutual Completion of Overlapping Legal Systems', 13 *European Law Review* (1988), 148.

[1269] On the principle's operation in that regard, J. Temple Lang, note 1086, 1483-1532.

[1270] Both principles have explicitly been incorporated in the EU Treaty framework since the 1993 Maastricht Treaty, see G. De Búrca, 'Proportionality and Subsidiarity as General Principles of Law' in U. Bernitz and J. Nergelius (eds.), *General Principles of European Community Law* (The Hague, Kluwer 2000), 93-112.

[1271] A. Goucha Soares refers to the Court of Justice's activities as enabling the fall of a structural system of conferred competences, see A. Goucha Soares, 'The Principle of Conferred Powers and the Division of Powers between the European Community and the Member States', 23 *Liverpool Law Review* (2001), 57-78.

260. *Constitutional confirmation of competence categories* – The Lisbon Treaty adaptations in large part codified the regulative and operational principles of competence division identified above.[1272]

Article 5 TEU directly incorporates the principle of conferral.[1273] Article 4(1) TEU states that competences not conferred by the Treaties shall remain with the Member States. The TFEU enumerates a set of exclusive competences. Article 3 TFEU states that the EU shall have exclusive competences to regulate the customs union, the establishing of the competition rules necessary for the functioning of the internal market[1274]; the establishment of monetary policy for the Member States whose currency is the euro[1275], the conservation of marine biological resources under the common fisheries policy and the common commercial policy. In addition, *the Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.*[1276] The list of exclusive competences is partially a confirmation of the Court's case law on the matter, but also includes other spheres of action that by their very nature have long been considered exclusive EU competences.

Article 4 TFEU states that the shared competences category encompasses all competences conferred that do not fall within either the exclusive competence or the supporting competence categories. The provision remarkably continues by providing examples of shared competences, including the internal market, agriculture and the environment.[1277] The principle of primacy is not directly confirmed by the new Treaties, but can nevertheless be found in a non-binding declaration attached to the Treaties.[1278]

The Lisbon Treaty also explicitly refers to operational principles underlying EU competence division. Article 2 TFEU establishes that 'when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the

[1272] For an overview, see P. Craig, *The Lisbon Treaty. Law, Politics, and Treaty Reform* (Oxford, Oxford University Press 2010), 155-192, in a chapter called Competence, Categories, and Control. See also L. Serena Rossi, 'Does the Lisbon Treaty Provide a Clearer Separation of Competences between EU and Member States?' in A. Biondi, P. Eeckhout and S. Ripley (ed.), *EU Law After Lisbon* (Oxford, Oxford University Press, 2012), 85 -106.

[1273] The provision states that [t]he limits of Union competences are governed by the principle of conferral.

[1274] On this provision in the Treaty establishing a Constitution for Europe and its scope, see P. Craig, note 1235, 328. For an assessment of what role subsidiarity could or should play in the institutional organization of EU competition law enforcement, with emphasis on national authorities pre-decentralization, see J. Bourgeois, 'Enforcement of EC Competition Law by National Authorities: Square Pegs in Round Holes?' in L. Gormley (ed.), *Current and Future Perspectives on EC Competition Law* (The Hague, Kluwer Law International, 1997), 94-95.

[1275] A long standing prediction of exclusivity surrounds that provision, see already A. Dashwood, 'States in the European Union', 32 *European Law Review* (1998), 212.

[1276] The scope of this provision does not entirely reflect the case law on that matter, see R. Schütze, 'Lisbon and the federal order of competences: a prospective analysis', 33 *European Law Review* (2008), 712.

[1277] D. Chalmers, G. Monti and G. Davies, note 683, 209.

[1278] See Declaration No. 17 concerning Primacy, [2008] O.J. C115/344, which reads: The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law. The Declaration demoted the binding legal status of Article I-6 of the Treaty establishing a Constitution for Europe to a mere declaration of intentions among the parties to the Treaty. An extract of a Council Legal Service Opinion of 22 June 2007 was attached to the Declaration, claiming that 'the fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice'. R. Barents, 'The precedence of EU law from the perspective of Constitutional Pluralism', 5 *European Constitutional Law Review* (2009), 421-446.

Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence'. The latter provision reflects the principle of pre-emption and, given the vagueness of its phrasing, potentially includes field pre-emption, rule pre-emption and obstacle pre-emption. Article 2 TFEU confirms particular supporting, coordinating and supplementary actions that cannot of themselves be harmonizing in nature.[1279] Article 5 TEU also contains references to particularly tailored EU principles of subsidiarity and proportionality.[1280] Article 4(3) TEU additionally states that, pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

2. Classifying constitutional principles

261. *Transformable constitutional principles governing competence division* – The conceptual recognition of exclusive, shared and complementary competences in EU constitutional law presents a starting point for the assessment undertaken in this dissertation. It is clear that the system of exclusive competences does not directly refer to supervisory powers in the framing of exclusive competences. It is also accepted that competences that have not been attributed exclusively to the Union, but can nevertheless be found, either implicitly or explicitly in the Treaty framework, operate in accordance with the regime of shared competences.[1281] The same argument can be made in relation to supporting competences, the nature of which also needs to be explicitly stated in the Treaty.[1282] Shared competences thus constitute the residual general category of EU Member State competence division.

262. *Classifying transformable constitutional principles* – The regulative and operational constitutional principles of shared competences are essentially *transformable*. They allow for a new equilibrium between supranational and national powers to be established, adapted to

[1279] Article 2(5) states that in certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonization of Member States' laws or regulations. Article 6 TFEU provides a summary of fields in which the EU can indeed act in a supporting or coordinative manner. These fields include protection and improvement of human health, industry, culture, tourism, educational and vocational training, youth and sport, civil protection and administrative cooperation. On the uncertain status of these fields, see R. Schütze, note 1250, 172-182 for examples.

[1280] Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, 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 or effects of the proposed action, be better achieved at Union level. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. An additional protocol No. 2 on the principles of subsidiarity and proportionality outlines the scope of these principles in the EU's lawmaking procedures.

[1281] Article 4(1) TFEU now explicitly confirms that position: The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

[1282] R. Schütze distinguishes between coordinated and supplementary competences and attributes different normative value to either subdivision. For the purposes of this dissertation, it suffices to group these categories into a single whole of non-shared competences as understood here. See R. Schütze, note 1276, 715.

the specifics of the time and the status of the European integration project.[1283] To the extent that these principles are applied with more or less rigour, the dynamics of EU-Member State interaction in the sharedness of competences effectively changes. At the same time however, these principles comprise stable background benchmarks against which new institutional innovations can be tested and in the light of which these innovations are enabled and restrained.[1284]

The previous section sketched the transformable principled framework of competence division in EU law. These principles do not however operate completely detached from an image of European integration in which 'unity in diversity' can indeed be considered a dynamic starting point.[1285] In that image, the conferral of competences significantly reflects an *idea* of supranational intervention that refers to a particular conception of subsidiarity. This idea of subsidiarity provides a starting point for the classification of *operational* principles governing the existence and exercise of shared competences in EU law.

263. *Two kinds of subsidiarity* – The idea of subsidiarity should be distinguished from the better known EU principle bearing the same title. The principle of subsidiarity has been introduced into the Maastricht Treaty[1286] as meta-principle structuring the *exercise* of legislative powers at the supranational level.[1287] It particularly confines the exercise of EU shared competences.[1288]

[1283] For a similar argument, see D. Curtin, H. Hofmann and J. Mendes, note 42, 1, stating that 'the evolution of the EU does not always take place according to a specific 'constitutional' blueprint. More than at the national level, the EU's institutional structures and decision-making procedures evolve beyond its formal constitutional frame, responding to the needs of the time and of specific policy areas, and reshape its constitution accordingly'.

[1284] *Ibidem*, 1-2: 'Yet one stable characteristic of such developments is the integration of executive bodies of the EU and its Member States through diverse forms of procedural cooperation and actors, such as networks of regulators, comitology and agencies. Progressively, a set of constitutional *values* emerged both as a result of case-law of the Court of Justice as general principles of law and of (incremental) Treaty amendments' (reference omitted and emphasis added by the author).

[1285] For a conceptualization of dynamism in that regard, see A. Von Bogdandy and J. Bast, note 1214, 292, considering the *scope* of shared competences to be dynamic as a misconception. Dynamism rather encapsulates a constitutional attitude that reflects the cooperative playing field between EU and national legal orders. In doing so, dynamism is not an undstanding of shifting values, but a constitutional category in its own right, at least in the realm of shared competences.

[1286] A. Toth, 'The Principle of Subsidiarity in the Maastricht Treaty', 29 *Common Market Law Review* (1992), 1079-1105; A. Estella, note 26, 74; N. Emiliou, 'Subsidiarity: an effective barrier against the "enterprises of ambition"?', 17 *European Law Review* (1992), 383-407. For an early account, see V. Constantinesco, 'Who's afraid of subsidiarity?', 11 *Yearbook of European Law* (1991), 33-55.

[1287] H. Hofmann, 'Which Limits? Control of Powers in an Integrated Legal System' in C. Barnard and O. Odudu (eds.), note 1204, 48. See also among others G. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', 94 *Columbia Law Review* (1994), 331-456; T. Schilling, 'A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle', 14 *Yearbook of European Law* (1994), 203-255; V. Harrison, 'Subsidiarity in Article 3b of the EC Treaty: Gobbledegook or Justiciable Principle?', 45 *International and Comparative Law Quarterly* (1996), 431-439; G. De Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor', 36 *Journal of Common Market Studies* (1998), 217-235; E. Swaine, 'Subsidiarity and Self-Interest: Federalism at the European Court of Justice', 41 *Harvard International Law Journal* (2000), 1-128; C. Henkel, 'The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity', 20 *Berkeley Journal of International Law* (2002), 359-386; P. Syrpis, 'In Defence of Subsidiarity', 24 *Oxford Journal of Legal Studies* (2004), 323-334; N. Barber, 'The Limited Modesty of Subsidiarity', 11 *European Law Journal* (2005), 308-325; D. Lazer and V. Mayer-Schoenberger, 'Blueprints for Change: Devolution and Subsidiarity in the United States and the European Union' in K. Nicolaïdis and R. Howse (eds.), note 40, 132-141. The Treaty of Amsterdam included an additional protocol on the application of the principle; see Protocol No 30 on the application of the principles of subsidiarity and proportionality, [1997] O.J. C340/105. That protocol has subsequently been upgraded and remains part of the Treaty framework. See R. von Borries and M. Hauschild, 'Implementing the Subsidiarity Principle', 5 *Columbia Journal of European Law*

264. *A putative principle of subsidiarity* – The scope of the principle of subsidiarity is essentially limited to the exercise of competences already attributed to the EU.[1289] In these circumstances, Article 5(3) TEU circumscribes Union action to situations where the objectives cannot be sufficiently achieved by the Member States and where the Union does not enjoy exclusive competences.[1290] The principle has over time given shape to a procedural principle that allows national parliaments to scrutinize legislative initiatives.[1291]

The principle of subsidiarity has been the subject of criticism. According to Gareth Davies, subsidiarity has been enshrined as a wrong constitutional principle, at the wrong time and in the wrong place.[1292] His most ferocious objection against the principle is that it is generally interpreted as a centralizing, or intolerant concept, which sets out to silence and deny the independent objectives of the lower level.[1293] In particular, it takes as its starting point that all

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(1999), 369-388. On subsidiarity in the light of the Lisbon Treaty, see R. Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?', 68 *Cambridge Law Journal* (2009), 525-536.

[1288] The exclusivity of particular competences already implies a constitutional agreement on the supranational nature of these competences. Exclusively conferred competences do not deny subsidiarity, they do not however mandate a specific and deliberate reflection before adopting supranational initiatives, see D. Cass, 'The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community', 29 *Common Market Law Review* (1992), 1117. On subsidiarity as a competence conferring principle, see N. Bernard, 'The Future of European Economic Law in the light of the Principle of Subsidiarity', 33 *Common Market Law Review* (1996), 633-666.

[1289] J. Weiler, U. Haltern and F. Mayer, 'European democracy and its critique' in J. Hayward (ed.), *The crisis of representation in Europe* (London, Frank Cass 1995), 35 refer to the principle as 'deliciously vague'. Another early critique can be found in P. Demaret, 'A Short Walk in the Realm of Subsidiarity' in R. Buxbaum, G. Hertig, A. Hirsch and K. Hopt (eds.), *European Economic and Business Law. Legal and Economic Analyses on Integration and Harmonization* (New York, de Gruyter, 1996), 14-31; see also J. Weiler, note 12, 318; Similar musings can be found in I. Ward, *A critical introduction to European Law* (Cambridge, Cambridge University Press, 2nd Ed., 2003), 47. R. Van den Bergh reads into the principle of subsidiarity two cumulative tests. First, the effective attainment test aims to outline whether or not Member States can act on their own. Second, the cross-boundary effect test considers whether individual Member State actions would present negative externalities or spill-overs, see R. Van den Bergh, 'The Subsidiarity Principle in European Community Law: Some Insights from Law and Economics', 1 *Maastricht Journal of European and Comparative Law* (1994), 353. See also S. Deakin, 'Two Types of Regulatory Competition: Competitive Federalism versus Reflexive Harmonisation. A Law and Economics Perspective on *Centros*' in 2 *Cambridge Yearbook of European Legal Studies* (1999), 240.

[1290] C. Ritzer, M. Ruttloff and K. Linhart, 'How to Sharpen a Dull Sword – The Principle of Subsidiarity and its Control', 7 *German Law Journal* (2006), 739; Article 6 of Protocol No 2 on the application of the principles of subsidiarity and proportionality grants evaluative room to national parliaments and in so doing, creates a platform for cooperation. That cooperation does not however extend to the substantive matters at hand.

[1291] The Court has so far seemed unwilling directly to engage in substantive subsidiarity analysis according to T. Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?', 50 *Journal of Common Market Studies* (2012), 269; see Case C-377/98, *Kingdom of the Netherlands v Parliament and Council*, [2001] ECR I-7079, para 30; Case C-491/01, *BAT*, [2002] ECR I-11453, para 177; Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health*, [2005] ECR I-6451 para 104-108; Case C-58/08 *Vodafone Ltd and Others v Secretary of State*, para 75–79. Article 8 of Protocol No 2 on the application of the principles of subsidiarity and proportionality, note 1280 specifically extends jurisdiction of the Court to consider infringements of the principle of subsidiarity, thus inviting the latter to outline the boundaries of that principle more clearly. Proceduralization tendencies are most apparent from the Protocol No 2 on the application of the principles of subsidiarity and proportionality, note 1280. That protocol mandates the involvement of national parliaments in the process of EU lawmaking.

[1292] G. Davies, 'Subsidiarity: The wrong idea, in the wrong place, at the wrong time', 43 *Common Market Law Review* (2006), 63. According to Weatherill, the principle of subsidiarity is of little operational usefulness in checking the scope of legislative ambitions. Subsidiarity rather allows to focus attention on the need for a proper accounting of the costs and benefits choosing between centralized rules and local autonomy. In doing so, however, subsidiarity serves to ask the right sort of questions rather than providing judicially enforceable and operationally useful answers to questions of competence division, see S. Weatherill, note 1204, 20-21.

[1293] G. Davies, note 1292, 78.

levels are united in wishing to achieve certain goals and that none has any other interests or objectives which conflict with these.[1294] The real function of subsidiarity should nevertheless lie in the provision of a balancing instrument[1295] in a system that defines and contains the legitimate scope of Union power and legislation.[1296]

265. *An alternative competence-conferring idea of substantive subsidiarity* – Contrary to the principle, the general idea of subsidiarity expounds on the interactive supranational framework the project of European integration presupposes.[1297] In that understanding, subsidiarity reflects a political and economic framework that structures and determines the conferral of competences and the distribution of regulatory powers across the supranational and national levels.[1298] It provides a framework that seeks to explain the conferral of competences to the EU level. The language of subsidiarity serves as an instrument to translate these political and economic considerations in the language of EU law.

The distinction between a constitutional principle of subsidiarity and a political and economic idea of subsidiarity relates to a distinction made between *instrumental* and *substantive*

[1294] G. Davies, note 1292, 78. That approach also guided the Advocate General's position in the well-known *Tobacco Advertising* judgment, see Opinon of Advocate General Fennelly in Case C-376/98, Tobacco Advertising *I*, para 65: 'In adopting approximating or coordinating measures, [the EU legislator] substitutes Community-level rules for national rules which, whatever their restrictive effect on trade or distorting effect on competition, may have been motivated by entirely different substantive concerns such as health, consumer protection, environmental protection, and so on. Thus, in adopting legislative acts, the Community stands in the place of the Member States and must give weight to national policy concerns which are not the subject of specific Community competence - and, a fortiori, to those in respect of which an express recommendation of high levels of protection is made in the Treaty itself'. From that perspective, subsidiarity essentially gives rise to 'institutional incestuousness', in which each EU institution tends to be in favour of EU-level action at the expense of national action, see S. Weatherill, note 1204, 22. See also Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health*, para 101-106.

[1295] Such balancing would require economic analysis to be taken into account, see R. Van den Bergh, note 1289, 337-366. From the same author and applied to the field of competition law, see 'Economic Criteria for Applying the Subsidiarity Principle in the European Community: The Case of Competition Policy', 16 *International Review of Law & Economics* (1996), 363 -383; J. Pelkmans, 'Testing for Subsidiarity', *Bruges Economic Policy Briefing No.* 13, 2006, http://www.coleurop.be/content/studyprogrammes/eco/publications/BEEPs/BEEP13.pdf; A. Portuese, 'The Principle of Subsidiarity as a Principle of Economic Efficiency', 17 *Columbia Journal of European Law* (2011), 231-262. On the centralizing role subsidiarity has played, see E. Carbonara, B. Luppi and F. Parisi, 'Self-Defeating Subsidiarity', 5 *Review of Law and Economics* (2009), 741-783.

[1296] Such a system should allow for flexibility in the autonomous regulatory powers of both the EU and the Member States. For a similar argument grounded in the creeping competence enhancements of the EU, see S. Weatherill, note 1204, 27: competence creep is loaded into the model that leads to fulfilment of the task of finding solutions to common problems. Aggressive curtailment of the condition of autonomy that generates competence creep and the risk of illegitimate action would in turn tend to impair the flexibility needed for effective problem-solving throughout the EU. Davies continues by developing an alternative normative analysis in G. Davies, note 1292, 83: a proportionality analysis should considered a solution in that regard. Cf. P. Craig, note 1297, 82 for a critique of that approach on grounds of the independent role apparently attributed to proportionality and the difficulties in adjudicating whether a measure is proportionate or directly intrudes national values.

[1297] G. Martinico, 'Dating Cinderella: On Subsidiarity as a Political Safeguard of Federalism in the European Union, 17 *European Public Law* (2011), 652; see also P. Craig, 'Subsidiarity: A Political and Legal Analysis', 50 *Journal of Common Market Studies* (2012), 72-87.

[1298] Hofmann states that the practical invocation of the principle of subsidiarity influenced to a great degree the distribution of powers between legislation and implementation. A system grounded in subsidiarity encouraged the adoption of new, cooperative and sovereignty-preserving means of sharing policies both on the European and the national levels. The emergence of institutionalized networks of national supervisory authorities presents an example of that approach. A system of decentralized and cooperative structures therefore neatly fits the constitutional framework of subsidiarity, see H. Hofmann, note 1287, 49-50. See also M. De Visser, note 23, 459, arguing that the establishment of supranationally structured networks exemplifies this approach.

subsidiarity in (law and) economics scholarship.[1299] An instrumental approach does not serve to allocate regulatory competences. It considers that a particular objective needs to be determined at the EU level and seeks to decide when and to what extent the EU or its Member States have to take action.[1300] In doing so, instrumental subsidiarity presumes that the regulatory goals and the determination 'regulatory failures' requiring supranational remediation are all predetermined within a given framework.[1301] Substantive subsidiarity theories on the contrary outline the conditions governing the *allocation of competences between centralized and decentralized regulatory entities*. These theories seek to identify the policy levels best suited for a particular regulatory framework.[1302] In doing so, substantive subsidiarity projects a morally and politically complex assessment of relative substantive claims of authority entertained by a particular governance level.[1303] Law in that understanding provides a toolkit to give shape to these claims of authority. The underlying substantive subsidiarity considerations as a result emerge throughout the existing competence framework reflected in the constitution and the legislative application and judicial determination of that framework. The Court equally contributes to uncovering these considerations through an interpretation of constitutional competence bases.[1304]

266. *Building on substantive subsidiarity* – The substantive subsidiarity understanding serves as an inroad into identifying the constitutional principles that structure the operationalization of shared competences in the realm of institutionally heteronomous and supranationally structured market supervision arrangements. A substantive subsidiarity approach presumes that the Treaty legal bases themselves reflect and shape a particular image of shared competences in which supranational and national regulatory powers can be balanced. The principle of conferred competences and the scope of particular legal bases conferring these competences are essential in that regard.

From the vantage point of substantive subsidiarity, five *structural constitutional principles governing the existence and exercise of shared competences* can be identified. These structural principles appear throughout the Treaty framework and allow for legal bases to be operationalized in accordance with an understanding of substantive subsidiarity. They are reflected within the *scope* of legal bases structuring the conferral of competences. Structural principles provide inroads into comprehending *how* substantive subsidiarity considerations have materialized.

[1299] See D. Halberstam, 'Comparative Federalism and the Role of the Judiciary' in K. Whittington, R. D. Kelemen and G. Caldeira (eds.), *The Oxford Handbook of Law and Politics* (Oxford, Oxford University Press, 2008), 153, referring to the 'idea' of subsidiarity in law; see in economics among others A. Alesina and R. Wacziarg, 'Is Europe going too far?', 51 *Carnegie –Rochester Conference Series on Public Policy* (1999), 1-42. The authors argue at 35 that '[p]olitical and economic union in Europe is at an unsettled stage. On many issues, Europe has gone far beyond a degree of centralization consistent with a free-trade area. However, the process of coherent institution-building has lagged far behind. On some other issues, such as policies to guarantee the adequate functioning of free markets, Europe should go farther'. The authors rely on economic data to outline the appropriate allocation of competences in that regard, thus giving shape to substantive subsidiarity. They refer to the principle of subsidiarity as being devoid of substantive content.

[1300] See also T. Heremans, note 84, 89.

[1301] D. Halberstam, note 1299, 153-154.

[1302] An example being A. Alesina and R. Wacziarg, note 1299.

[1303] D. Halberstam, note 1299, 154.

[1304] K. Lenaerts and P. Van Nuffel, *European Union Law* (Robert Bray & Nathan Cambien, eds.) (London, Sweet & Maxwell, 2011), 133. One example in that regard relates to the choice of legal basis, the analysis of which in the *Tobacco Advertising* cases led Gutman to conclude that it provides a direct contribution to the realization of subsidiarity and proportionality, see K. Gutman, note 683, 175.

Firstly, the conferral *focus* underlying the principle of conferred competences allows to assess the focus of supranational intervention. That focus can vary between enhanced supranational regulatory developments, the inclusion of national authorities into a supranationally determined framework and granting deference to national institutional autonomy. In all these circumstances, Treaty legal bases are said to reflect a focus on how supranational competences should be construed.

Secondly, the *scope* of conferred competences is structured in accordance with an image of *subsidiarity*. The principle of subsidiarity in Article 5(3) TEU reflects a taste for subsidiary action at the supranational level. As elements ingrained in the *scope* of conferred competences however, subsidiarity conditions directly determine the extent to which EU legal bases allow for particular institutional and substantive action and the extent to which such actions need to give way to national regulatory autonomy.

Thirdly, the *scope* of conferred competences additionally reflects *proportionality* considerations. In addition to questioning whether supranational regulatory or institutional competences exist, the proportionality outlook on the scope of conferred competences allows to determine the extent to which and the framework within which these competences should be exercised overall.

Fourthly, the notion of *sincere cooperation* provides additional input to the structuring of EU competence division principles. Sincere cooperation allows to determine the extent to which legal bases project a particular image of integrated or composite regulatory interaction across supranational and national levels of regulation.

Fifthly, the concept of *national institutional autonomy* provides a presumed limit on the scope of supranational regulatory intervention. The operationalization of this principle provides a benchmark in accordance with which the limits on supranational intervention can more effectively be outlined.

These five structural constitutional categories enable to assess the division of competences and powers from the vantage point of substantive subsidiarity. They constitute categories that enable and facilitate the establishment of supranationally structured frameworks that operate in accordance with a particular substantive subsidiarity outlook. In doing so, these principles effectively establish benchmarks that allow to grasp the operationalization of shared competences in the light of underlying economic principles structuring supranational intervention.

267. *Outlook* – The following table summarizes these principles as a conceptual basis for understanding how substantive subsidiarity concerns have effectively been operationalized throughout the EU constitutional framework.

structural principles	*substantive subsidiarity operationalization*
conferral focus: supranational role	
conferral scope I: subsidiarity	
conferral scope II: proportionality	
sincere cooperation	
national institutional autonomy	

The following chapters propose to fill the blanks in the abovementioned table. They will outline how the constitutional principles reflect and incorporate the operationalization of

substantive subsidiarity concerns that have given shape to converging institutionally heteronomous market supervision arrangements.

Chapter 2. An operational framework for institutional heteronomy

268. *Introduction* – A substantive subsidiarity reading of EU law presupposes an economic and political framework of understanding in which structural legal principles take shape. In order to be able to reconfigure constitutional principles governing shared competences among supranational and national levels, insight in these economic and political dynamics is necessary. For the purposes of identifying the principles structuring market supervision, the economic dynamics underlying EU regulation and the particular 'federalist' image projected in legal theory provide the most relevant 'external' approaches that serve to structure and operationalize constitutional principles within a particular substantive subsidiarity framework.

This chapter sketches these dimensions. A first section outlines the economic frameworks underlying EU regulatory integration. A second section integrates these economic frameworks into an understanding of EU federalism. The resulting image projects the emergence of *regulatory coopetition* structuring and guiding the division of competences between the supranational and national levels. That image provides a benchmark in accordance with which the constitutional principles structuring such division can be reconfigured and operationalized to accommodate the establishment of supranationally structured market supervision arrangements.

1. European competitive federalism in action: regulatory competition and coopetition reconsidered

269. *EU integration as competitive federalism* – This section outlines the economic theories of regulatory competition and competitive federalism and the ways in which they have been applied or refined in the context of EU law. The first subsection provides a brief overview of evolutions and important concepts structuring these debates. A second subsection attunes ideas surrounding competitive federalism to the emergence of regulatory pluralism in EU law. That allows for a third subsection to analyze the emergence of cooperative competition or coopetition as a structural condition for European market integration. That framework confirms the EU's quest for a distinctive and particular type of regulatory competition that gives shape to its market integration aims.[1305]

a. The economics of regulatory interaction in federally structured systems

270. *Regulatory competition theories underlying competitive federalism* – Theories of regulatory competition emerge from the idea that competition should not only take place among private market operators but also govern the functioning of public authorities.[1306] Public authorities should *supply* the rules *demanded* for by competitors in order to attain a *welfare-enhancing equilibrium* or the most efficient allocation between supply and demand.[1307] In that image, market operators should be able to seek out the most effecitve

[1305] S. Deakin, note 1289, 232 states that *from a law and economics perspective, the vital question is not whether to allow more scope for regulatory competition, but, rather, what type of regulatory competition to encourage.* EU constitutional law principles play an instrumental role in that understanding.
[1306] See R. Van den Bergh, note 1295, 364.
[1307] On the supply of and demand for rules, see S. Deakin, 'Legal Diversity and Regulatory Competition: Which Model for Europe?', 12 *European Law Journal* (2006), 442. T. Heremans, note 84, 95 refers to states shopping around. D. Geradin and J. McCahery, 'Regulatory Co-opetition: Transcending the Regulatory Competition Debate', *TILEC Discussion Paper DP 2005-020*, available at

regulatory authority and subject to that authority's regulatory standards. In doing so, a regime of *regulatory arbitrage* would come into being whereby market operators' mobility influences the adoption of sets of local rules aimed at attracting them.[1308]

Economist Charles Tiebout's 1956 article developing a pure theory of local expenditures is often taken as a starting point in that regard.[1309] Tiebout maintained that U.S. municipalities or other local public bodies' revenue and expenditure patterns significantly differ amongst one another and thus allow residents – Tiebout refers to them as citizens-consumers – to move to that community whose local government best satisfies his set of preferences. Accordingly, the greater the number of communities and the greater the variance among them, the closer the resident-citizen-consumer will come to fully realizing his preferences.[1310] On the basis of these findings, Tiebout argued in favour of a competitive model among these municipalities. In that model, each municipality would compete for its breed of preferetial residents-consumers.

In order for such a model to emerge, seven conditions had to be fulfilled.[1311] Firstly, consumer-voters should have full mobility, i.e. the ability to move to a community where their preference patterns are best satisfied. Tiebout thereby presupposes that consumer-voters have fixed preferences at least at the time of their choice. In case of subsequent alteration of preferences, full mobility would allow them to transfer to another municipality.[1312] Secondly, the first condition naturally implies that consumer-voters should also have full knowledge of expenditure patterns, the ability to understand and react to these patterns. Thirdly, a sufficiently different number of communities needs to co-exist within the full mobility and knowledge schemes to allow for the efficient distribution of different consumer-voter preferences. Fourthly, the model presupposes that no public service expenditure interactions between local economies exist that serve to integrate or disintegrate particular expenditure models. Fifthly, the model does not take effects on employment opportunities into account. Sixthly, local communities are supposed to function as firms, in which a bundle of services directed to an optimal community size can be produced at the lowest average cost. Seventhly, communities that have not attained this optimal size and production of (public) services will engage upon direct initiatives to attract new residents in order to attain such optimum.

Tiebout presupposes a market of competing, efficiency-seeking localities as firms, trying to attract an optimal number of customers. These customers are not however directly purchasing a particular good of service, but rather a bundle of public services, the cost of which will be financed through a particular taxation system.[1313] Tiebout is not however advocating the abolition of a federal level of government. Whilst his theory indeed projects a competition among local governments, it also presupposes a more general and centralized framework in which these localities can operate as firms. Tiebout not only recognized the existence of such

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http://arno.uvt.nl/show.cgi?fid=53830;h=repec:dgr:kubtil:200520, 1, state that regulatory competition equates decentralization with efficient results.

[1308] On regulatory arbitrage in the realm of market regulation, see A. Licht, 'Regulatory Arbitrage for Real: International Securities Regulation in a World of Interacting Securities Markets', Harvard Law School John M. Olin Law and Economics Working Paper (1997), available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/219_2.pdf, 90 pp.

[1309] C. Tiebout, 'A Pure Theory of Local Expenditures', 64 *The Journal of Political Economy*, (1956), 416-424. (hereinafter referred to as Tiebout). For references to Tiebout as an analytical starting point, see T. Heremans, note 84, 91; R. van den Bergh, note 1295, 369; R. Van den Bergh, note 1289, 339.

[1310] Tiebout, 418.

[1311] Tiebout, 419.

[1312] Tiebout, 418.

[1313] Tiebout, 421.

level as a precondition for his theory[1314], he also stated that a more central level is not subject to similar competitive principles in relation to these municipalities. It rather provides a general framework in which such local competition could become a reality.[1315]

271. *Competitive federalism theory* – Tiebout's work on the *horizontal competition among defederated entities* served as a basis or contrasting perspective for theories of competitive or fiscal federalism *governing the vertical federal division of powers.*[1316] According to these theories, local authorities were also to compete directly with centralized or federal authorities over competences in a market-like structure. Building on Tiebout's suggestion that a stable set of expenditure preferences can be detected at the local level, competitive federalism theories argue in favour of a competitive dynamic of decentralized government that should underlie all federally structured organizations.[1317] Whilst centralized federal action could indeed be justified in limited circumstances, a federal regime had to structure predominantly to enable competition among defederalized public entities. According to the theories of economic federalism, federal policy action should first of all be undertaken only to facilitate such competitive interactions and to allow for private actors to engage upon 'regulatory arbitrage'. Federal regulation should in that regard directly address problems of transaction costs through incomplete information and limited mobility. Second, federal authorities should directly intervene when economies of scale and non-internalizable externalities limit the operation of competitive federated entities. Third, federal regulation could address or alleviate problems of public choice and regulatory capture operating at the defederated levels. All three elements reflect different features of the theories of competitive federalism and will be discussed separately.

Firstly, in order for citizens to make a meaningful choice between defederated systems, perfect information and unlimited mobility should be available. The latter implies the presence of institutional frameworks that allow for free movement rights and enable citizens directly to transfer between defederated jurisdictions.[1318] The former addresses the problem of

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[1314] Tiebout, 417, as Tiebout develops a reaction against issues that are difficult to solve through the political system.

[1315] Tiebout, 416. See also W. Oates and R. Schwab, 'Economic competition among jurisdictions: efficiency enhancing or distortion inducing?', 35 *Journal of Public Economics* (1988), 333-354; T. Heremans, note 84, 91 for an overview and additional critique. This is even all the more clear when one understands Tiebout's theory as a response to Samuelson's identification of market failures in the realm of public expenditures, in P. Samuelson, 'The Pure Theory of Public Expenditures', 36 *Review of Economics and Statistics* (1954), 387-389 and 'Diagrammatic Exposition of a Pure Theory of Public Expenditures', 37 *Review of Economics and Statistics* (1956), 350-356, also referenced in Tiebout, 416. In both pieces, Samuelson presupposed that public expenditure occurred predominantly at a centralized level. Tiebout sought to address the failures identified by Samuelson by positing a model in which public expenditures occur at a defederated level. In doing so, Tiebout did not however completely refute a federal or a centralized public expenditure model.

[1316] For that distinction, see B. Kobayashi and L. Ribstein, 'The Economics of Federalism' in B. Kobayashi and L. Ribstein (eds.), *Economics of Federalism* (Cheltenham, Edward Elgar, 2007), 1. See also A. Breton, 'Towards a Theory of Competitive Federalism', 3 *European Journal of Political Economy* (1987), 263-328.

[1317] See among other founding fathers, R. Musgrave, *The Theory of Public Finance: a study in public economy* (New York, McGraw-Hill, 1959), 628 pp.; W. Oates, 'The Theory of Public Finance in a Federal System', 1 *The Canadian Journal of Economics* (1968), 37-54; W. Oates, 'On Local Finance and the Tiebout Model', 71 *The American Economic Review* (1981), 93-98; W. Oates, 'Toward a second-generation theory of fiscal federailsm', 12 *International Tax and Public Finance* (2005), 349-374. In the realm of EU (private) law in particular, see K. Riesenhuber, 'A competitive approach to EU Contract law', 7 *European Review of Contract Law* (2011), 115-133 and R. Sefton-Green, 'Choice, Certainty and Diversity: Why More is Less', 7 *European Review of Contract Law* (2011), 134-140.

[1318] The theory obviously presupposes that these citizens will be willing to move – being rational subjects. For a critical approach to that position, invoking arguments of culture and relational elements impeding subjects to move freely even in an internal market environment projected here, see A. Ogus, 'Legal Culture as (Natural?)

diverse regulatory mechanisms governing different federated entities. Even though one of these mechanisms might better fit the preferences of a particular citizen, limited access to knowledge about these mechanisms significantly impedes a citizen's ability to move and function within the federal market sphere. The different regulatory mechanisms in that respect impose transaction costs on citizens acting as market participants in the federal system.[1319] A centralized regime should intervene to alleviate the transaction costs involved and to avoid or correct such 'market failures' in the competitive interactions between defederated entities.[1320] Federal authorities should therefore use the law to establish mechanisms of knowledge dispersal and availability with a view to enable cross-border movement among defederated entities.[1321] This perspective does not impose on defederated entities an obligation to de-regulate or re-structure their market regulatory regimes. It rather encourages the abolition of transaction costs impeding interactions and movement *between these defederated entities.*[1322] The market structure and operations *within* these entities are not considered within the economic theories discussed here.[1323]

Secondly, economic theories of federalism have also focused on regulatory competences attributed to the federal level. The federal level should not only to establish a competitive market between defederated or local entities on that market. Federal authorities could intervene in the governing features of a marketplace. As such, a federal authority structures a set of relationships among public entities, between public entities and private market operators and directly among private market operators. In EU law, this idea of a competitively structured set of both horizontal and vertical relationships has mainly been assessed through the principle of subsidiarity. The federal – or supranational – level should intervene if and to the extent that particular economies of scale arise that cannot be regulated, structured or governed optimally at a sub-federal level. In that case, the federal level should intervene to correct the scale imbalances between private market operators and public authorities.[1324] The federal authorities should equally intervene in cases where particular externalities – positive or negative effects on other economies of sub-federated entities – cannot be adequately addressed through the internalization of costs within the economic sphere causing the externalities to occur.[1325] The best example of the perceived need for federal regulation in those instances lies with environmental regulation. Environmental pollution caused by an operator in jurisdiction A can severely harm consumers in jurisdiction B, whereas jurisdiction A may not be willing to devote regulatory resources to affect the negative effects of its

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Monopoly' in A. Marciano and J.-M. Josselin (eds.), *The Economics of Harmonizing European Law* (Cheltenham, Edward Elgar, 2002), 73.

[1319] On the problem of transaction costs in federal systems, see D. Geradin and J. McCahery, note 1307, 9.

[1320] See for an overview (and critique) of that justification, R. Revesz, 'Rehabilitating Interstate Competition: Rethinking the "Race-to-the-bottom" Rationale for Federal Environmental Regulation', 67 *New York University Law Review* (1992), 1220-1221.

[1321] F. Easterbrook, 'Federalism and European Business Law' in R. Buxbaum, G. Hertig, A. Hirsch and K. Hopt (eds.), note 1289, 3.

[1322] For that understanding as a 'majoritarian' European integration project, M. Maduro, note 40.

[1323] T. Heremans, note 84, 87 rightly remarks that the question on which level regulation should take place essentially differs from whether regulation is desirable at all.

[1324] Law would structure these relationships in particular, see D. Geradin and J. McCahery, note 1307, 6.

[1325] D. Geradin and J. McCahery, note 1307, 7. Externalities could also be triggered by a lack of cross-border mobility, as such lack often relates to cultural values, see the same contribution at 8. On externalities, see A. Pigou, *Wealth and Welfare* (London, MacMillan, 1912), 159 and also R. Van den Bergh, note 1295, 372-373. See additionally R. Van den Bergh, 'Regulatory competition or harmonization of laws? Guidelines for the European regulator' in A. Marciano and J.M. Josselin (eds.), note 1318, 30, stating that if the European regulator took the competitive process seriously, he would in the first place 'organize' competition between the member states' laws and would only enact rules of substantive law if and where such competition cannot lead to efficient outcomes.

pollution-allowing regulatory framework on another jurisdiction.[1326] Given the extraterritorial nature of the environmental pollution, it is often argued that jurisdiction B equally lacks the legal tools to effectively address these externalities.[1327] In that case, federal regulation could alleviate potential frictions between both jurisdictions by regulating the issue of environmental pollution through a centralized regulatory framework.[1328]

Thirdly, theories of federalism address, refine or at least touch upon theories of public regulation in general. Economic theory justified public intervention in the market by allowing the public interest to correct negative externalities generated by private interests. Public authorities, working in the public interest, would thus use regulation as a device to correct market failures.[1329] This public interest theory of regulation has nevertheless been subject to vigorous criticism by public choice or private interest theorists. These theorists claim that regulatory intervention is subject to the private interests of those in power or those able to influence policymakers.[1330] In that image, regulators are captured by private interests and encourage market failure. Captured regulators are unable to work in the public interests, but will have certain private interests prevailing over others and thus cause competitive distortions. A central level of regulation is often said to ease the capturing by powerful interests. A plurality of decentralized regulators would be more difficult to be captured by powerful private interests.[1331]

It could nevertheless also be maintained that regulation at the federal level serves to avoid decentralized regulators being captured by local interests neglecting economies of scale or negative externalities affecting other jurisdictions.[1332] In that understanding, federalism would serve as a tool to strengthen or weaken the theory of public choice or private interest regulation.

[1326] D. Geradin and J. McCahery, note 1307, 7, see also T. Heremans, note 84, 98, referring to different methods and intensities of regulatory competition.

[1327] Although not every economic theorist agrees on this issue, see R. Revesz, note 1320, 1243 for an overview of critiques and 'dissenting' opinions. Externalities can also occur on a very indirect scale, see N. Bernard, note 32, 56 and are less likely to emerge in cases of homogenous preferences. Bernard argues that such homogeneity exists at the EU level.

[1328] W. Oates qualifies that position, stating that centralized regulation should only emerge if it saves costs, see W. Oates, 'An Essay on Fiscal Federalism', 37 *Journal of Economic Literature* (1999), 1122. For a similar position and a call for more EU-wide centralization in relation to fiscal burden-sharing, see A. Majocchi, 'Theories of Fiscal Federalism and the European experience', *Società Italiana di Economia Pubblica Working Paper 608* (2008), 1. See also H. Sondergaard Birkmose, note 85, 1079.

[1329] See J. Den Hertog, note 56, 225.

[1330] A. Ogus, note 1, 55-75 and J. Den Hertog, note 56, 235 and references in note 88. See also J. Macey, 'Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public Choice Explanation of Federalism', 76 *Virginia Law Review* (1990), 265 -291.

[1331] T. Heremans, note 84, 101-102.

[1332] See for that trade-off, A. Arcuri and G. Dari-Mattiacci, 'Centralization versus Decentralization as a Risk-Return Trade-Off', 53 *Journal of Law and Economics* (2010), 359-378. Examples in this realm are plentiful, see among others R. E. Wagner, 'Competitive Federalism in Institutional Perspective," in D. Racheter and R. E. Wagner (eds.), *Federalist Government in Principle and Practice* (Norwell, MA: Kluwer, 2001), 19-37 ; C. Volden, 'The Politics of Competitive Federalism: A Race to the Bottom in Welfare Benefits?', 46 *American Journal of Political Science* (2002), 352-363; O. Lipsett, 'The Failure of Federalism: Does Competitive Federalism actually Protect Individual Rights?', 10 *Journal of Constitutional Law* (2008), 643-664; For an argument that the EU failed to take locational rights and cross-border mobility into account in its regulatory outlook, see W. Kerber, 'Interjurisdictional Competition within the European Union', 23 *Fordham International Law Journal* (1999), S217-S248; H. Sondergaard Birkmose, note 85, 1080 and 1096, arguing that if EU harmonization sought to counter regulatory competition in its entirety, it failed. For a Europeanization perspective, see T. Börzel, 'From Competitive Regionalism to Cooperative Federalism: The Europeanization of the Spanish State of the Autonomies', 30 *Publius: The Journal of Federalism* (2000), 17-42.

This third aspect of the theory of federalism not only addresses when federal regulation should concern particular problems. It also formats answers to questions *how* such regulation should proceed. Economic theory aims to engage with different formats of regulatory intervention with a view to outline the most efficient or welfare-enhancing *regulatory method*. In the field of EU law, this inquiry sought to determine the most efficient outlook of a harmonized European legal framework.[1333]

272. *Two markets, one framework* – Despite all being discussed under the economic theories of federalism banner, the first category of federal intervention discussed above markedly differs from the second and third discussed in this section. The federal authorities' roles in enabling and maintaining a market among defederated entities in itself does not project a direct regulatory role for the federal level into the market. It rather presumes the maintenance of a market environment among existing defederated regulatory bodies. The economies of scale, externalities and public choice arguments – emphasized in the second and third categories – on the other hand presume that the federal government's role is not only to establish and maintain a competitive market environment for public actors but also to regulate private market operators' business within such market. As a result, economic theories of federalism attribute a dual role to the federal level. On the one hand, the federal level serves to structure a market among *public authorities.* On the other, that market seeks to establish a more efficient regulatory framework that also benefits *private market participants*. Federal regulation aims to establish an economically justified framework in which both *types* of regulation can co-exist and interact.

b. The shifting roles of law: from competitive federalism to regulatory coopetition

273. *Economic federalism as regulatory pluralism* – The basic premiss that a federal structure creates and guarantees a a market for both *regulation* and for *market operators* has subsequently been refined in economic theories of 'regulatory pluralism'. Theories of regulatory pluralism provide a more dynamic framework that seeks to project and predict institutional adaptations resulting from the interplay between both markets.[1334] These theories identify and acknowledge 'races', 'network externalities' or 'functional alternatives' in an attempt to comprehend and justify that interplay.

274. *Regulatory races* – Competition between regulatory regimes presupposes a dynamic market for the supply of regulatory standards.[1335] Economic theories of federalism do not presume the market for legal regimes to remain static and incapable of change. A market environment on the contrary presupposes the existence of a dynamic framework that allows for an optimal market equilibrium to emerge.[1336] A federally structured market for regulation

[1333] See in the realm of EU contract law, F. Gomez and J.J. Ganuza, 'An economic analysis of harmonization regimes: full harmonization, minimum harmonization or optional instrument?', 7 *European Review of Contract Law* (2011), 275-294 and references included therein, contemplating different regulatory formats. According to these authors, the choice among regimes should try to effectively reduce barriers for cross-border commercial activity while at the same time trying to preserve the alignment between the substantive standards actually applied in the different countries and societal preferences in each of them. In that case, an optional instrument is more attractive than a singular maximum harmonisation regime.

[1334] See for a general example of this approach, R. Cooter and J. Drexl, 'The Logic of Power in the Emerging European Constitution: Game Theory and the Division of Powers', 14 *International Review of Law and Economics* (1994), 307-326; J. Bednar, J. Ferejohn and G. Garrett, 'The Politics of European Federalism', 16 *International Review of Law and Economics* (1996), 279-294.

[1335] S. Deakin, note 1307, 440.

[1336] T. Heremans, note 84, 97.

in that image establishes a *race* among defederated entities in order to attract regulatory customers.

The races metaphor first presupposes that defederated legal orders are willing to adapt their standards in accordance with the preferences of their constituents. To the extent that these constituents want less stringent rules, it is argued that regulatory regimes will be willing to soften their scrutiny to lure 'regulatory customers' away from other jurisdictions.[1337] In order to retain their customers, these other jurisdictions will also lower their standards, resulting in a downward spiral of regulatory scrutiny. Such a regulatory race to the bottom has been identified in the realm of U.S. corporate law.[1338] Federal intervention should steer these races to a more balanced, well-regulated system in which different interests will be maintained and supported. The federal approach argues that federal authorities should enable a race between defederated regulatory structures but only if and to the extent that such races generate optimal equilibria.[1339] A second presentation of this metaphor argues that a regulatory race among defederated entities would by itself result in a variety of institutional and regulatory formats. These formats would not necessarily converge into a particular lowest common denominator standard.[1340] Federal intervention would in that image frustrate the optimal equilibrium envisaged by a regulatory race. The federal level should refrain from intervening in the market and allow the regulatory race to take shape.

Both 'races' approaches reflect contending views on what a market is and whether and to what extent a governmental body should intervene in its operations. As such, races theorists either embrace or reject the idea of unfettered or densely controlled competition between regulators. In both instances however, the idea that a federal system should enable and structure such races is vehemently promoted. Law's role is instrumental in that regard.[1341]

275. *Network externalities* – A direct argument in favour of law's role can be found in so-called dynamic 'network externalities' theories. That theory argues that the approaches to 'races' instrumentalize law too much as a direct translation of political or economic preferences. Network externalities theories on the contrary argue that law operates as a system

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[1337] This apparently goes against Tiebout's presumption that defederated entities are not directly adapting rules to attract consumer-citizens, but rather enable these citizens to 'vote with their feet' and leave the entity concerned, see on that distinction, R. Revesz, note 1320, 1237-1239. See also A. Ogus, 'Competition between national legal systems: a contribution of economic analysis to comparative law', 48 *International and Comparative Law Quarterly* (1999), 407.

[1338] See references in note 93. See also W. Cary, 'Federalism and Corporate Law: Reflections Upon Delaware', 83 *The Yale Law Journal* (1974), 663-705; D. Fischel, 'The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporate Law', 76 *Northwestern University Law Review* (1981-1982), 913-945. For an additional and more comprehensive 98 pp. overview in that respect, see K. Kocaoglu, 'A Comparative Bibliography: Regulatory Competition on Corporate Law', available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103644. In the EU context, see J. Wouters, 'European Company Law: Quo Vadis?', 37 *Common Market Law Review* (2000), 257-307; M. Gelter, 'The Structure of Regulatory Competition in European Corporate Law' 5 *Journal of Corporate Legal Studies* (2005), 247-284; S. Deakin, note 1289; A. Johnston and P. Syrpis, note 1183, 378-404; A. Sachdeva, 'Regulatory competition in European company law', 30 *European Journal of Law and Economics* (2010), 137-170.

[1339] See in that regard among others, J. Seligman, 'The Case for Minimum Corporate Law Standards', 49 *Maryland Law Review* (1990), 947-974; L. Bebchuk and A. Ferrell, 'Federal intervention to enhance shareholder choice', 87 *Virginia Law Review* (2001), 993-1006.

[1340] See R. Romano, 'Regulatory Competition a Problem or Irrelevant for Corporate Governance?', 21 *Oxford Review of Economic Policy* (2005), 212-231; see also S. Choi and A. Guzman, 'Choice and Federal Intervention in Corporate Law', 87 *Virginia Law Review* (2001), 961-992.

[1341] On the important role of law in that regard, see S. Deakin, note 1289, 236, referring to the need for federal power through law and states rights. See also R. Van den Bergh, note 1289, 342; H. Sondergaard Birkmose, note 85, 1085.

in its own right that is in some respects detached from these political or economic incentives.[1342] Indeed, these incentives are supplemented by particular 'legal incentives', such as the preferences of judges and lawyers to retain particular expertise[1343] and the preferences for standards instead of rules or vice versa.[1344] Room for judge-made law or the exemplary use of standards promote a particular legal image that other jurisdictions would like to replicate. These replicas are nevertheless prone to remain inferior to the original legal structure, due to the latter's network externalities.[1345] The expertise gained by judges of the first jurisdiction relying on vague standards cannot easily be replicated. Legal cultural experience in itself grants a competitive advantage to one legal order and in so doing, establishes a particular network among private actors willing to rely on the first provider of particular standards. That first provider of standards basically operates under a natural monopoly because its regulatory approach established a network of loyal adherents to that approach.[1346] Law is no longer a purely dependent variable in that approach, but somehow comprises an independent variable explaining why some defederated entities are more successful in gaining market power among their peers. From that point of view, regulatory races operate as attempts to break the natural monopoly triggered by this networked approach. Federal authorities play a fundamental role in that understanding. They could either confirm the existence of negative externalities or could mitigate their development by opting for a federal regulatory monopoly in particular markets or fields.

Deakin's 'reflexive harmonization' approach directly entrusts a supranational level with overcoming network externalities. Reflexive harmonization understands competition as a dynamic process aimed at discovering differences between systems.[1347] Whilst regulatory competition theories and ensuing 'races' aim to remove such differences in favor of uniform – the most efficient – rule allocation, reflexive harmonization emphasizes competition for the sake of competition between systems.[1348] Regulatory competition in that understanding serves as an end in itself.[1349] Any attempts to make systems converge at either bottom or top would therefore tend to destroy the diversity needed for reflexive harmonization. In order to maintain competition, reflexive harmonization presents a procedural outlook. Procedural means that 'the preferred mode of intervention is for the law to underpin and encourage autonomous processes of adjustment, in particular by supporting mechanisms of group representation and participation, rather than to intervene by imposing particular distributive outcomes'.[1350] In that image, federal harmonizing intervention is necessary, but only to the extent that it consistently promotes a continuous competitive process among defederated entities. Whilst the enabling of such a process of discovery thus serves as a justificatory

[1342] See A. Ogus, note 1318, 76-77. On network externalities in the realm of intellectual property rights, see D. Geradin and J. McCahery, note 1307, 11.
[1343] A. Ogus, note 1318, 81.
[1344] On rules and standards in an EU law context, see F. Weber, 'European integration assessed in in the light of the "rules v. standards debate"', *European Journal of Law and Economics* (2011), Online publication, 24 pp.
[1345] A. Ogus, note 1318, 82.
[1346] A. Ogus, note 1318, 78, defining a natural monopoly as a situation in which average production costs decline in the long run as output increases.
[1347] S. Deakin, note 1307, 444.
[1348] S. Andreadakis, 'Regulatory competition or harmonisation: the dilemma, the alternatives and the prospect of reflexive harmonisation' in M. Andenas and C. Baasch Andersen (eds.), *Theory and Practice of Harmonisation* (Cheltenham, Edward Elgar, 2011), 63.
[1349] See for a similar proclamation with reference to the Austrian School of Economics, O. Andriychuk, 'The Dialectics of Competition Law: Sketching the Ordo-Austrian Approach to Antitrust', 35 *World Competition* (2012), 355-384; see also O. Andriychuk, 'Rediscovering the Spirit of Competition: on the Normative Value of the Competitive Process', 6 *European Competition Journal* (2010), 575-610.
[1350] S. Deakin, note 1307, 445.

instrument for public intervention, it does not determine when, how, why and to what extent a *federal legislator* should or could intervene in the economy.[1351] Whereas legislators have been considered to perfect imperfect markets for regulation, it is difficult to consider whether any federal intervention would at all be feasible if it aims to unify particular conditions of economic life.[1352] Regulatory competition would remain a continuous process of adaptations through mutual learning. As a result, the scope of federal intervention and the existence of a federal system at all would seem questionable under this theory.[1353]

276. *Functional alternatives* – The functional alternatives variant goes even one step further. It argues that the federally structured 'race' and its mitigation by the natural monopoly of a first regulatory service provider subsequently enable the emergence of new competitive regulatory spheres.[1354] These new spheres transcend or refute the jurisdictional scope of the original regulatory authorities involved in the federal structure. They comprise new, functional, overlapping and competing jurisdictions (FOCJ).[1355] FOCJ can coincide with defederated or federal regulatory structures, but this need not be the case. In any format however, a legal infrastructure remains a necessity according to FOCJ theorists. FOCJs are composed of and structured by rules and standards that are enforceable among those operating within the FOCJ.[1356] As such, FOCJ theorists presuppose that the federal regulatory framework encourages, allows for or promotes the transition from defederated regulatory entities to functional regimes. The scope of regulatory intervention depends on the particular functional regime and the perceived needs of that regime.[1357] In reality however, the concrete operationalization of what exactly comprises a functional regime remains highly vague and therefore problematic.[1358]

277. *Remedying pluralism through regulatory coopetition* – The summary review of these dynamic additions to economic theories of federalism demonstrates that the competition among defederated entities not only instrumentalizes the law as a dependent variable. Law is on the contrary perceived as a partly independent variable capable of directly steering the regulatory competition framework presented in the economic theories of federalism. In that image, law is not only responsive to, but also responsible for particular regulatory races, the emergence of network externalities and the promotion or impediment of functional alternatives. Law could in that image particularly be relied on to alleviate the negative externalities generated by competitive federalism approaches. A particular role attributed to law is exemplified in the theory of 'regulatory coopetition' structuring federal interactions.

[1351] T. Heremans, note 84, 97-98.

[1352] S. Deakin, note 1289, 243. See also S. Deakin, note 1307, 448 for examples of the movement away from uniformity.

[1353] See S. Andreadakis, note 1348, 62, stating that convergence or uniformity focused theories tend to misunderstand the optimal market as a uniform regulatory space.

[1354] B. Frey, 'A Europe of Variety, not harmonization' in A. Marciano and J.M. Josselin (eds.), note 1318, 210.

[1355] For overviews, see B. Frey and R. Eichenberger, 'FOCJ: competitive governments for Europe', 16 *International Review of Law and Economics* (1996), 315-327; B. Frey and R. Eichenberger, 'A Proposal for Dynamic European Federalism: FOCJ' in R. Mudaubi, P. Navarro and G. Sobbino (eds.), *Rules and Reason. Perspectives on Constitutional Political Economy* (Cambridge, Cambridge University Press, 2001), 237-257; B. Frey and R. Eichenberger, 'The New Democratic Federalism for Europe: Functional, Overlapping and Competing Jurisdictions' in J. Backhaus and D. Doering, *The Political Economy of Secession* (Zürich, Neue Zürcher Zeitung Publishing, 2004), 231-280.

[1356] B. Frey, note 1354, 211.

[1357] B. Frey, note 1354, 214.

[1358] For a critique as to its unfeasibility in practice, see T. Heremans, note 84, 94.

The origins of regulatory coopetition lie in the perceived need to remedy theoretical and practical deficiencies underlying the dynamic 'races' theories.[1359] The very idea of regulatory competition is fraught with practical difficulties: the presence of externalities result in inefficient outcomes adhered to in all jurisdictions, the lack of perfect information and mobility among actors results in the failure of a truly competitive regime to take shape and defederated authorities are prone to capture by their directly involved constituents.[1360] Regulatory co-opetition seeks to safeguard the essence of regulatory competition, but also takes the need for centrally structured mutual learning and reflexive harmonization processes into account. It starts from the assumption that races to the bottom or top operate by virtue of a general organizing framework.[1361] That framework should seek to address economies of scale resulting in more efficient centralized regulatory approaches and to regulate strategic behaviour that could underlie and frustrate unfettered regulatory competition.[1362]

In order for effectively structured competition among defederated entities to take place, a *legal* framework should be designed to remedy negative externalities generated by regulatory races.[1363] In particular, federally structured cooperative techniques need to be conceived in order to limit unfettered competition among defederated entities. These techniques should be aimed at including regulatory competition within a supranationally or federally structured *cooperative* framework. According to Geradin and Esty, a balance between supranational cooperation and regulatory competition among public authorities should thus be promoted as a *means* to establishing a supranational *market regime*.[1364] Specific examples of such federal cooperative techniques include the establishment of supranational or federal agencies, the integration of national administrative structures within a composite administration framework or the cooperative involvement of civil society.[1365]

Regulatory coopetition theory argues in favour of centralized cooperation techniques as a necessary precondition for the competition among defederated regulatory entities. It thus proposes the need for a balance between federal powers and States' rights.[1366] Federal structures should not only promote regulatory races, they should equally 'regulate' the existence, features and structures accompanying them. The theory does not in itself project a clear boundary on the scope of federal regulation, but deems the co-existence of both supranational cooperation techniques and regulatory races among defederated entities to be most effectively resulted in an efficient governance framework. That desire for efficiency implicitly reflects a preference for supranational or federal law to establish principles that allow for a meaningful balance between federal cooperation and defederated regulatory competition. In that image, regulatory coopetition projects a supranationally or federally

[1359] D. Esty and D. Geradin, note 11, 236.
[1360] See also P. Larouche, 'Legal Emulation between Regulatory Competition and Comparative Law', *TILEC Discussion Paper 2012-17,* available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2044679; C. Radaelli, note 90, 7-8.
[1361] D. Esty and D. Geradin, note 11, 237. See also A. Sykes, 'Regulatory Competition or Regulatory Harmonization? A Silly Question?', 3 *Journal of International Economic Law* (2000), 257-264, arguing in favour of an organizing framework structuring both cooperation and competition through law.
[1362] On the rational behaviour assumptions underlying regulatory competition and the lack of such behaviour in practice, see C. Radaelli, note 90, 12.
[1363] See on the role of law in particular, P. Larouche, note 1360, 9-10, attributing an impoverished view of the law to the difficulties associated with bringing the regulatory competition model to its fullest practical realization.
[1364] D. Esty and D. Geradin, note 11, 247. See also P. Larouche, note 1360, 20.
[1365] D. Esty and D. Geradin, note 11, 248-254; D. Geradin and J. McCahery, note 1307, 13-16.
[1366] On that balance, see S. Deakin, note 1289, 243. For a broader conceptualization of federalism as a market for rights, see R. Stewart, 'Federalism and Rights', 19 *Georgia Law Journal* (1984-1985), 917-980.

structured framework of interaction and cooperation as a means to establish an integrated market atmosphere. It provides an exogenous model through which endogenous legal transformations can take place.[1367]

2. Regulatory coopetition and European 'integration through law': EU law's particular kind of federalism

278. *From economic to 'legal' theories of federalism* – This section integrates the 'economic' theories of federalism in the legal and theoretical discourse giving rise to the EU's specific form of federalism[1368] that has been called upon to justify the establishment of institutionally heteronomous market supervision bodies. It sketches the evolution in EU federalism theory from a dual image to a cooperative framework and seeks to highlight how legal theories of federalism reflect, incorporate or at least provide room for the incorporation of economic federalism considerations. In doing so, this section distinguishes between dual, cooperative and coopetitive legal federalism frameworks.

a. Federalism as dual division of competences: structuring competition through law

279. *Federalism as policy mantra* –European integration has consistently been understood as a federal project.[1369] The notion of federalism has been relied on to denote the inherent duality between the Member States and the 'new international organization' established by the constituent Treaty framework.[1370] Within that image, Member States and the supranational organization comprise two different regulatory 'levels' that are structured in a mutually exclusive way. Both levels have been attributed particular competences.[1371] At the same time, the federal co-existence presumes a set of conflict principles that structure relationships between the federal and defederated levels in an orderly fashion. These principles are developed at the federal level. In such federal regime, the principle of attributed competences,

[1367] In doing so, it provides a basis for legal emulation – or endogenous legal change – to come about, see P. Larouche, note 1360, 26: 'Legal emulation treats legal orders as the outcome of a series of choices, substantive and institutional, fundamental or more fleeting, and allows for dialogue and interaction between the orders against the background of those choices'. It is submitted here that EU law – which is confirmed by Larouche at 28 – presents a background framework against which national legal emulation can effectively take place. The institutional structuring of market supervision at the supranational level provides a framework through which national institutional adaptations can be envisaged and designed.

[1368] E. Wymeersch, note 37, 28.

[1369] See references in notes 9, 12, 13, 14. For an excellent overview, see L. Azoulai, note 604, 13 pp. and the collection L. Azoulai, L. Boucon and F.-X. Millet (eds.), *Deconstructing EU Federalism through Competences* (EUI Working Paper 2012/06), 114 pp.

[1370] For that reading, see Case 26/62, *Van Gend & Loos*, [1963] ECR 3 (English Special Edition, at 1), in which the Court famously held in para 3 that the European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals. It continued to identify eu rights and contrast these with community law: 'independently of the legislation of Member States, Community Law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the Institutions of the Community'. In so stating, the Court clearly distinguished the supranational from the national legal order. The judgment could in that image be read as invigorating a dual federalism approach underlying supranational integration through law.

[1371] On dual federalism as an assumption for the application of economic federalism theories in Europe, see G. Hertig and J. McCahery, 'Company and Takeover Law Reforms in Europe: Misguided Harmonization Efforts or Regulatory Competition?', 4 *European Business Organization Law Review* (2003), 179-211, in which harmonization is explicitly distinguished from national regulatory powers and considered to intrude national regulatory autonomy.

exclusive powers and pre-emption of either national or federal powers serve as necessary operational principles.[1372] The principles of subsidiarity and national administrative implementation additionally serve to confirm a dual federal image undergirding EU law. These principles reflect an image of subsidiarity that allows for regulatory races, network externalities or functional principles to emerge.

280. *Attributed competences* – Firstly, a principle of attributed competences has been granted a major role in the design and operations of dual federalism structures. The supranational level can in that image only act if it has been granted powers to act.[1373] The Member States retain all powers not captured by the Treaty legal basis framework. Particular modifications to this dual image, such as the identification of implicit competences[1374], the introduction of complementary or supporting competences[1375] and a federal court's ultimate authority in determining the scope of a particular legal basis do not manifestly alter the idea that Member States retain a core set of regulatory competences not included among the supranational competences catalogue.[1376] From an economics point of view, that core would remain open for regulatory competition among the Member States in the shadow of the established supranational framework.[1377]

281. *Exclusive powers* – Secondly, the establishment of a catalogus of exclusive competences as a basis for regulatory action supports the idea of a dual federal order.[1378] Whilst a catalogue of exclusive competences now forms part of the EU's Treaty framework, the exclusive nature of particular competences mainly found its basis in their identification as such by the Court.[1379] The recognition of such exclusive competences nevertheless highlights the dual nature of EU federalism. Exclusive competences represent a model in which either the EU or the Member States have been granted or retain particular competences and powers to act. The recognition of exclusive competences at the supranational level and the either/or modus in which the system of exclusivity is grounded also seem to presuppose that national legal orders retain a particular set of exclusive competences.[1380] The economic theory of federalism subscribes to such exclusivity. If and to the extent that centralization of particular regulatory powers would prove inefficient or prone to public choice and regulatory capture, economic theory prescribes decentralized and exclusively Member-State held competences.[1381]

[1372] For an outline of similar principles, see R. Widdershoven, 'European Administrative Law' in R. Seerden (ed.), *Administrative Law of the European Union, its Member States and the United States* (Antwerp, Intersentia, 2012), 246, who outlines the principle of supremacy, sincere cooperation and subsidiarity as three leading principles in this regard. He additionally refers to equivalence and effectiveness as European constraints on national administrative law. The classification developed here builds on a combination of these identified principles.

[1373] R. Schütze, note 1208, 3, stating that exclusively attributed competences presuppose two mutually exclusive legal spheres. In that understanding, attributed competences play a fundamental role in outlining the scope of EU federal competences. See also B. De Witte and G. De Búrca, 'The Delimitation of Powers between the EU and its Member States' in in A. Arnull and D. Wincott (eds), *Accountability and Legitimacy in the European Union*, (Oxford, Oxford University Press, 2002), 201-222.

[1374] On implied competences, see G. Conway, note 1254, 977-979 and references included therein.

[1375] See R. Schütze, note 1249, 168-169.

[1376] See L. Azoulai, 'The "Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?', 4 *European Journal of Legal Studies* (2011), 192-219.

[1377] S. Deakin, note 1289, 233.

[1378] R. Schütze, note 1208, 5.

[1379] See nr. 258 of this dissertation.

[1380] R. Schütze, note 1208, 8.

[1381] T. Heremans, note 84, 113.

282. *Pre-emption as a competition-enabling technique* – Thirdly, dual federalism supports an image of pre-emption as a conflict rule. Pre-emption presupposes a dual division of competences, with the supranational and national levels operating as entirely independent yet interrelated spheres of governance.[1382] The EU constitutional framework did not envisage a principled framework governing the pre-emption of national law by newly created supranational standards. Whilst such pre-emption could indeed be read in the Treaty's competition law supervision provisions[1383], the Court has once again been responsible for outlining a basic EU pre-emption doctrine and for developing the underlying doctrine of shared competences in which pre-emption problems arise in a more nuanced fashion.[1384] Depending on the nature and scope of regulatory intervention, EU law has been said to impede the adoption or application of national law in an entire subfield of law, the application of new national norms following the adoption of harmonizing EU provisions or the application of a particular national norm that infringes EU market freedoms. Despite such conceptual clarity, the exact scope of pre-emption in EU law remains fundamentally contentious and case dependent.

Doctrines of national law pre-emption equally presuppose the dual nature of EU and national law. In that understanding, EU law cannot intervene in areas the core of which remains to be regulated by national law. EU law would thus be pre-empted from intervening in particular national law areas.[1385] The economic theory of federalism would explain these evolutions as the establishment of a regulatory level playing field in which competition amongst national regulatory authorities is perceived more efficient in some situations and less in others.[1386]

From an economics perspective, pre-emption in that regard serves as an instrument for enabling a competitive regulatory playing field. EU law pre-emption seeks to address negative externalities associated with unfettered regulatory competition within an integrated legal regime. National law pre-emption on the other hand seeks to sustain a competitive playing field among these national regulators in areas not directly covered by EU law

283. *Proportionality* – The emergence of the principle of proportionality[1387] substantiated the need for a pre-emption framework. Proportionality presumes that actions at each level of governance should not exceed the forms and objectives necessary to attain the EU Treaties' goals. The notion of shared competences on the other hand demonstrates that particular competences are not held exclusively by the supranational level or the national legal orders. In the images of proportionality and shared competences, both the EU and national levels could be involved in the development of similar regulatory structures. Whilst attribution, exclusivity and pre-emption presume that supranational and national levels can co-exist entirely separate from one another, proportionality assumes that both EU and national law at least operate in similar fields of regulation.[1388] Within these fields, EU law should only intervene in the form

[1382] See R. Schütze, note 1255, 1023. See also A. Goucha Soares, note 1260, 143 for a conceptualization of competition underlying pre-emption.
[1383] R. Van den Bergh, note 1295, 375.
[1384] For an overview, see R. Schütze, note 1255, 1032, arguing that the Court did not develop a pre-emption vocabulary, but rather cloaked these issues within its supremacy doctrine. See also R. Schütze, note 757, 368-375 for an overview.
[1385] L. Azoulai, note 1376, 195.
[1386] The Court and EU law scholars have nevertheless appeared unwilling to recognize a hard core of national regulatory powers that would remain immune to EU involvement. See L. Azoulai, note 1376, 196.
[1387] On its emergence, see G. De Búrca, 'The Principle of Proportionality and its Application in EU Law', 13 *Yearbook of European Law* (1993), 105-150; T.-I. Harbo, 'The Function of the Proportionality Principle in EU Law', 16 *European Law Journal* (2010), 158-185 and references included therein.
[1388] M. Kumm, note 754, 524 and G. Conway, note 1254, 990.

and to the extent that diverging national regimes cannot achieve the goals set by EU law. This means that both EU and national law could indeed interact or intertwine in the concrete governance structures of a particular subfield.[1389] At the same time however, the principle of proportionality continues to distinguish both EU and national law as different spheres of governance. It mainly determines the *intensity* of EU intervention. As such, the principle equally confirms the dual federal nature of EU law.

284. *A principle of instrumental subsidiarity* – Fourthly, the principle of subsidiarity is considered to provide substantive content to the principles of attribution, exclusivity and pre-emption. It outlines – or is purported to outline – translated economic standards that determine the legal boundaries of both national and supranational competences within a supranationally determined framework.[1390] Whilst the abovementioned federalism principles mainly provide tools governing the operation of a federally-structured polity, the principle of subsidiarity determines whether and to what extent different levels of governance co-exist. By explicitly stating that the EU should intervene 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 or effects of the proposed action, be better achieved at Union level, the Treaty framework incorporates an 'economies of scale' argument.[1391] Despite recurring criticism of the judicial unenforceability of such arguments[1392], the principle is nevertheless considered to play a role as a political benchmark determining what action should be taken at which level. From the perspective of federalism theories, subsidiarity holds great hopes for providing clear-cut delineations of competences between supranational and national legal orders. The EU level in that regard serves to enable or eliminate regulatory competition depending on the subfield covered by the EU's market integration project.[1393]

285. *A principle of national administrative implementation* – Fifthly, the administrative implementation of exclusive or harmonized supranational fields of law also allows more directly to connect the economic theories of federalism with the legal tools giving shape to the EU's specific kind of federalism. The EU Treaty framework now directly states that Member States are primarily responsible for the implementation and application of EU law.[1394] Whilst that provision was previously more or less implicit, it has indeed long been considered an operational principle of EU law.[1395] Related to the economic theories of federalism, the dispersed or indirect implementation of supranational provisions aims to establish a new level playing field among national authorities. In that image, these national authorities are competing to ensure either the best or the worst implementation of supranational provisions.[1396] As such, indirect implementation confirms the dual nature of EU federalism.

The field of internal market law integration confirms that paradigm. National legal orders acted as primary regulatory structures capable of regulating products and services. Since the 1970s, the organization of free movement law had indeed continuously been structured in an entirely dual atmosphere. The free movement provisions in the Treaty framework enjoyed

[1389] M. Ross, note 1234, 477, indicating three points of interaction in which conflicts could arise.
[1390] G. Conway, note 1254, 989; A. Goucha Soares, note 1260, 143; . Kumm, note 754, 510.
[1391] Article 5(3) TEU. See already A. Alesina and S. Warzciag, note 1299, 35; T. Heremans, note 84, 107.
[1392] Most recently in P. Craig, note 1297 and T. Horsley, note 1291.
[1393] D. Halberstam, note 1299, 153-154. T. Heremans, Heremans, note 84, 89.
[1394] See Article 291 TFEU and the emphasis put thereon by R. Schütze, note 586, 1398.
[1395] The predecessor to that provision referred to the Council being responsible. It was nevertheless held that Member States retained implicit implementation powers as long as the Council – or the Commission – did not act under that provision. See K. Lenaerts and A. Verhoeven, note 686, 650.
[1396] A. Goucha Soares, note 1260, 143.

direct effect and could therefore as a matter of EU law be invoked against the Member States.[1397] Member States were subsequently called upon to justify the regulatory choices made. Only in case of particularly recognized 'public policy' objectives[1398] or mandatory requirements[1399] could Member States rules remain standing against the imperatives of EU law's intervention.[1400] The scope of intervention in that paradigm was essentially negative: if a national rule does not fit within the justificatory framework recognized by the Treaty and the Court, the national rule will have to be disapplied and will subsequently be replaced by the application of the Treaty freedom. That freedom basically allows for market access of providers of goods and services regulated in a different Member State.[1401] Judicially-mandated granting of market access is often considered as resulting in national deregulation in favour of EU market integration principles. This result has often been described as a neoliberal or deregulatory bias entertained at the EU level.[1402]

This image remains effective until today and continues to dominate the EU's internal market outlook. National rules are not merely replaced by EU market access, but rather by a different Member State's product or services' regulation.[1403] EU law merely arbiters between divergent national regimes. The home country supervision and mutual recognition principles allow a particular producer or services' provider to get established in a Member State that has a regulatory regime that best fits the providers' preferences.[1404] The EU's regime thus establishes a competition between national legal orders to attract their preferred providers.[1405] EU law thus aims to provide a 'race' between Member States in order to attract new businesses.[1406] Concerns about deregulation and neoliberalism mostly refer to fears that this race might actually be structured as a 'race to the bottom', in which protective national standards are being replaced by less reliable and ineffective standards entertained in another Member State or by insufficient supervisory and enforcement systems effectuated in that Member State.[1407]

The image of limited re-regulation at the EU level[1408] – the replacement of detailed national products and services rules with a vague 'market access' principle at the EU level and

[1397] On such effect, see Case 2/74, *Reyners* [1974] ECR 631 and Case 33/74 *Van Binsbergen* [1974] ECR 1299. On 'negative integration' in this context, see P. Caro de Sousa, 'Negative and Positive Integration in EU Economic Law: Between Strategic Denial and Cognitive Dissonance?', 13 *German Law Journal* (2012), 979-1011.

[1398] Article 36 TFEU lists these public order exceptions in the realm of goods, for background, see P. Oliver (ed.), *Oliver on Free Movement of Goods in the European Union* (Oxford, Hart, 2010), 215-311.

[1399] For mandatory requirements, see Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 and its progeny; see also references in note 620.

[1400] The establishment of an additional and preliminary *Keck* exception and its progeny also limit the interventionist scope of EU law in that regard, see references in note 756 and note 1175.

[1401] C. Barnard and S. Deakin, 'Market Access and Regulatory Competition' in C. Barnard and J. Scott (eds.), *The Law of the Single European Market: unpacking the premises* (Oxford, Hart, 2002), 197.

[1402] On the neoliberal bias in EU market integration projects, see D. Kennedy, *The Dark Sides of Virtue. Reassessing International Humanitarianism* (Princeton, Princeton University Press, 2007), 169-198.

[1403] G. Hertig refers to this regulatory structure as second-best or imperfect mutual recognition, see G. Hertig, note 632, 178. See also G. Hertig, 'Imperfect Mutual Recognition for EU Financial Services' in R. Buxbaum, G. Hertig, A. Hirsch and K. Hopt (eds.), note 1289, 221, referring to imperfect mutual recognition as second-best solution.

[1404] K. Nicolaidis, 'Trusting the Poles? Constructing Europe through Mutual Recognition', 14 *Journal of European Public Policy* (2007), 690.

[1405] C. Barnard and S. Deakin, note 1401, 204-205.

[1406] K. Nicolaidis, note 1404, 687, referring to the American example.

[1407] G. Hertig, note 632, 178; N. Bernard, note 32, 43.

[1408] C. Barnard and S. Deakin, note 1401, 219, referring to the economic underpinnings of such project. See also H. Sondergaard Birkmose, note 85, 1092.

potentially inefficient home state rules – did not affect that understanding. The EU's internal market programme provided for more direct positive integration venues through approximation of national law. EU regulatory standards would in that image replace diverging national standards. Since the Internal Market programme projected a framework of minimum harmonization grounded in home state control and supported by mutual recognition, Member States in principle remained at liberty to adopt additional standards above the minimum. In doing so, the re-regulation at the EU level did not however do much to alleviate the 'race to the bottom' fears underlying the Treaty framework. Although the 'bottom' threshold had now been set at the EU level, the divergent scope of supervisory practices and the actual enforcement of these EU minimum standards did not immediately contribute to a singular market supervision framework. Additionally, the harmonized provisions could not cover all situations and instances. In the absence of harmonization, the classical negative integration framework remained in place.

286. *Conclusion* – The principles sketched above demonstrate that the dual nature of EU federalism can be interpreted as constitutionally requiring two distinctive and complementary legal orders. The principles of attribution, exclusivity, subsidiarity and indirect implementation hint at the necessary existence of two distinct and continuously distinguishable legal orders as a necessary precondition for the optimal functioning of EU federalism. Federally structured principles are meant to ensure that competition among regulators can occur in the most efficient – welfare-enhancing – way so as to contribute to the goals set by the federation of legal orders. The continuous existence of two separate but interrelated legal spheres hints at the existence of core regulatory fields that should remain detached from direct supranational or national influences. Additional attention of economic theory to the establishment of a market for public authorities and the need to address economies of scale, public choice and regulatory capture within that market confirm the desirability for such frameworks to remain separate in order for a market for regulators to function properly.

b. Typologies of cooperative federalism: enabling cooperation through law

287. *From dual to cooperative federalism* – The federal organizational principles outlined in the Treaty framework have never only been relied on as static regulative provisions enabling two circumstricted and distinct exclusive regulatory regimes to act in federal concert. The Court's (non-)interpretation of federal principles resulted in a particular dynamic that allowed for more intense cooperative operationalization of these principles. It has indeed been argued that EU law has evolved from a dual to a cooperative federal structure.[1409] In that cooperative structure, the static regulative principles governing the dual federalism framework have been interpreted and shaped in accordance with a cooperative operational logic.

This section builds upon that argument and sketches the transformation of these principles. It subsequently argues that the structure of EU constitutional law more or less aligned with more recent developments in economic theory resorting to regulatory coopetition. That alignment has not however been complete. On the contrary, a dynamic interaction between economic insights and constitutional law continues to develop and has developed particularly in the field of the implementation and application of EU law in national legal orders. In that field, a particular regime of executive cooperative federalism is in the process of being constitutionalized, as the next section will demonstrate.

[1409] See for a recent and comprehensive overview in that regard, R. Schütze, note 10.

288. *From shared to integrated competences* – The emergence of cooperative federalism has most directly been manifested in the Court's interpretation of the scope of exclusive and shared EU competences. As Schütze convincingly argued, the attractiveness of exclusive competences has significantly diminished.[1410] Not only did the Court only recognize the existence of exclusive competences in a very limited set of circumstances, it explicitly allowed for the delegation of these competences to national legal orders. Without disrupting the qualification of exclusivity – Member States would no longer entertain competences in the particular field without being enabled so by the European Union level – this permission to delegate effectively rendered the operation of exclusive competences somewhat shared.[1411] National authorities are in that image effectively included into the opreationalization of EU exclusive competences.

In the field of shared competences, the growing scope of Article 114 TFEU allowed for the development of extensively regulated subfields of EU law. Most of the newly adopted EU measures supporting these fields had to be implemented into national law or relied extensively on national supervisory authorities to be implemented.[1412] National authorities applying implemented supranational provisions no longer act exclusively as national authorities, but rather represent and share the EU's responsibilities of making its regulatory regimes work properly. In doing so, policy decisions are being taken more exclusively at the EU level, whilst the concrete implementation, application and enforcement of such decisions remains a matter for national authorities acting in their capacity as supplementary EU bodies.[1413] The establishment of supranational networks of national supervisors confirms that approach. National authorities have thus been included within a more general supranational framework. The sharing of competences in that image is no longer a matter of distinguishing two different legal orders. Quite on the contrary, it presents a method through which both supranational and national authorities and policymakers can operate within a single-structured legal framework. The Court's reading of these inclusive conditions in Treaty legal bases and the movement away from rigid exclusivity therefore attest to the emergence of a sphere of cooperation amongst national and supranational actors as a constitutional precondition for EU policymaking.[1414]

289. *Pre-emption as a marker of integration* – The inclusive interpretation brought about particular consequences for the understanding of pre-emption in an EU context. A constitutional principle of pre-emption no longer serves as a tool to delineate rigid boundaries between supranational principles and soon-to-be-defunct national rules or vice versa. It rather shifts discourse away from exclusive zones of regulatory competences. In doing so, pre-emption presents a fluid tool to re-allocate regulatory competences from one level onto the other. In doing so, it presupposes that both levels effectively operate within a single framework.[1415] That single framework does not necessarily comprise a federal state, but mainly serves as an enabling structure for cooperative interaction amongst committing Member States.[1416] Pre-emption in that regard serves as a policing device, an instrument for the proportionate division of competences. As such, the framework presupposes that pre-emption occurs within a generally structured framework of competence division, according to

[1410] R. Schütze, note 1208.
[1411] R. Van Ooik, note 487, 15.
[1412] See for an overview, A. Ottow, note 22.
[1413] M. De Visser, note 23, 322.
[1414] R. Schütze, note 586, 1421, for an implicit argument in that regard.
[1415] R. Schütze, note 1255, 1040, focusing on the Court's role as a pre-emption developer.
[1416] On that understanding of pre-emption as horizontal mutual recognition, see K. Nicolaidis and G. Shaffer, note 90, 263-313.

which particular competences can shift between the supranational and national levels, without remaining exclusively within one of them. Only if and to the extent that these shifts are constitutionally sanctioned, the pre-emption framework will seek to provide a balanced co-existence of and interaction between national and supranational norms. In that image, the principle of pre-emption no longer serves to maintain duality, but to provide for integration among formerly distinct legal orders. The principle of pre-emption therefore effectively becomes a principle of coordination.[1417]

290. *A cooperative federal Bund?* – More generally, the movement towards cooperative federalism has recently been illustrated as the emergence of a European *Bundesunion*. Building on the constitutional theory of a Union or Bund[1418], Matej Avbelj proposed a new categorization for the European Union that overcomes the limits of a traditional federation or confederacy approaches.[1419] Whilst a federation presumes a singular state-like structure at the top, a confederacy comprises a mere loose connection of otherwise independent states. The confederacy only exercises particular attributed competences in the name of the participating states, without as such creating a new legal order superseding these participating orders.[1420] A Bund structure on the other hand presupposes a federal level and defederated levels, just like a federal state. At the same time however, it also comprises a third component which is referred to as the Union between federal and defederated levels or the whole gluing parts together.[1421] That third component is meant to acknowledge the sovereignty of both the supranational and national levels – each within their respective spheres of competences – and to ensure that these different sovereign orders co-exist and cooperate towards a greater project.[1422] The different sovereing orders operate in a non-hierarchical way, but cooperate in accordance with third-level Bundesrules that structure their interactions.[1423] Avbelj argues that the Court of Justice has been most instrumental in outlining this whole through a set of regulative and operational principles that aim to transcend the very federal and defederated levels which they govern.[1424] The emergence of a Bund-like structure to explain the political and legal evolutions at the EU level is also said to allow for the identification of particular operational principles governing the cooperation between the federal and federated levels as a matter of Bund-law. In the EU, the Court's interpretation of the Treaty framework served as a tool to extract these operational Bund principles from both EU and national law.[1425] From that perspective, the indeterminate and unidentified *sui generis* nature of the EU legal order would actually present a pluralist internal structure serving a real Union of supranational and national sovereign legal orders.[1426]

Whilst the Bund theory presents an attractive explanatory device to justify cooperative structures between the supranational and national legal orders, it also reconfirms the common federal build-up of the European Union that has governed its functioning.[1427] The very ideas

[1417] On pre-emption as coordination, see A. Goucha Soares, note 1260, 145.
[1418] A seminal work in that regard constitutes C. Schmitt, *Verfassungslehre* (Berlin, Duncker & Humboldt, 1954), 404 pp.
[1419] M. Avbelj, 'Theory of European Union', 36 *European Law Review* (2011), 820.
[1420] M. Avbelj, note 1419, 821.
[1421] M. Avbelj, note 1419, 822.
[1422] M. Avbelj, note 1419, 822.
[1423] M. Avbelj, note 1419, 824.
[1424] M. Avbelj, note 1419, 825.
[1425] M. Avbelj, note 1419, 829.
[1426] M. Avbelj, note 1419, 835.
[1427] See already, J. H.H. Weiler, note 9. See also M. Cappelletti, M. Seccombe and J. H.H. Weiler (eds.), *Integration through Law. Europe and the American Federal Experience Volume 1 Methods, Tools and*

of primacy and direct effect that have been crucial in creating new EU regulatory norms presuppose some hierarchical elements and establish partial sovereignty in the hands of the supranational level.[1428] The actual division of these competence spheres nevertheless flows from the third level – the Bundeslevel itself – and thus imposes a hierarchical or at least potentially hierarchical structuring mechanism on both the supranational and the national levels. The paradox of this third hierarchical level is that it is the Court of Justice – in determining the scope of EU law – that continues to have the final authority in delineating the respective spheres of competence through its more or less extensive interpretation of the scope of EU law in a particular field.[1429] Since the federal requirements of primacy and direct effect mandate Member States to conform to these demands, the supranational level effectively enjoys even more legitimation to extend its spheres of competences within a Bund theory context. The third level – the European whole – therefore effectively transforms into an extension of the second or federal level. At the same time however, it directly structures the national legal orders firmly within this supra-federal level and serves as a mechanism to induce cooperation between formally distinguished and hierarchically structured legal orders. From that perspective, a Bund explanatory framework serves as a constitutional background framework that allows the Court and the Union legislator more directly to consider cooperative mechanisms as necessary conditions of the project of European integration.[1430]

291. *From cooperative federalism to regulatory coopetition* – The abovementioned approaches and theories present explanatory frameworks guiding EU law evolutions. They do not however provide more concrete normative guidance on *how* EU law has evolved and should continue to evolve to further these cooperative and Bund-structured aims. Economics insights provide more focused direction in that regard. The most fitting explanatory economics framework in that regard lies with regulatory coopetition. As mentioned above, that framework remedies unfettered regulatory competition by additionally requiring cooperation initiatives among federally-structured entities. The cooperative mechanisms that structure regulatory competition can take place at a supranational level. The scope of intervention by cooperative mechanisms is meant to overcome negative externalities of unfettered competition or to address economies of scale that otherwise remain unaccounted for in a purely competition based regulatory system.[1431] At the same time, it incentivizes regulators to identify these externalities and to address them through supranational initiatives. These supranational initiatives serve to complement the competitive edge considered to lie with national authorities and to structure that competition in a supranational whole. In the image of Bund theory, economic regulatory coopetition principles provide a framework allowing for the interaction between and cooperation among both supranational and national actors.[1432] These principles could indeed serve as third-level structuring devices integrating supranational and national sovereign spheres into a workable and efficient entity.[1433] In that image, constitutional principles are read to incorporate regulatory coopetition insights and to

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Institutions, Book 2 Political Organs, Integration Techniques and Judicial Process (Berlin, de Gruyter, 1985), 355 pp.

[1428] M. Avbelj, note 1419, 827.

[1429] For an example in the realm of procedural law, see S. Prechal and R. Widdershoven, 'Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection', 4 *Review of European Administrative Law* (2011), 31-50.

[1430] On the project and process-oriented need of European integration, see G. Majone, *Europe as the Would-be World Power. The EU at Fifty* (Cambridge, Cambridge University Press 2008), 77-78.

[1431] D. Esty and D. Geradin, note 11, 237.

[1432] D. Geradin and J. McCahery, note 1307, 11.

[1433] Cf. M. Avbelj, note 1419, 835.

determine where boundaries between regulatory competition and cooperation need to be placed as a matter of EU constitutional law.

c. *Executive cooperative federalism* and the establishment of a specific regulatory coopetition framework

292. *Executive cooperative federalism* – The regulatory coopetition image most explicitly appears in the realm of the implementation of EU law in national legal orders. Despite the general proclamation in Article 291 TFEU that Member States are responsible for the implementation of EU law, the European Union consistently adopted particular implementing, supervisory or executive mechanisms replacing national authorities as the sole implementing bodies of EU law.[1434] In addition, EU law transformed the roles of national administrations and national independent authorities. This transformation has been captured by the notions of mixed, composite or integrated administration.[1435] According to Schütze, the idea mixed administration comprises an institutional translation of cooperative federalism in the executive realm.[1436] Within a single procedural framework, national and European components formally co-exist and co-function.[1437] The notion of composite administration is broader and refers to the embedding of EU regulated activities in joint information, support and coordination processes between the administrations involved.[1438] Administrative coordination is deemed to be partly vertical and partly horizontal, between the supranational and national levels and amongs national levels.[1439] The cooperative processes projected in that regard distinguish between informational cooperation, procedural cooperation and institutional cooperation. Informational cooperation refers to the exchange of information on an occasional basis or within a more centralized and networked scheme. Procedural cooperation considers the coordination of national and supranational administrative proceedings and the mutual recognition of particular national decisions. Institutional cooperation extends these informational and procedural functions into a supranationally institutionalized framework. EU agencies of formalized networks serve a key function in that regard. These mechanisms reflect an integrated administrative sphere in which national and supranational actors operate within a federally structured framework. Integrated administration in that image refers to a set of regulatory provisions enabling cooperation and coordination between different administrations at the national and supranational levels.[1440] The constitutional principles governing the realm of executive federalism largely coincide with the general federal or Bund-principles structuring EU federalism.[1441] The principles of

[1434] On the emergence of supplementary supervisory agencies in that image, see references in note 30. On more general administrative law interactions, see J. Rivero, 'Vers un droit commun européen: nouvelles perspectives en droit administratif' in M. Capelletti (ed.), *New perspectives for a common law of Europe*, (Nijhoff, Leiden, 1978) 389; J. Bridge, 'Procedural aspects of the Enforcement of EC Law through the Legal Systems of the Member States', 9 *European Law Review* (1984), 28-42; J. Usher, 'The "Good Administration" of European Community Law', *Current Legal Problems* (1985), 269. J. Schwarze, 'Tendencies towards a Common Administrative Law in Europe', 16 *European Law Review* '1991), 3. See also K.–H. Ladeur, *The Europeanisation of Administrative* Law (Aldershot, Ashgate, 2002), 159 pp.; R. Widdershoven, note 1372, 289-343. See also J. Schwarze, *European Administrative Law* (London, Sweet & Maxwell, 2006), 1562 pp.
[1435] E. Schmidt-Assmann, note 1102, 14.
[1436] R. Schütze, note 586, 1420.
[1437] E. Schmidt-Assmann, note 1102, 4.
[1438] R. Schütze, note 586, 1421.
[1439] E. Schmidt-Assmann, note 1102, 5.
[1440] E. Schmidt-Assmann, note 1102, 5.
[1441] Cf. M. Avbelj, note 1419, 835; R. Schütze, note 586, 1421. Whilst both authors differ in approach, they essentially agree on the existence and operationalization of a core of constitutional principles structuring and supporting EU-Member State interactions.

attributed competences, subsidiarity, proportionality, pre-emption and national autonomy govern the administrative interactions between national and supranational regimes.

293. *Executive cooperative federalism as an example of regulatory coopetition* – Integrated administration provisions shape an image of *executive cooperative federalism* that provides a background against which institutionally heteronomous market *supervision* regimes have developed. In that image, EU law is able to impose organizational requirements on national administrative authorities and to commandeer Member States to develop their administrative structures with a view to accommodate these EU requirements.[1442] The institutional autonomy of the Member States is at the very least curtailed.[1443] At the same time however, EU executive cooperative federalism does not envisage the replacement of national authorities with ful-fledged supranational implementation bodies. It rather proposes the inclusion of Member States into the operations and execution of EU administrative governance. Member States directly operate and are able to compete with each other within the confines of a constitutional framework enabling or limiting the emergence of particular administrative enforcement structures.[1444] As benchmarks governing national institutional autonomy, these principles allow to balance the cooperative obligations imposed by supranational law with the competitive opportunities for national regulators to distinguish themselves as EU-mandated supervisory bodies. From that point of view, the regulatory coopetition framework identified above could also serve to structure and determine the institutional outlook of EU executive federalism initiatives.

3. Towards constitutional incorporation of regulatory *coopetition*

294. *Economic theories underlying EU law* – This chapter sketched how economic approaches to federalism have pervaded debates on the federal structure of EU law. It particularly outlined that both dual and cooperative federalism frameworks reflect a preference for regulated competition among national authorities. In that image, these national authorities retain particular autonomous features by virtue of EU law. If and to the extent that EU law deems supranational intervention necessary, national regulatory autonomy and the consequential competition among national legal orders will be diminished accordingly and replaced by supranational regulatory alternatives. The dynamism underlying this process has given rise to the identification of *regulatory coopetition* as a framework for understanding EU federalism evolutions. Regulatory coopetition presumes that the EU legal framework reflects a balanced approach to cooperation and competition among national legal orders. In that image, a set of federal constitutional principles determines the extent to which cooperation and competition need to be balanced. EU constitutional law in that image comrpises a translation of regulatory coopetition considerations in a particular fashion. The emergence of EU executive federalism structures provides a particular illustration of that approach.

295. *Reconfiguring constitutional principles in the light of a regulatory coopetition image* – The analysis in this chapter particularly related economic federalism debates to evolutions in the legal framework structuring EU federalism. It advocated a reading of that legal framework

[1442] In the realm of competition law, see P. Van Cleynenbreugel, note 526.
[1443] On that curtailment as a necessity implied in integrated administration, see R. Schütze, note 586, 1426, reading scope for further curtailment in Article 197 TFEU. Article 197 TFEU states that '[e]ffective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest. The Union may support the efforts of Member States to improve their administrative capacity to implement Union law'. Schütze argues that this provision excludes the harmonization of coordinated Member State administrative implementation. As a result, supranational mechanisms might present a more viable alternative in the absence of harmonized coordination tools.
[1444] D. Esty and D. Geradin, note 11, 251.

as constituting a translation of economic principles into legal discourse and principles. In that image, EU constitutional principles incorporate and give shape to economic considerations underlying the federal features of European integration. EU law is in that image both an instrument of economic federalism and a translator of such federalism considerations into the language of the law. The translation perspective thus envisaged allows to identify particular markers of economic federalism into the constitutional principles structuring the existence and exercise of supranational competences. These markers in turn give shape and content to the constitutional principles underlying and justifying new institutional arrangements in which supranational and national law intertwine. The establishment of supranationally structured market supervision arrangements can be considered to constitute an example of such constitutional principles being operationalized.

The image of operationalized constitutional principles serves as a specific inroad into reconfiguring the principles underlying the emergence of institutionally heteronomous EU market supervision regimes. These principles – constitutional structural principles governing the existence and exercise of shared regulatory competences in accordance with EU law – can be said to incorporate a particular regulatory coopetition image. Taking the perspective of regulatory coopetition as a starting point, the following chapter will indeed reconfigure the existing principles into balancing standards to ensure simultaneous cooperation and competition among national authorities as a matter of EU law. Reconfiguration of these principles will additionally allow to clarify the stakes and scope of regulatory coopetition envisaged by the establishment of institutionally heteronomous market supervision regimes.

Chapter 3. From open-textured to coopetition-oriented constitutional principles

296. *Constitutional structural principles and regulatory coopetition* – This chapter outlines how existing constitutional principles have been reconfigured with a view to reflect a balance between supranational cooperation and national regulatory competition. The chapter more specifically considers the extent to which regulatory coopetition considerations have been incorporated into constitutional structural principles of executive cooperative federalism that underlie the *institutional organization of supranationally structured market supervision.* In doing so, it seeks to establish the constitutional framework in which both directly and indirectly mandated market supervision initiatives have been taking shape.

The chapter proceeds in two sections. A first section reconsiders the constitutional structural principles outlined in chapter one and refined in chapter two. The second section relates these reconfigured constitutional principles to the elements of institutional heteronomy identified in part II of this dissertation. It allows to outline a relationship of mutual dependency between principles and elements of institutional heteronomy.

1. Constitutional structural principles reconfigured

297. *Introductory overview* – This section undertakes to revisit the constitutional structural principles identified in chapter one – and deemed to apply to the institutional organization of market supervision regimes outlined in part II – in the light of a regulatory coopetition understanding developed in the previous chapter. In doing so, it identifies how the scope of conferred competences (subsidiarity and proportionality) has been read, how the principles of sincere cooperation and national institutional autonomy have been interpreted to accommodate the establishment of supranationally structured market supervision bodies and how these principles affect the *focus* of competences conferred to the supranational level in that regard. Doing so will allow to distinguish the reconfigured coopetition-structured principles from their open-textured counterparts directly figuring in the Treaty framework. The reconfigured principles therefore provide additional substance and direction to otherwise seemingly non-sensical constitutional principles.

298. *Scope of conferral: subsidiarity* – The idea of subsidiarity projects that supranational intervention could be warranted if necessary to structure the implementation and enforcement of EU law and to avoid unfettered regulatory competition among national authorities applying EU law. In that image, the supranational level can intervene as a matter of 'second' resort to regulate such competition.[1445] National supervisory authorities continue to play a crucial role in that understanding and cannot merely be replaced by a mastodontic supranational supervisory bureaucracy.[1446] The involvement of supranational supervisory bodies should therefore directly be supplementary and secondary to the operations of national supervisory authorities.

The institutional frameworks underlying directly and indirectly mandated market supervision reflect that approach. In the Regulation 1/2003 regime, the European Commission retains full enforcement powers, but shares these powers simultaneously with national authorities. National authorities are not only obliged to apply EU competition law, but should do so in the light of the Commission's instructions.[1447] The Commission itself can decide what cases to

[1445] A. Alesina and R. Wacziarg, note 1299 already project such image on the basis of their economic model.
[1446] For a similar argument, M. De Visser, note 23, 499.
[1447] See nr. 59 of this dissertation.

subject to a supranational inquiry and to relieve national authorities of their powers to decide on these cases.[1448] The justification for this division of powers is to allow the Commission to be occupied with 'more important' transboundary competition law cases, leaving 'minor' or 'less important' transboundary issues to one or more national competition authorities.[1449] The Commission thus fulfils a secondary role as a first-line and full-fledged market supervision body in that regard.

In the realm of financial market regulation, this secondary supervision role has been entrusted to newly established supervisory authorities. National authorities are predominantly charged with supervising the application of harmonized supranational law by home country financial market operators.[1450] The ESAs coordinate the implementation of supranational provisions and to intervening in instances where such implementation requires a direct response from the supranational level. As a result, the ESAs have been specifically delegated intervention powers in the realm of misapplication of EU law and emergency situations.[1451] The ESAs cannot directly take over a particular case from national authorities and render a final decision, except in very exceptional breach of law, emergency or consumer protection circumstances.[1452] In that respect, the ESAs do not immediately share enforcement competences with the national authorities, but operate in a more direct hierarchical relationship to them.[1453] The European Commission also continues to play its role, but merely as a tertiary accountability structure.[1454] It polices Member States' actions on the basis of Article 258 TFEU rather than intervening in the day-to-day operations of national supervisory authorities.

299. *Subsidiarity as principled second-resort supranationalism* – Despite these organizational differences, directly and indirectly mandated regimes both embody a principle of 'second resort' supranational intervention. This principle is premissed on the European Union intervening as a supplementary market supervision body in its own right. The EU is meant to support the operations of an EU market regulation regime that allocates supervisory competences to national legal orders. Supranational law incorporates an image of operational support, in which the ultimate supervisory intervention powers remain with the supranational level, but in which national authorities remain responsible for the day-to-day implementation and application of EU law in the national legal orders.

Traditionally, subsidiarity has been defined as an operational principle of shared competences, determining the scope of exercise, but not the existence of EU shared competences.[1455] In this field however, subsidiarity provides a toolkit to delineate and determine EU competences establishing integrated supervision structures.[1456] As a principle of second resort intervention, it not only determines the scope, but also the existence of supranational intervention powers in national legal orders. Contrary to the established principle of subsidiarity, the principle of

[1448] See nr. 59 of this dissertation.
[1449] Recital 9 Modernization White Paper.
[1450] See nr. 140 of this dissertation.
[1451] See nrs. 164-166 of this dissertation.
[1452] See Articles 17-19 ESA Regulations and Article 28 Regulation 236/2012.
[1453] For a similar account on a more general level, R. Schütze, note 586, 1401, conceptualizing the subsidiary nature of supranational intervention.
[1454] See nr. 212 of this dissertation.
[1455] See T. Heremans, note 84, 89, for a concise overview.
[1456] Thus giving shape to a substantive subsidiarity understanding reflected directly in the Treaty legal bases, see K. Lenaerts and P. Van Nuffel, note 1304, 133.

second resort supranational intervention brings subsidiarity forward as a condition ingrained in the Treaty legal bases relied on to establish EU-wide supervisory regimes.[1457]

The interpretation of Article 114 TFEU accompanying the ESAs' establishment serves as an example of the constitutional boundaries of this second resort principle. EU law supervisory authorities play a secondary role in the system of EU financial regulation. They guide Member States' authorities, protect the cooperative rights underlying the regulatory framework and guarantee the involvement of national authorities in the system. At the same time however, they also subsume the extent of direct supranational intervention to national authorities' day-to-day enforcement powers.[1458] Article 103 TFEU more directly reflects that understanding. The reading of that provision as justifying a decentralized supervisory framework in EU competition law confirms that the European Commission maintains its supervisory role granted in Article 105 TFEU. At the same time however, it is supported by national authorities and courts. These national authorities and courts retain day-to-day enforcement powers, but have to share these powers with – and are subordinated to – the European Commission's decision-making powers.

The pinciple of second resort supranational intervention leaves room for institutional diversity. It does not impose a singlularly structured supranational intervention blueprint. As such, it does not mandate Commission's intervention or the establishment of supranational regulatory agencies per se. It rather enables the European Union to delegate operational support roles to supranational supervisors or to entrust national supervisory authorities with particularly tailored EU-intervention options. At the same time, it also limits the role of the EU in the organization of market supervision to supplementary intervention. In that image, second resort supranational intervention serves as a constitutional principle restraining the emergence of full-fledged supranational supervisors devoid of any national support or intervention. The principle incorporates a particular preference for a network-like structure in which supranational and national interests can converge. The emergence of an informal network or a more formalized network agency are examples of that approach.[1459] In order to guarantee the operations of that network, the supranational level needs to have the final authority, but should also leave particular day-to-day competences to national authorities. A principle of second resort intervention allows the supranational level to strike that balance in favour of supranational supporting frameworks that embrace and confine national regulatory autonomy.

300. *Scope of conferral: proportionality* – The principle of proportionality appears in three guises in EU law. First, it serves as a principle restraining the extent of supranational initiatives, limiting their form and method to what is deemed appropriate in the light of particular regulatory objectives.[1460] Second, it also serves as a tool to assess the scope of

[1457] For that argument, K. Gutman, note 683, 175.
[1458] See recital 17 ESA Regulations.
[1459] For a preference for network agencies rather than mere networks in that regard, see S. Lavrijssen and L. Hancher, 'Networks on Track. From European Regulatory Networks to European Regulatory "Network Agencies"', 34 *Legal Issues of Economic Integration* (2008), 23-55.
[1460] For this political dimension, see *Vodafone*, para 52: With regard to judicial review of compliance with those conditions the Court has accepted that in the exercise of the powers conferred on it the Community legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. Thus the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue. See also N. Höss, 'The Principle of Proportionality in the *Viking* and *Laval* cases: an appropriate standard of judicial review?', *EUI Law Working Paper 2009/06,* 37 pp.

national measures operating in the shadow of EU fundamental freedoms or harmonized provisions.[1461] In both instances, proportionality serves as a shield against overly infringing supranational and national norms. Third, proportionality serves as a constitutional device to justify the extent of fundamental rights intervention into national legal orders.[1462] Contrary to fundamental freedoms, fundamental rights have long remained unwritten constitutional principles of EU law. The principle of proportionality ensures that both supranational and national measures operating in the shadows of EU law did not impinge upon these fundamental rights in a disproportionate way.[1463] In this instance, proportionality still serves as a shield against intrusions by both supanational and national authorities. At the same time however, proportionality serves a a sword to allow for newly identified EU fundamental rights to serve as evaluative standards against national and supranational rules. In doing so, the principle of proportionality allows for supranational fundamental rights standards to be invoked and applied in the national legal orders. The latter guise also potentially serves to structure and limit national institutional operations in the realm of market supervision.

301. *Proportionality as pro-active commandeering standard* – As a constitutional principle of integrated administration, proportionality equally reflects both dimensions and extends the sword dimension in a more concrete way. Thus understood, the principle of proportionality constitutes a modus to commandeer national authorities to operate into a supranationally structured market supervision system and to impose upon these national authorities particular EU-induced organizational modifications that render the supranational system effective.[1464] The constitutional principle of proportionality does not however impose a free reign on commandeering to the supranational level.

Firstly, EU constitutional law does not generally allow to commandeer specific national actors.[1465] That claim is not entirely accurate however. Commands can indeed only be addressed to Member States in their entirety if these commands take the format of a Directive. These Directives in themselves could nevertheless incorporate particular obligations for specific Member State bodies. Specialized EU Directives did indeed directly impose obligations on national administrative authorities.[1466] As a precondition to these obligations, Member States were required to organize and establish independent authorities. The Court additionally also felt capable of directly commandeering national judges and even national administrative authorities.[1467] As a result of these legislative and judicial endeavours, national administrations have effectively been 'integrated' into the EU administrative system.

Secondly, these legislative and judicial commands themselves are encapsulated in the idea of proportionality. Commanding national authorities should only take place in a format if that is the most economical way to achieve particular objectives. This means that adopting direct supranational intervention or allowing for unfettered competitive structure among defederate

[1461] See for proportionality in that regard, T.-I. Harbo, note 1387, 171.
[1462] Hofmann contends that the principle is relied on to delimit the exercise of EU powers vis-à-vis fundamental individual rights. These individual rights are then presumed to differ from EU powers. See H. Hofmann, note 1287, 53. In that image however, proportionality only serves as a reactive principle. The adoption of EU-wide fundamental rights standards nevertheless results in proportionality analysis serving as a balancing tool between two sets of EU powers: EU fundamental rights and EU regulatory powers. See F. de Cecco, 'Room to Move? Minimum Harmonization and Fundamental Rights', 43 *Common Market Law Review* (2006), 9-30.
[1463] See in that respect recently, Joined Cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v Land Hessen*, [2010] ECR I-11063, para 74.
[1464] M. Ross, note 1234, 480.
[1465] On that notion, see R. Schütze, note 586, 1419.
[1466] Market liberalization Directives are a perfect example, see infra nrs. 506 and 511 of this dissertation.
[1467] See Case C-518/07, *Commission v Germany*, [2010] ECR I-1885. See also A. Ottow, note 22, 214.

regulators could represent a more efficient or effective tool in the light of particular constitutional objectives. Only when particular commands are considered economically justifiable, the principle's sword or pro-active function presents a constitutional justification for the establishment of particular integrated supervision mechanisms.

The pro-active function of proportionality outlined here is double-edged. On the one hand, it guides institutional developments engaged upon by EU legislative action. Proportionality in that understanding serves as a tool allowing the supranational legislator to commandeer Member States to adopt particular implementing structures or to maintain standards of independence, accountability and judicial review in their operations.[1468] On the other, it also serves as an instrument for the Court of Justice to commandeer national judges to induce national institutional transformations.[1469] The organizational structures of both directly and indirectly mandated market supervision have been built on such commands, packaged into cooperative rights.[1470] The Court's approach in *Vebic* additionally highlighted a willingness to ensure more in-depth coordination among national authorities and to streamline their institutional functioning in accordance with unwritten EU standards of adequate national institutional organization.

The principle of proportionality is thus presented as a tool to directly impinge upon Member States' institutional autonomy in the name of effective EU market supervision. Proportionality as economically justified commandeering in that regard encapsulates a constitutional standard for the operationalization of a system grounded in institutional heteronomy.

302. *Mutual cooperative rights as building blocks* – The principle of sincere cooperation serves as a constitutional catch-all provision governing mutual duties and obligations between the national and supranational levels. It is also the foremost constitutional expression of cooperative federalism.[1471] In accordance with the principle of sincere cooperation outlined in Article 4 TEU, both supranational and national authorities are called upon to assist each other in fulfilling the tasks which flow from the Treaties. Member States shall in particular assist the Union and refrain from any action or inaction that could jeopardize the Union's actions. Thus formulated, the provision reflects a particular set of obligations predominantly imposed on Member States.

The Court held that the principle of sincere cooperation also applies to Union institutions.[1472] In that image, sincere cooperation incorporates a set of mutual cooperation obligations that frame and structure the interactions between different administrations and institutions. That image continues to guide the institutional organization of market supervision, albeit to a different extent. In the present regulatory framework, cooperative obligations are matched by the image of cooperative rights. In EU competition law, Member States have the right to apply Article 101 in its entirety, have the right to request information and the right to participate in the European Competition Network. The European Commission on the other hand has the right to withdraw a case from national authorities, has the right to act as an amicus curiae in national proceedings and to mandate the support of national enforcement agencies when conducting inspections. The ESA framework grants national supervisory authorities the right to engage in day-to-day supervision, to be informed in the ESFS, to

[1468] See also Article 35 Regulation 1/2003, which could explicitly be read as incorporating similar commands to national legal orders to organize their competition authorities in accordance with EU law.
[1469] M. Ross, , note 1234, 480. See also nr. 119 of this dissertation.
[1470] See nr. 246-247 of this dissertation.
[1471] R. Schütze, note 586, 1398.
[1472] Case C-2/88, *Zwartveld*, para 16.

participate in colleges of supervisors and to participate in the operations of the ESAs as members of the Board of Supervisors. The ESAs on the other hand have the right to develop and refine draft regulatory and implementing technical standards, to address infringements of EU law, emergency situations and supervisory conflicts, to require information, to adopt guidelines and recommendations, to impose sanctions on credit rating agencies. The European Institutions have the right to be informed or to participate in the Board of Supervisors' meetings as observers. They have the right to hold the ESAs accountable.

Whilst it could be argued that a right is merely the opposite of an obligation[1473] and both rights and obligations operate in conjunction, the institutional regimes supporting market supervision put more emphasis on the 'rights'-dimension than had previously been the case. Cooperative rights not only allow to distinguish different tasks among supranational and national market supervision agencies, they also include both types of actors in a single system structured by federally determined cooperative rights. As such, the principle of sincere cooperation is operationalized as a set of mutual cooperative rights that structure and guarantee the development of a more integrated administrative sphere. These cooperative rights reflect a framework within which competition among national authorities can take place. The operationalization of a principle of sincere cooperation into mutual cooperative rights therefore serves to structure a coopetitive regime within EU law.

303. *National institutional autonomy reconfigured: pre-emption* – The second-resort intervention, pro-active commandeering and mutual cooperation principles project that the exercise of supranational integated administration or market supervision powers can take place to the detriment of national institutional autonomy. The image of competition among national authorities nevertheless only emphasizes the *coordination* of national law structures within supranational frameworks. National legal systems should in that understanding remain at liberty to design and establish a particularly tailored institutional framework supporting market supervision. The technique of EU law pre-emption serves to balance institutional autonomy and supranational intervention.

The technique of pre-emption enables supranational law to replace and disapply conflicting national provisions.[1474] This is, however, a one-sided approach to the problem of EU-national interactions. Pre-emption can also mean to imply that in particular circumstances, national rules would prevail in case of conflict with EU law. The emergence of complementary competences presents an example in that regard. The legal bases structuring these competences allow the EU only to support or complement national initiatives, without immediately engaging upon full-scale harmonization. In those instances, a harmonizing EU provision could be pre-empted by national legislation in force.[1475] From that perspective, pre-emption works as a two-way principle, the main function of which is to determine whether a conflict between a national or a supranational norm emerges and the extent to which conflict

[1473] W. Hohfeld, 'Some Fundamental Conceptions as Applied in Judicial Reasoning', 23 *Yale Law Journal* (1913), 30.

[1474] In the words of Robert Schütze, it presents a tool to enable the principle of supremacy to come into being, see R. Schütze, note 1255, 1024.

[1475] This position should nevertheless be qualified, as the Court has repeatedly stated that no nucleus of sovereignty exists in which Member States can avoid any EU law interference, see Cases . See also K. Lenaerts, 'Federalism and the Rule of Law: Perspectives from the European Court of Justice', note 14, 1341. That position does not however exclude the idea that the Court could rule that the scope of application of an EU rule does not extend to a particular national rule. In that understanding, the existing national rule would indeed pre-empt the EU rule from being applicable, but only as a matter of (non-applicable) EU law. As such, EU law still determines the scope of conflict and ensuing pre-emption occurring in that regard.

regulation principles – such as the principles of primacy or proportionality – need to come into play.[1476]

To the extent that a supranational or national provision directly or indirectly conflicts with a national or supranational provision, the conflict will have to be addressed. A conflict can indeed be direct – two different rules applying to the same behaviour – or indirect – a rule interfering with a set of rules regulated at a different level or constituting an obstacle to the effective implementation of rules at a different level.[1477] Direct conflicts have been said to emerge whenever a similar situation is governed by two rules the enforcement of which proves either incompatible or more stringent. Indirect conflicts govern a less specific set of potential misalignments between supranational and national law. These misalignments depend on the extent to which EU law regulated a matter, the room left to national authorities by virtue of secondary Union law and the ways in which the Court of Justice perceives the scope of application reflected therein.[1478] Indirect conflicts could also result in the implicit pre-emption of particular national rules.[1479] To the extent that the latter conflict with newly established supranational provisions, these national rules constitute obstacles that could – as a matter of primacy – be disapplied, even in instances where the EU legislator did not specify the existence or exact scope of pre-emption a particular legal instrument is to bring about.[1480]

Any doctrine of pre-emption necessarily presupposes an analysis of the scope of application of both supranational and national norms.[1481] In the Regulation 1/2003 regime, national authorities are obliged to apply EU law standards in addition to national competition law. Any assessment on the basis of national competition law cannot however prohibit agreements that would have been deemed legal on the basis of EU law. In that perception, national competition authorities are pre-empted from adopting a contrary position on the basis of national law. This entails two consequences regarding the scope of application of EU law. First, to the extent that national law continues to be applied in conjunction with EU competition law in relation to agreements that affect trade between Member States, national provisions or interpretations have to align with EU law on the matter. Second and more fundamentally, this implies that national competition law structures have to fit within the EU competition law framework. Policy room for manoeuvring around these EU standards remains limited to situations in which interstate trade remains unaffected. The scope of interstate trade affectation firmly remains within the Court's confines, which thus ultimately determines the policy space remaining with national legislators and authorities in that regard.[1482]

The pre-emption of national rules – and the underlying scope of application of harmonizing or regulating EU law standards – nevertheless also relates to rules not directly regulating the substance of a particular field. Principles governing the institutional organization of national authorities are exemplary in that regard. It is well-known that national authorities operate within a framework of national institutional autonomy and are presumed to be virtually left

[1476] R. Schütze, note 1255, 1033.
[1477] R. Schütze, note 1255, 1039.
[1478] R. Schütze, note 1255, 1047 for a specific example.
[1479] R. Schütze, note 1255, 1036.
[1480] R. Schütze, note 1255, 1028 on the effect of disapplication.
[1481] That might also explain why pre-emption is often considered a rather imprecise or unprincipled doctrine, see R. Schütze, note 1255, 1033-1034.
[1482] For an articulation of a movement from pre-emption to partnerships as a result of the Court's actions, see G. Majone, 'Regulatory Legitimacy in the United States and the European Union' in K. Nicolaidis and R. Howse (eds.), note 40, 255.

untouched by EU law requirements.[1483] The extent of pre-emption governing particular substantive law matters nevertheless also affects this perceived scope of autonomy. If and to the extent that a national legal order is pre-empted from adopting its own substantive roles or to the extent that these rules are to be encapsulated in a particular EU-law based framework, its national implementation, supervision and enforcement frameworks merely becomes an instrument of EU law in the national legal orders. It could in that image be expected that EU law could equally pre-empt *national institutional organization rules and principles* that frustrate the implementation and enforcement of these EU-determined substantive law standards.

304. *Institutional obstacle pre-emption as operational principle of effectiveness* – The challenges presented by national law pre-emption in the realm of the institutional organization of market supervision bodies can be described as a species of obstacle pre-emption. National supervisory authorities are called upon to participate in or operate from the shadows of supranational enforcement bodies. In doing so, these bodies have to be equipped to enforce and apply EU law in ways compatible with the objectives of EU law in that particular subfield.[1484] To the extent that organizational principles governing national law constitute obstacles to the effective application of EU rules, these principles will – to some extent – have to be set aside as obstacles to the functioning of EU law. Although these rules might not directly conflict with a particular substantive EU law provision, the system of market supervision envisaged by EU law mandates their removal from national legal orders.

The pre-emptive removal of national institutional obstacles reflects a particular operationalization of an EU constitutional principle of effectiveness. The principle of effectiveness has lead a somewhat elusive existence in EU law. On the one hand, the notion of *effet utile* in EU law is widely recognized as a condition for granting more direct intervention into national legal orders.[1485] On the other hand however, effectiveness did not gain formal constitutional recognition in the EU Treaty framework. Effectiveness is mainly a case law development and its status as an independent constitutional principle of EU law has therefore been questioned.[1486] These seemingly contrarian developments should not however detract from the increasing attention paid to a principle of effectiveness by the Court. According to Malcolm Ross, the principle of effectiveness allows for a particular convergence-oriented approach. Throughout the case law, the principle of effectiveness has provided 'an institutional mantra operative at both national and European levels in order to secure the replication of the latter style of reasoning in the former'.[1487] The principle of effectiveness promotes a particular breed of instrumentalism, tending towards the best result from a particular EU law point of view.[1488] *Vebic* illustrates this point. In that case, the effective enforcement of EU competition law at the national level would be jeopardized if the national competition authority was unable to participate – in principle – as a defendant or respondent in appellate proceedings against its own decisions.[1489] National rules impeding that participation to become a reality had first of all to be disapplied as they constituted an

[1483] Unless a specific obligation is imposed on them, see the market liberalization Directives discussed in nrs. 506 and 511 of this dissertation as examples of that approach. Article 35(1) Regulation 1/2003 and Article 49 AIFM Directive equally fall within that category.
[1484] See for a direct judicial confirmation of that argument, *Vebic*, para 63.
[1485] M. Ross, note 1234, 481. See also M. Accetto and S. Zleptnig, 'The Principle of Effectiveness: Rethinking its Role in Community Law', 11 *European Public Law* (2003), 388-390.
[1486] M. Ross, note 1234, 479. This effectiveness approach has consistently been applied in relation to national procedural autonomy considerations, see S. Prechal and R. Widdershoven, note 1429.
[1487] M. Ross, note 1234, 480.
[1488] M. Ross, note 1234, 486.
[1489] *Vebic*, operative part, see also nr. 144 of this dissertation.

obstacle towards the emergence of an integrated EU market supervision regime. Pre-emption in that image served as a tool to enable such effectiveness analysis taking shape.[1490]

Institutional obstacle pre-emption grounded in an instrumental effectiveness standard once again grants the supranational level significant intervention options. The need for effective application of EU law provides a toolbox in which EU-wide conditions of adequate national institutional organization can be identified and relied on to pre-empt existing national principles. Obstacle pre-emption constitutes a device to significantly extend the powers of EU law beyond mere national rule pre-emption. It effectively supports and enables the development of institutional commands imposed on national legal orders.[1491] As a result, EU law is able to outline the principles governing the most adequate organization of national supervisory bodies. Both the EU legislator and the Court have a role to play in that regard and can determine the 'adequateness' principles national legal orders have to take into account.

305. *Focus of conferral* – The outset of shared competences is that at least two differently situated legislative bodies are equally competent to regulate similar fields. A federal constitutional framework comprising unitary principles is necessarily relied on to police the boundaries of sharedness and to create an effective co-existence of differentially levelled legislators once the federal level exercises its competences to the detriment of existing state legislation. In EU law, the principles of subsidiarity, proportionality and the technique of pre-emption supported by primacy and effectiveness serve that purpose.[1492] These principles seek to establish an equilibrium between the supranational and national levels. As such, these principles determine the policy space national legal orders retain when operating within the realm of EU law.

EU law consistently focused on the extent to which supranational law could intervene in national legal orders and the leeway granted to national diversity in that image.[1493] In doing so, the focus of conferred competences lay on the extension of supranational competences and their development across national legal orders. The principle of conferral could in that image be understood as a constitutional basis for the transformation of a static catalogue of shared competences into a renewed institutional equilibrium.[1494] The image of continuous European integration would in that understanding rely on conferral to justify an ever increasing set of supranational competences and the development of these competences into more refined supranational frameworks.

306. *National institutional adaptation focus* – The identification of reconfigured principles governing the scope of conferral in the institutional organization of market supervision calls for a more nuanced version of this 'supranational competence development' focus. The systems of supranationally structured market supervision are attached to a supranational regulatory programme in which both supranational and national rules coalesce. The objectives of such supranationally structured supervision schemes are to ensure that supranational rules – even if implemented in a national setting – are duly enforced by national supervisory

[1490] See P. Van Cleynenbreugel, note 1186, 89, referring to a need for combined supranational negative and positive action.
[1491] See for a U.S. perspective on that matter, K. Jordan, 'The Shifting Preemption Paradigm: Conceptual and Interpretive Issues', 51 *Vanderbilt Law Review* (1998), 1149-1229.
[1492] R. Schütze, note 1255, 1047.
[1493] See S. Andreadakis note 1348, 62-63for an overview of this image in the harmonization approach,
[1494] H. Hofmann, note 1287, 56.

authorities.[1495] In order to enable that role, the gathering of these authorities into a network or network agency allows to contribute to more intense supranational competence development.[1496]

At the same time however, the supervisory competences attributed to national authorities within these supranational frameworks explicitly acknowledge the role of national supervisory authorities as independent operators of EU law. Cooperative rights structure the interaction between supranational and national bodies as a bundle of rights each level enjoys and is able to enforce. These rights obviously serve to encapsulate national authorities in a supranational scheme. At the same time, they refer to national authorities' independence from the supranational level. National authorities are governed by different operational principles that remain within the realm of national institutional autonomy. Emphasis on national institutional autonomy in turn serves to confirm that supranational competence development cannot directly invade into particular spheres of governance entertained at the EU level. A mere replacement of national supervisory authorities by a single supranational solution would in that respect thwart cooperative rights underlying the legal bases that served to establish the supranational supervision frameworks presently in force. Cooperative rights thus establish an equilibrium in the shared regulatory space between the supranational and national levels and allow for the national authorities to retain at least some nucleus of operational independence.

The legislative establishment and judicial recognition of cooperative rights facilitate national institutional adaptations and shift the focus placed on the principle of conferral. The EU legislator can rely on general or specific Treaty bases with a view to impose particular institutional organization obligations on Member States. Member States have to implement these 'commands' with a view to allow a supranationally structured operational support framework to take shape. Within that framework, sets of cooperative rights additionally provide benchmarks to structure institutional cooperation. Cooperative rights provide the Court with interpretative benchmarks to mandate national institutional or organizational adaptations in the name of effective EU law application. Judicial attention paid to national institutional adaptations also establishes a constitutional playing field in which the Court can consider the constitutionality of particular national institutional choices as it did in *Vebic* and as it might do in the light of the *Twin Peaks* alterations currently taking place in financial market regulation. National authorities operate in a heteronomous atmosphere, can be commandeered into adapting their structures to the necessities of EU law, but in doing so also see their own powers as EU law enforcement bodies confirmed.

The focus of conferred 'shared' competences in that image no longer exclusively aims for the development and extension of supranational regulatory powers. It also seeks to include a national institutional autonomy into the understanding of what shared competences amount to and what role the EU level has been attributed in that shared competences framework. In that image, the extension of supranational competences does not take place in the abstact, but in the light of a very concrete national instituitonal autonomy framework. Member States' institutional autonomy becomes a focal point to assess and balance the supervisory powers of the Member States and the supranational level in the design and operations of supranationally structured market supervision. In doing so, the focus of conferral of competences lies in the overcoming of negative externalities reflected by the unfettered institutional autonomy of

[1495] See for an explicit elaboration in the ESA Regulations, Recital 8, referring to the roles of national authorities: The ESFS should be an integrated network of national and Union supervisory authorities, leaving day-to-day supervision to the national level.
[1496] M. De Visser, note 23, 500.

Member States in the organization, design and implementation of national market supervision bodies.

A national institutional adaptations focus is directed towards the establishment of an equilibrium in which each level performs its particular function and in which enforcement powers are effectively divided in accordance with a regulatory coopetition image. The scope of shared competences justifies an interventionist supranational focus into the institutional and operational realm of national supervisory authorities. Despite the notion of shared competences, the EU level firmly establishes itself as the competent regulator of market supervision. At the same time however, attention to national institutional adaptations allows national authorities to remain operationally independent. Although some of the principles guiding their organization and functioning might have to be adapted, national supervisory bodies remain important actors in the application and enforcement of EU law in the Member States.

307. *Concluding overview* – The thus reconfigured constitutional principles no longer remain open-textured and open-ended. They represent tools to ensure supranationally structured cooperation and competition among national regulators. As constitutional principles, they not only structure cooperation between the supranational and national levels, but also impose new boundaries on what the European Union can and cannot do in the field of market supervision. As such, the constitutional principles identified reflect *constitutional tools for the institutional design of supranationally structured market regulation regimes.*

The following table summarizes the adapted principles as identified in the previous subsections. The table demonstrates that the constitutional principles governing the existence and exercise of shared competences have been transformed from vague open-textured constitutional principles into more workable enabling and restraining constitutional principles emphasizing the integration of national supervisory structures into a cooperative supranational framework.

constitutional principles	open-textured	coopetition-structured
conferral	supranational competence development	national institutional adaptation focus
subsidiarity	open-ended intervention	second-resort supranationalism
proportionality	reactive intervention	pro-active commandeering
sincere cooperation	cooperation duties	cooperative conflict, control and adaptation rights
national institutional autonomy	undefined pre-emption scope	effectiveness pre-emption

2. Constitutionalizing institutional heteronomy

308. *Connecting principles and elements* – The reconfigured constitutional *principles* structuring institutionally heteronomous market supervision justify the emergence of heteronomous *elements* underlying supranationally structured market supervision arrangements. The following table demonstrates how the reconfigured constitutional *principles* fit the *elements* of institutional heteronomy identified in the previous part.

elements of institutional heteronomy	*reconfigured constitutional principles*
unity of policymaking	national institutional adaptation focus
cooperative incentives/rights	cooperative rights as conflict mitigators
supplementary supranational supervision	second-resort supranationalism; pro-active commandeering
hierarchical quasi-duality	effectiveness pre-emption

309. *Integrating elements and principles* – The constitutional principles of institutional heteronomy serve to explain the appearance of institutional heteronomy elements identified in both directly and indirectly mandated market supervision structures.

Firstly, the systems of institutional heteronomy identified arose within a framework of *de iure* or *de facto* unity of substantive policymaking. In both EU competition law – the substantive realm of which presents an exclusive competence – and EU financial regulation – which has increasingly been the subject of maximum harmonization– the role for national substantive choices within the scope of EU law remains strictly limited. In that respect, national legal orders are predominantly required to implement the newly established full-fledged EU law framework. This also means that national supervisory authorities or departments are effectively transformed into EU law supervisors operating within an EU mandate.[1497] In that image, national authorities will have to be able to comply with EU requirements. As such, national institutions might be subject to institutional or organizational adaptations imposed by or required from the EU level. A unity of policymaking perspective combined with decentralized day-to-day application therefore reflects a constitutional focus on national institutional adaptations.

Secondly, enhanced attention to cooperative incentives structured through cooperative rights has manifested itself in the particular operationalization of Article 5 TEU. The principle of sincere cooperation has effectively been translated into bundles of mutually supportive cooperative rights. As demonstrated above, these cooperative rights serve to resolve actual or potential conflicts among supranational and national authorities. Regulation 1/2003 effectively structures cooperation as a means for the European Commission to withdraw cases from national authorities and to commandeer national authorities to assist in or conduct inspections. At the same time, national authorities are entitled to apply EU competition law without having to await the Commission's approval in any instance. In case of conflicts or potential conflicts, the Commission only enjoys a right of intervention and potential withdrawal. The ESA Regulation framework structures the resolution of actual or potential conflicts between national and among national and supranational authorities within a limited set of mutual rights of intervention. The ESAs only enjoy supplementary intervention powers in that regard and at the same time serve as conflict resolution bodies between national authorities applying EU law. The ESAs can effectively withdraw a conflict from national authorities and render a decision on that conflict. Contrary to the European Commission in competition law enforcement, the ESAs cannot however decide the conflict on the merits. They rather leave that entitlement to the national authority which they considered the best fit to decide on the matter. A similar approach to cooperation can also be found in *fundamental*

[1497] M. De Visser, note 23, 323.

rights that structure both national and supranational procedures. Fundamental rights principally reflect tools for individuals to ascertain against public authorities. Since fundamental rights are considered to comprise a common foundation among the Union and its Member States, these rights also reflect tools for aligning national and supranational procedures. Whilst such procedures directly benefit individuals seeking redress or a decision, the EU equally relies on these rights to impose on and coordinate the development of similarly structured procedures across the Member States. In doing so, Member States are – by virtue of their respect for fundamental rights – made to cooperate in developing a European 'rights' architecture.[1498] Cooperation in that regard does not imply a complete synchronization or heterarchical interaction between supranational and national law. It rather structures an heteronomous relationship through the language of rights.

Thirdly, the presence of supplementary supervision mechanisms is directly attached to the understanding of subsidiarity as a principle of second-resort supranationalism. By distinguishing day-to-day supervision from supranational intervention in only a limited number of supervision cases, supplementary supervision mechanisms reflect a taste for decentralized enforcement as a basic principle. Supranational intervention would be warranted only if and to the extent that national authorities are either in conflict or in disagreement on particular issues. The institutional design of supranational enforcement bodies reflects that approach. The European Commission is supported by an Advisory Committee and comprises a decision-making college of commissioners chosen from the Member States. The ESAs assemble all national authorities within their Boards of Supervisors. In that image, supranational intervention and enforcement are premised on consensus among or at least coordination between national legal orders and authorities. Whilst the European Commission decision-making format reminisces a truly supranational actor, the ESAs are more or less formalized networks of national authorities. In both instances however, the supranational level is not exclusively responsible for day-to-day supervision.[1499] Second-resort intervention indeed implies that day-to-day supervision is left to national authorities. The exact extent of what day-to-day supervision implies nevertheless allows for some discretion at the EU level.

Supplementary supervision mechanisms also support the availability of pro-active commandeering mechanisms. Although national authorities are capable of conducting day-to-day supervision, such supervision needs to be structured in accordance with EU law. In order to maintain a balance between effective day-to-day national supervision and the consistent administration of EU law, national authorities can effectively be commandeered to re-arrange organizational or procedural frameworks. Such commands need to be compatible with the reconfigured principle of proportionality. They therefore remain limited to commands necessary to enable second resort intervention and effective or adequate application of EU law.

Fourthly, the focus on national institutional adaptations significantly benefits from the availability of institutional obstacle pre-emption as a technique of European integration. Institutional obstacle pre-emption allows for national institutional structures that contradict the premises of the EU enforcement system to be removed and invites national institutional re-arrangements. The explicit recognition of such obstacle pre-emption features largely in the

[1498] For a conceptualization of that dynamic in a different field, see F. Lafarge, 'Administrative Cooperation between Member States and Implementation of EU Law', 16 *European Public Law* (2010), 597-616.

[1499] On the continuing importance of day-to-day supervision, see P. Schammo, note 1. On independent agencies as mini-Commissions, see P. Kjaer, 'Embeddedness through Networks: A Critical Appraisal of the Network Concept in the Oeuvre of Karl-Heinz Ladeur', 10 *German Law Journal* (2009), 495. See also M. Zinzani, note 21, 37.

Court's approach to national procedural autonomy.[1500] It can equally be transposed to the realm of national institutional autonomy, as the *Vebic* judgment demonstrated.[1501] By allowing or recognizing institutional obstacle pre-emption as a constitutional technique of European integration, institutionally heteronomous systems can be effectively designed and modelled within a supranational constitutional modus.

310. *Mutual dependency* – The relationship between *elements* and *principles* of institutional heteronomy reflects mutual dependency. On the one hand, principles of institutional heteronomy contribute to the fulfilment of the elements identified earlier. As such, the principles reflect the normative constitutional foundations of empirically established elements identified throughout the analysis of EU market supervision regimes. On the other however, constitutional principles do more than justify the emergence of institutionally heteronomous structures. They effectively structure the emergence of heteronomous regimes and serve as building blocks for refinements to the particular sector systems or for future initiatives in different sectors. At the same time however, the relationship between elements and principles of institutional heteronomy presents a chicken-and-egg problem. The elements of institutional heteronomy reflect the operationalization of constitutional principles. It is nevertheless unclear whether these principles effectively served as constitutional blueprints or have only been able to appear in the light of operating heteronomous systems. As a matter of EU law, both positions can be defended. EU law operationalized and in doing so transformed the constitutional framework of shared competences in the institutional organization of market supervision. As a result, reconfigured constitutional principles could effectively be identified on the basis of the institutional heteronomy elements identified through a bottom-up inquiry into the institutional regimes of supranationally structured market supervision. Constitutional principles serve as cross-sector normative benchmarks for present and future initiatives in the organization of EU market supervision arrangements.

311. *From constitutional principles to operational maxims* – The constitutional principles outlined above can once again be operationalized into concrete maxims guiding the institutional design of market supervision regimes. Five operational maxims governing the institutional allocation of competences and powers appear in that regard. These maxims coincide with the reconfigured constitutional principles outlined and applied in the previous chapter. They specifically aim to structure these constitutional principles into policy guidance tools. In doing so, maxims provide a practical twist to reconfigured constitutional principles.

The following maxims can be distinguished:

1) The *no full-fledged primary supranational supervisor* maxim: the case studies on directly and indirectly mandated market supervision highlighted that a single supranational market supervisory body does not – or does at least no longer – find constitutional support in the EU Treaty framework. Whilst EU constitutional law does not impede the European Commission from being capable to act as a binding

[1500] For overviews, see R. Craufurd Smith, 'Remedies for Breaches of EU Law in National Courts: Legal Variation and Selection' in P Craig and G. De Búrca (eds.), note 33, 304-316; W. Van Gerven, note 1227, 506-521; P. Craig, note 350, 668-738. For a recent update and critique of mainstream scholarly narratives, M. Dougan, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts' in P. Craig and G. De Búrca (eds.), note 51, 407 – 438. See also C. Himsworth, 'Things fall apart: the harmonisation of Community judicial procedural protection revisited', 22 *European Law Review* (1997), 291 – 311.

[1501] See nr. 119 of this dissertation.

decision-making agency with sanctioning powers[1502], such supranational supervisory actions cannot completely pre-empt national authorities from enforcing EU market regulation as well. Both the constitutional mandate to institutionalize market supervision and the institutional delegation mandate allowing for the establishment of supranational supervisory bodies envisage the inclusion of national legal orders in the operations of EU market supervision. In the present constitutional arrangements, a full-fledged EU market supervision body seems to go against the image of EU integration. That is not to say however that supranational supervisors cannot act as *primary* supervisors. The European Commission's role in EU competition law enforcement and ESMA's sanctioning powers with regard to credit rating agencies attest to that primary market supervision image. *Primary* supervisors are exclusively capable of directly enforcing EU rules against market operators and impose sanctions on them. The European Commission is not *exclusively* entrusted with sanctioning powers to the detriment of all national supervisory intervention. ESMA's Credit Rating Agency supervision powers on the other hand are construed as exclusive.[1503] Since these exclusive powers nevertheless only relate to the registration and supervision of credit rating agencies rather than all investment services providers, it could be argued that ESMA does not constitute a *full-fledged* primary market supervisor capable of overseeing the entirety of financial market operators and operations.

2) The *cascade of gatekeepers* maxim: the lack of a full-fledged primary supranational supervisory body necessitates interaction with and intervention of national supervisory authorities. Established as a matter of supranational law, independent national authorities serve as national extensions of an EU mandate. This implies that the organizational features and structures of national authorities can directly or indirectly become a subject of supranational intervention. In the realm of financial market regulation, EU law directly established and structured the organization and operations of NRAs. The Court also intervened through the direction of judicial commands to national authorities with a view to streamline their institutional functioning in the light of the effective application of EU law. The institutional settlement image that thus appears is one of a cascade of gatekeepers. Whilst national authorities are established in accordance with national law, EU law can nevertheless intervene to command the ways in which these gatekeepers are structured and function. In addition, the establishment of secondary supranational supervisory bodies fulfil a similar function with regard to national authorities. Through intervention in national cases or by withdrawing cases from national authorities, supranational supervisory bodies effectively 'command' national authorities to play a particular role in the supranational market supervision regime.
3) *Institutional obstacle pre-emption* as necessary and constitutional technique of commandeered intervention grounded in mutual sincere cooperation: the ability for EU law to remove national institutional obstacles and the resulting diminution of national institutional autonomy is deemed essential for the functioning of a supranationally integrated supervision system. The translation of mutual loyalty obligations into mutual cooperative rights attests to that approach. Entitlements to

[1502] By virtue of an explicit mandate in Article 105 TFEU and its more general mandate to ensure the general interest of the Union as proclaimed in Article 17 TEU.

[1503] With regard to Credit Rating Agencies however, national supervisory authorities continue to play a subordinate role. In addition, national judges will be called upon to review the proportionality of proposed inspections, see nr. 170 of this dissertation.

cooperate with national authorities imply that supranational authorities should be able to effectively to intervene in national supervisory operations. Meaningful supranational coordination on the other hand implies that national authorities should be able to feed information to and benefit from information streams from supranational authorities. The availability of a pre-emption tool to facilitate such interactions is therefore essential. Pre-emption tools in that image serve as a means to replace inefficient institutional structures with supranationally attuned alternatives.

4) The *adversarial supervisory functioning and participative judicial review* maxim: the case studies in this dissertation demonstrated that fundamental procedural rights serve as a set of converging conditions structuring the operational functioning of both supranational and national supervisory authorities. As a result, fundamental rights such as access to files, transparency, the right to be heard, the right to be consulted, the right to effective, sufficient and meaningful judicial review and the right to conduct an adversarial judicial debate when contesting an authority's decision have all been identified as key positions in that regard. These fundamental procedural rights can be grasped by the notion of adversarial public enforcement and have served as a set of standards relied on by both the ECtHR and the Court to develop a converging institutional model of market supervision. That institutional model has most directly been manifested in the organization of judicial review against supranational and national supervisory decisions.
5) The *reflexive convergence* maxim: the division of supervisory competences demonstrates that a particular role remains for national supervisory authorities. These authorities not only serve as day-to-day supervisory bodies – whether or not in conjunction with supranational bodies – but also as supporting bodies comprising supranational institutions. Either assembled in a supranational decision-making Board of Supervisors or in an Advisory Committee, national authorities are primarily responsible for the development of converging guidelines, best practices and a 'single EU rulebook'. At the same time, EU law continues to allow for diversified national regulatory bodies that remain to be structured in accordance with national law – only partially supported by supranational commands and pre-emption techniques. The partial supranational intervention in the institutional realm in that image serves to retain national divergence necessary to enable meaningful substantive convergence initiatives.

These operational maxims structure the relationships between the supranational and national legal orders. In doing so, they operationalize the constitutional principles of institutional heteronomy and allow these principles to be transformed into practical institutional design guidelines. The principle of second-resort supranationalism coincides with the maxims that the EU level should not act as a full-fledged *and* primary market supervisor and with the need for a federally structured cascade of market supervision gatekeepers. These operational maxims allow for constitutionally sanctioned commandeering to occur. In order to ensure that supranational intervention effectively retains its second-resort status and to ensure the functioning of a cascade of gatekeepers, EU law – either through its legislative institutions or by the Courts – can command the national structures within a particular EU mandate. That could result in the adaptations of national institutional structures to the image of EU law. The constitutionally sanctioned technique of institutional obstacle pre-emption equally facilitates such commands. At the same time, the need for participative, transparent national and supranational supervisory functions as well as participative judicial review constitute a practical inroad justifying the need for such pre-emption to structure the allocation of supervisory competences and powers. Operational emphasis on participative review and

transparent functioning also necessitates the structuring of cooperative rights. Through these cooperative rights, information can be exchanged and a procedural framework for such exchange and cooperation can be structured. In that image, procedural rights serve as converging tools for the bringing about of transparent, participative and fundamental rights-compatible national and supranational procedures. At the same time, they allow for constant interactions between national and supranational authorities and the ensuing reflexive convergence processes engaged in that regard. The national institutional adaptation focus underlying the interpration of 'shared competence' legal bases specifically contributes to bringing about the reflexive convergence maxim outlined above. A focus on national institutional adaptations in that image fosters and promotes the emergence of a reflexive space in which mutual learning can effectively be enabled.[1504]

The following image appears in that regard.

reconfigured constitutional principles	*operational maxims*
second-resort supranationalism	no full-fledged primary supranational market supervisor; cascade of gatekeepers
pro-active commandeering	no full-fledged primary supranational market supervisor; cascade of gatekeepers; adversarial supervisory functioning
effectiveness pre-emption	institutional obstacle pre-emption technique; adversarial supervisory functioning and participative judicial review
mutual cooperative rights	adversarial supervisory functioning and participative judicial review; reflexive convergence
national institutional adaptation focus	reflexive convergence

The abovementioned table clarifies that each operational maxim does not necessarily fit a particular constitutional principle. Operational maxims serve as more concrete institutional design guidelines for the development of market supervision structures across different sectors of market regulation. They comprise a design-oriented translation of the constitutional principles extracted from and identified in the case studies of directly and indirectly mandated market supervision. At the same time, they provide limits on how these constitutional principles are to be interpreted.

312. *Towards a new synthesis* – The regulatory coopetition image provided an *antithesis* to the understanding of dual and separated enforcement positions underlying EU market supervision. In that understanding, national authorities are responsible for the day-to-day implementation and enforcement of EU-determined policy standards. Whilst such understanding is not entirely inaccurate, the constitutional principles of institutional heteronomy demonstrate that it requires some nuance. Heteronomous principles structure supranational and national authorities into a singular enforcement structure by virtue of

[1504] See S. Deakin, note 1289, 245.

cooperative rights and other constitutional intervention techniques. In doing so, the dual structure of EU law enforcement is replaced by an integrated supervision image governing the supervision of EU law across the Member States. A regulatory coopetition reading in that understanding triggers a new *synthesis* grounded in refined and reconfigured constitutional principles.

Chapter 4. Constitutional heteronomy as institutional settlement

313. *Overview of this chapter* – The previous chapter identified the constitutional principles and resulting operational maxims explaining and justifying the emergence of institutionally heteronomous market supervision arrangements. The constitutional heteronomy framework thus identified applies to both directly and indirectly mandated market supervision structures. It reflects an image of regulatory coopetition and translates that image into EU law requirements and conditions. In doing so, the constitutional framework governing institutional heteronomy serves to accommodate a framework that could be relied on to guide institutional developments across other sectors

This chapter develops that framework and identifies the *institutional settlement* it incorporates. The first section argues that the economic framework of regulatory coopetition not only underlies, but also limits the scope of constitutionally sanctioned EU market supervision action. It identifies a framework of *reflexive regulatory coopetition* giving shape to the constitutional principles identified. That framework allows to identify and distinguish the particular roles attributed to supranational and national actors. The second section identifies that practical division of powers. In doing so, it outlines the institutional settlement established as such.

1. Constitutional heteronomy as *reflexive regulatory coopetition*

314. *Regulatory coopetition as unfettered supranational institutional expansion?* – The previous section argued that the constitutional principles governing the existence and exercise of shared competences have been refined and reconfigured to justify the establishment of institutionally heteronomous EU market supervision regimes. It identified these principles as incorporating regulatory coopetition considerations and translating them into principles of EU law. These coopetition-structured principles remain open-ended to some extent. Whilst they do impose new limits and constitutional structures of understanding on the institutionalization of market supervision, second resort intervention, pro-active commandeering, institutional obstacle preemption and cooperative rights presume a particular and extralegal conception of 'effectiveness' that guides developments in EU law. Second resort intervention is believed to be more effective than full-fledged supranational or national market supervision structures. Pro-active commandeering requires legislative and judicial 'commands' that contribute to attaining particular efficiency objectives. The removal of institutional obstacles equally fits that picture. The structure of cooperative rights presupposes an underlying framework in which cooperation is deemed efficient.

The image of regulatory coopetition sketched so far justifies the emergence of these principles and techniques, but does not provide meaningful limits on their emergence. In order for the reconfigured principles to serve as a constitutionally viable model for institutional developments in other sectors, the underlying extralegal framework requires additional elaboration. This section therefore expounds on *what type of regulatory competition* is promoted by the reconfigured constitutional principles.[1505] To that extent, it seeks to integrate regulatory coopetition and reflexive harmonization theories into an image of *reflexive regulatory coopetition*. It argues that EU constitutional law is projecting that image. In doing so, EU law effectively enables the operationalization of an economic framework of regulatory coopetition into the legal infrastructure of European integration.

[1505] A position maintained by S. Deakin note 1289, 232 and mentioned in nr. 398 of this dissertation.

315. *Regulatory coopetition revisited* – Regulatory coopetition projects a degree of supranational or federal intervention with a view to enable meaningful competition among defederated entities.[1506] In doing so, supranational structures can legitimately be established in order to mitigate negative externalities and races to the bottom triggered by unfettered regulatory competition. The reconfigured constitutional principles allow for the development of such specific supranational structures. These specific structures complement and integrate diversified national legal and institutional arrangements into a supranational whole.

The nature of coopetition inaugurated by these institutional principles is both extensive and limited. It is extensive as the establishment of supplementary supranational structures within which national authorities operate allows for the development of a new kind of competitive relationships. Whereas regulatory competition has traditionally been structured to occur between *legal orders* on the basis of *substantive legal rules and principles*, the constitutional principles enable the inclusion of *national authorities* within a *supranational organizational framework.* Competition thus occurs within the institutional framework established at the supranational level and among the national authorities bearing different organizational features. The scope for competition within that framework focuses on the non-approximated organizational aspects of national authorities. Issues such as separated or segregated prosecution and decision-making practices, administrative or judicial review at first instance, the possibilities and limits for imposing fines or sanctions can all be captured within that competitive realm. National authorities can differentiate themselves through the application of these institutional principles in different fashions tailored to the specifics of the national legal orders.

316. *Structuring a race to the 'institutional top'* – From that point of view, legislative and judicial principles of 'good national institutional organization' serve as minimum standards. These standards are considered to enable a race to the top concerning the institutional functioning of national authorities operating within a cooperative supranational framework. National authorities are to contribute to the effective enforcement of EU law in the national legal orders. As EU law determines – or is able to determine – the floor of such effective enforcement, national authorities will be enticed to adopt institutional frameworks that allow for the most effective enforcement of EU law. These institutional frameworks will not only directly incorporate institutional requirements posited by the EU legislator and the Court, but will also include additional nationally established organizational features that better serve to implement or anticipate EU 'effectiveness' conditions. The top should in that regard be defined as national authorities furthering the institutional requirements imposed as a matter of EU law.[1507]

The race structure presupposes that other national authorities will equally adopt these additional institutional changes with a view to attain a new equilibrium of good institutional practice. The exact point of convergence remains unclear in that regard. Whilst it could be argued that EU procedures and practices present an exemplary equilibrium in that regard[1508], a mere convergence towards existing supranational examples should be cautioned. The role of

[1506] D. Esty and D. Geradin, note 11, 251.

[1507] For a similar perspective in the realm of EU agencification, see E. Chiti, 'An important part of the EU's institutional machinery : features, problems and perspectives of European agencies', 46 *Common Market Law Review* (2009), 1412, who questions the emergence of a race to the top in that regard. The same question remains valid here, as this dissertation only develops a claim that the European Union explicitly relies on its constitutional law categories to promote or exemplify such race. It cannot indeed be argued that this race should effectively be adhered to.

[1508] For that approach – albeit implicitly – see the Commission's argument in Opinion of A.G. Mengozzi to *Vebic,* para 55.

the European Commission in EU competition law enforcement has indeed been severely criticized for its monolithic presence and nature.[1509] Initiatives to segregate investigation, prosecution and adjudication have only resulted in marginal adaptations to the existing framework.[1510] It cannot therefore be argued that this model presents the ideal-type to be attained through institutional races to the top. It would rather seem more feasible for EU law to induce national authorities to find even better institutional solutions relying on a set of principles of good institutional organization provided for by the EU itself.[1511] In that image, the race to the top is somewhat undefined institutionally and serves to bring about mutual learning towards higher pursuits.

317. *Limits of a race to the institutional top* – The scope for institutional 'races to the top' is nevertheless limited in three respects.

Firstly, as with all races metaphors, the materialization of such a race to the top is highly uncertain at best. From the vantage point of national authorities, EU-wide minimum principles might not constitute a floor which is sufficient to accommodate the procedural, organizational and institutional safeguards available in different Member States and to trigger a meaningful race to the top indeed. The obligation only to comply with these minimum standards might result in a race to the bottom or to more lax institutional organization principles. As a result, well-established institutional separations between prosecution and decision-making agents or the availability of unlimited jurisdiction might be downplayed in response to incentives from parties willing – and able – to relocate to other jurisdictions. The competitive equilibrium thus enabled would result in a bottom-spiraled race structure. The existence of races to the top or bottom is nevertheless in the eye of the beholder.[1512] To the extent that the EU legislator and judiciary develop standards of adequate national institutional organization and procedure, they can somehow trigger the emergence of a race and steer it 'upwards' towards common European standards of good institutional organization. Whilst these standards will necessarily constitute a compromise between different legal orders, they might just come to be perceived as replacement standards of unfitting national institutional practices. In that image, no race is triggered. On the contrary, national authorities retain their own national structures and only adapt their particular structure if specifically commandeered as such by the Court of Justice. Instead of a race to anywhere, Member States act as mere participating observers in the Court's willingness to apply EU principles of adequate national institutional organization.

Secondly, the scope of any race appearing in this regard is only limited to the realm of authorities' institutional organization. Competition 'on the merits' of substantive legal regimes is not captured by this image. The institutional organization of market supervision structures obeys to particular institutional principles and these institutional principles structure a race to develop the most efficient supervisory mechanism. If and to the extent that a market operator decides to be established – or conduct business – in the EU, EU law effectively neutralizes or steers the institutional framework to which that operator will have to submit. National legal orders are in that understanding incentivized to develop an institutional framework that incorporates EU standards of adequate institutional organization and that is capable of attracting market operators. That race is nevertheless only *secondary* to the

[1509] W. Wils, note 279, 203.
[1510] See nr. 119 of this dissertation.
[1511] P. Van Cleynenbreugel, note 526.
[1512] See T. Heremans, note 84, 111; D. Esty and D. Geradin, note 11, 245, referring to the limited use of the prisoners' dilemma commonly relied on to explain the need for regulatory competition; R. Revesz, note 1320, 1244.

development of common, converging or diverging substantive regulatory standards that will directly affect the legal position of market operators. Institutional principles only constitute means through which these substantive positions could be structured and operationalized.

Thirdly, a real choice to shift jurisdiction between one supervisory body and another on the basis of 'institutional organization' characteristics is unlikely to emerge as the sole reason for operator relocation.[1513] It is indeed highly unlikely that regulatees will directly prefer a particular home country and its supervisory regime for the sake of the institutional organization of its national supervisory authority. The inclusion of the latter into a supranationally structured framework nevertheless facilitates such choice. A race to the institutional top should therefore also be *subordinate* to a more general regulatory framework in which a regulatory race is either adhered to or addressed through supranational regulation.

318. *Reflexive regulatory coopetition as alternative justification* – It is clear from the foregoing that the establishment of an institutional race to the top cannot of itself justify and restrain the establishment of a constitutional framework structuring institutionally heteronomous principles. The creation of such races it too far-fledged and detached to justify a reconfiguration of the EU's constitutional principles. In addition, the establishment of instituitonal organization principles and supplementary supranational structures does not in itself provide a sufficient trigger for a regulatory race to emerge across the national legal orders. The lack of directly identifiable regulatory races does not however imply that the regulatory coopetition understanding could not provide meaningful justifications for the constitutional principles identified. A reflexive perspective directly serves that purpose.

A reflexive regulatory coopetition justification builds upon the concept of reflexive harmonization. At first sight, regulatory coopetition markedly differs from reflexive harmonization sketched in chapter two of this part. Reflexive harmonization essentially focuses on national divergence and continuous mutual learning.[1514] In addition, reflexive harmonization excludes techniques such as *pre-emption* of national norms as that would impede national diversity to be maintained.[1515] Reflexive harmonization additionally only proposes the harmonization of procedural norms through which diverse national arrangements can continue to develop. Substantive regulatory harmonization would have to remain limited in that understanding.

Reflexive regulatory coopetition seeks to integrate the features of reflexive harmonization into the framework of integrated and supranationally structured supervision arrangements. It argues that regulatory coopetition does not merely project a race towards a singular converging institutional blueprint, but enables national diversity to remain within a cooperatively structured supranational framework. The minimum standards underlying the institutional framework of constitutional heteronomy provide a starting point in accordance with which divergent national frameworks can be united in diversity. That united in diversity posture relies on particular coopetitive constitutional techniques that serve to bring about a reflexive framework of EU-Member State institutional interaction.

EU constitutional law relies on *institutional obstacle* pre-emption as a tool to remove particular institutional organization rules from national legal orders. Such pre-emption is accompanied by the imposition of alternative EU-wide adequate national institutional

[1513] On locational rights and information difficulties existing in relation to substantive provisions and the limited importance of institutional arrangements, see W. Kerber, note 1332, S220.
[1514] S. Andreadakis, note 1348, 63.
[1515] S. Deakin, note 1289, 242; S. Deakin, note 1307, 451.

organization standards.[1516] These alternative standards on the one hand serve as replacement principles but on the other allow – given their vagueness – for the development of varying national institutional standards that all comply with these replacement standards.[1517] Institutional regulatory coopetition thus serves as a means to promote the establishment of national standards of good institutional organization. It could thus be argued that these EU-crafted standards serve as 'procedural norms' enabling institutional adaptations in the light of an EU-wide structured framework. The converging institutional principles in that image provide a set of minimum standards beyond which divergent national institutional evolutions can remain in place. Regulatory coopetition should thus be construed as an example of *reflexive institutional coopetition structured and guided by EU law requirements*. Beyond the minimum converging requirements provided by EU law, Member States remain at liberty to structure the organization of their authorities in accordance with diverging institutional principles. As such, reflexive regulatory coopetition promotes convergence and divergence in one single institutional framework.

319. *Reflexive regulatory coopetition as a restraining institutional framework* – As a background framework justifying the reconfiguration of structural constitutional principles, reflexive regulatory competition enables and restrains constitutional developments at the EU level. The enabling and restraining role of *reflexive regulatory coopetition* as an explanatory framework particularly lies in its operationalization of what 'effective' EU law intervention amounts to. The Court justifies the adoption of EU-wide principles of adequate institutional organization on the basis of the effective application of EU law.[1518] In the same vein, the obligation to establish national regulatory authorities or national competition authorities are considered to contribute to the effective application, supervision and enforcement of EU law.[1519] The notion of effectiveness is often associated with a welfare-economics image of total welfare and individual liberty.[1520] The true meaning of effectiveness is nevertheless a matter of perspective and degree and the ultimate denominator for effectiveness is the legislator's or constitution's notion of what effective application amounts to.

A reflexive regulatory coopetition framework justifies the effectiveness approach reflected in the reconfigured constitutional principles. In the particular context of European integration, effectiveness can be interpreted as ensuring that national authorities continue to retain some autonomy within a framework of EU standards of adequate institutional organization. These EU standards – envelopping both institutional and procedural requirements – serve to structure a cooperative framework in which national authorities enable EU law enforcement and contribute to the realization of the EU's market integration framework. At the same time, national authorities are still able to 'compete' by adopting diverging institutional structures. These structures have to be developed and designed in the shadow of supranationally created institutional obligations. Within the confines of these obligations however, national legal

[1516] P. Van Cleynenbreugel, note 36, 544.
[1517] See nr. 120 of this dissertation for an overview of possibilities in the wake of *Vebic*.
[1518] See *Vebic*, para 63. See also M. Ross, note 1234, 480.
[1519] See e.g. recital 11 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ("Framework Directive"), [2002] O.J. L108/33: In accordance with the principle of the separation of regulatory and operational functions, Member States should guarantee the independence of the national regulatory authority or authorities with a view to ensuring the impartiality of their decisions. This requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States or to the principle of neutrality with regard to the rules in Member States governing the system of property ownership laid down in Article 295 of the Treaty. National regulatory authorities should be in possession of all the necessary resources, in terms of staffing, expertise, and financial means, for the performance of their tasks.
[1520] And should be distinguished from mere allocative efficiency, see S. Shavell and L. Kaplow, note 78, 1028.

orders retain their institutional autonomy as a matter of EU law. Such national autonomy is nevertheless growing increasingly heteronomous by virtue of more intrusive judicially sanctioned EU law standards.

2. The constitutional settlement of reflexive regulatory coopetition

320. *Reflexive regulatory coopetition underlying constitutional settlement* – The framework of reflexive regulatory coopetition justifies the establishment of the third-generation constitutional principles identified in the previous chapter. It also demonstrates that EU constitutional principles reflect an extra-legal settlement. Legal principles in that image shape economic principles of federalism with a view to balance EU-Member State interactions as structured by supranational law. From that perspective, these principles also allow to identify a particular constitutional settlement, in accordance with which different institutional actors have different roles to play in the institutional framework of supranationally structured market supervision. This section outlines the institutional settlement having taken shape against the background of a 'reflexive regulatory coopetition'-promoting constitutional framework.

321. *Institutional settlement* – The concept of institutional settlement originates in U.S. legal process theory.[1521] According to that theory, 'law should allocate decisionmaking to the institutions best suited to decide particular questions, and […] the decisions arrived at by those institutions must then be respected by other actors in the system, even if those actors would have reached a different conclusion'.[1522] This dissertation sought to identify such allocation of decision-making powers in the realm of EU market supervision and explicated

[1521] David Kennedy and W. Fisher, *The Canon of American Legal Thought* (Princeton, Princeton University Press 2006), 241 situate the period until the mid-1960s. C. Barzun, 'The Forgotten Foundations of Hart and Sacks', *University of Virginia School of Law Research Paper*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1959406, 10 refers to the use of legal process materials in U.S. law teaching well into the 80s. See on U.S. legal process theory in general, E. Rubin, 'The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions', 109 *Harvard Law Review* (1996), 1393. See for an example, L. Blomgren Bingham, 'The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance', *Wisconsin Law Review* (2010), 297-356 and M. Stephenson, 'Information Acquisition and Institutional Design', 124 *Harvard Law Review* (2011), 1422 – 1483. The legal process constitutional perspective refers to the need to identify 'neutral principles' in law. That position is most famously advocated by H. Wechsler, 'Toward neutral principles of constitutional law' 73 *Harvard Law Review* (1959), 1-35. A similar belief also underlies J. Ely, *Democracy and Distrust. A theory of judicial review* (Cambridge, Harvard University Press 1980), 268 pp., arguing that courts should adopt a representation-reinforcing attitude when reviewing substantive legislation. Representative democracy principles are thus held to act as neutral arbiters governing substantive policy choices. But see also, K. Greenawalt, 'The Enduring Significance of Neutral Principles', 78 *Columbia Law Review* (1978), 991, limiting the scope of neutrality. A more modern approach can be found in N. Komesar, *Law's Limits. The Rule of Law and the Supply and Demand for Rights* (Cambridge, Cambridge University Press 2001), 3: *the essence of law does not lie in disembodied principles and abstract values. What law is, can be, or ought to be is determined by the character of those processes that make, interpret and enforce law*. For similar perspectives, see J. Rachlinski, 'Bottom-Up versus Top-Down Lawmaking', 73 *University of Chicago Law Review* (2006), 933-964; M. Stephenson, 'Mixed Signals: Reconsidering the Political Economy of Judicial Deference to Administrative Agencies', 56 *Administrative Law Review* (2004), 657-738. In the EU context, see M. Maduro, note 40. On the role of law as a variable for institutional developments, see G. Morgan and S. Quack, 'Law as a Governing Institution' in G. Morgan, J. Campbell, C. Crouch, O. Pedersen and R. Whitley (eds.), *The Oxford Handbook of Comparative Institutional Analysis* (Oxford, Oxford University Press, 2010), 275-308.

[1522] See E. Young, 'Institutional Settlement in a Globalizing Legal System', 54 *Duke Law Journal* (2004-2005), 1149-1150. For background on the concept of institutional settlement in particular, see also W. Eskridge and G. Peller, 'The New Public Law Movement: Moderation as Postmodern Cultural Form', 89 *Michigan Law Review* (1991), 707-791; K. Werhan, 'The Neoclassical Revival in Administrative Law', 44 *Administrative Law Review* (1992), 567-627; N. Duxbury, 'Faith in Reason: The Process Tradition in American Jurisprudence', 15 *Cardozo Law Review* (1993), 601-704; R. Fallon, 'Reflections on the Hart and Wechsler Paradigm', 47 *Vanderbilt Law Review* (1994), 953-987.

the criteria relied on to justify a particular division of institutional competences between the EU and national levels. Reconfigured EU constitutional principles incorporate operational standards that determine the scope of EU action across sectors. These principles also enable national authorities to continue functioning within the heteronomous context provided for by EU law.

322. *Institutional settlement in supranationally structured market supervision* – In a legal process theory mindset, the reconfigured constitutional principles reflect a particular allocation of competences among different institutional actors. These principles grant particular institutional-design and institutional-implementation roles to the EU legislature, EU courts, supranational authorities, national legal orders (i.e. national legislatures, executives and judges in general), national supervisory authorities, national courts and private market operators. Some of these institutional actors play roles in both the design and operational adjustment of an EU institutional market supervision regime. Others rather implement these design features and in so doing, contribute to the fulfilment of that framework. Institutional design and institutional implementation can in that image be structured on a sliding scale in which the institutional settlement can be operationalized as a concrete set of constitutionally sanctioned tasks attributed to different players, resulting in all other players having to accept that division of tasks. Within this settlement, the following allocation of institutional design and implementation powers appears:

constitutional settlement in EU market supervision	institutional design-powers	institutional implementation powers
EU 'legislature': Commission, Council and Parliament	establishment of regulatory frameworks	Member State infringement proceedings (Art. 258 TFEU); Commission as a mandated primary market supervisor
EU Courts	commandeering 'standards of adequate (supra)national institutional organization'	judicial review against supranational supervisors
supranational authorities	[preparatory decision-making] [nudging national authorities; 'network' power]	secondary supervision decisions; [convergence initiatives]
national legal orders	implementation regulatory frameworks (Art. 291 TFEU); establishment national supervisory authorities	[legislature or administrative departments as market supervision bodies]
national courts	[enablers of national institutional change in conformity with EU law]	national judicial review bodies; preliminary reference enablers

national authorities	[mutual learning adaptations]	day-to-day supervision; quasi-adjudicative decisions
private market operators	[initiators of change]	subjects of a supervisory decision; parties to a review action

The division of tasks outlined in this table reflects the ways in which the constitutional principles have enabled different actors to cooperate and engage within the mazes of EU law. The table outlines competences directly granted by EU law to national or supranational, public or private actors. At the same time, EU law indirectly establishes 'regulatory spaces' for these actors to contribute to the current institutional settlement. These regulatory space enablers are put between [ ]-brackets in the table. Together, these powers and regulatory spaces operationalize the constitutional framework and reflect the institutional settlement, operational maxims and reconfigured constitutional principles 'in action'.[1523]

323. *Settled institutional roles: explanations to the table* – The abovementioned table identifies particular functions for different regulatory levels and actors. The table's categorizations and subdivisions can be identified as follows.

It is no surprise that EU legislative institutions play a fundamental role in the institutional design of EU-wide market supervision systems. They determine the substantive and institutional regulatory frameworks in which both supranational and national supervisory authorities take shape. In addition, the EU Treaty framework shapes the democratic, transparent and accountable decision-making contexts against the background of which constitutional principles structuring institutional heteronomy arrangements can take shape.[1524] The EU Courts are called upon to interpret and apply the constitutional principles governing the structure and operations of that framework. At the same time, the institutional set-up allows the Courts to determine additional principles of adequate institutional organization or effective judicial review that enable the supranational level indirectly to structure national and supranational institutional arrangements. The different sectors studied have deliberately incorporated regulatory spaces for supranational authorities or supranationally structured networks of national authorities. These structures constitute constitutionally sanctioned 'networked' spaces in which best practices can be exchanged and developed within a supranational frame. Supranational authorities serve to nudge national authorities towards a singular supranational model structure.[1525] In that image, the development of advices, recommendations, guidelines, best practices and opinions provides a means to enable convergence of substantive and institutional practices among national authorities.

In the institutional implementation realm, the European Commission can act as a direct market supervisor and – more generally – as an initiator of infringement proceedings on the

[1523] See for that action perspective, N. Komesar, note 1521, 4.
[1524] See J. Mendes, note 61, 22-41.
[1525] This is frequently referred to as 'network power', for a general account, see D. Singh Grewal, *Network Power. The Social Dynamics of Globalization* (New Haven, Yale University Press, 2008), 405 pp. See also A. M. Slaughter, *A New World Order* (Princeton, Princeton University Press, 2004), 342 pp.

basis of Article 258 TFEU. In addition, nothing impedes the European Commission to act as a secondary market supervisor under the current institutional settlement. The EU Courts are called upon to rule on the scope and existence of such infringements. In addition, EU courts serve as review bodies against supranational supervisory bodies. In so doing, the Courts are called upon to scrutinize the legality of secondary or full-fledged EU market supervision decisions adopted by the Commission or a supranational body. These implementation functions are directly related to supranational decisions. EU Courts are not called upon to assess the legality of national administrative or judicial decisions. The Court can only indirectly do so through its interpretation of EU law in a reference for a preliminary ruling. That 'interpretative' function confirms the institutional design role attributed to the Court in this regard.

National actors and actions firmly operate within an EU institutional settlement. Within that settlement, these national bodies retain a particular distinctiveness and autonomous institutional 'design' powers. That autonomy is nevertheless conditioned upon EU law requirements and thus shows increasingly heteronomous characteristics. In accordance with Article 291 TFEU, Member States are responsible for the implementation of EU law in the national legal orders. This responsibility translates in the execution of supranational commands that require implementation, transposition and application of supranational law. Similar commands mandate the establishment and operational integrity of independent national supervisory authorities. EU law in that respect does not specify the competent national body or structure responsible for the implementation or the fulfilment of 'independent' supervisory functions. National legal orders could therefore have opted to attribute the national legislator or a department within the executive with market supervision tasks. Sector-specific EU legislation in particular instances impeded such attribution of functions, as did the Court's case law on the matter. On a general level, the Treaty and harmonizing EU initiatives nevertheless leave significant room for national institutional autonomy. Whilst that image does not conform to the present institutional reality, Member States retain a significant amount of discretion in the present constitutional settlement.

Member States' crucial position in the institutional settlement lies in their institutional implementation role. Not only do Member States directly apply transposed national law, national authorities adopt decisions on the basis of such transposed law that affects the legal position of market operators. National courts are – as a matter of the principle of effective judicial protection – called upon to review national authorities' decisions and to enable preliminary reference proceedings should judicial review uncover problematic EU law applications.[1526] EU law also creates regulatory space for national courts to identify and resolve particular institutional misalignments of national supervisory systems with EU law. The Brussels Court of Appeal's approach in *Vebic* reflects that approach. A national court could in that regard refer the matter to the Court of Justice or resolve the matter itself and act as a decentralized and potentially activist EU court.[1527] Whilst national supervisory authorities are generally concerned with the day-to-day supervision of transposed law, they also have to adapt their institutional operations to be able to function as members of supranational networks. In doing so, national institutional structures are presumed to remain open to mutual adaptations in the light of on-going supranational transformations. The movement towards a

[1526] Article 47 CFR juncto Article 267 TFEU.

[1527] On national judicial autonomy, see H. van Harten, 'National judicial autonomy. The Example of National European Law Precedents in the Dutch Case-Law on the Free Movement of Services and the Freedom of Establishment', 2 *Review of European Administrative Law* (2009), 135-153.

Twin Peaks supervisory model among national financial supervisors exemplifies that approach.

'Institutional organization' competences have equally been allocated to private market operators. Market operators have to act within the framework of supervisory procedures, as subjects of supervisory procedures and decisions. In that image, market operators have to undergo and act within the framework of supranationally and nationally determined procedures and authorities. These actions within that framework establish a regulatory space in which private market operators contribute to the institutional design of a particular system. Individual natural or legal persons or their representative associations could serve as initiators of institutional change.[1528] Institutional change would most likely take place through national courts. EU law creates regulatory space for individuals to initiate national or supranational court proceedings in instances where a national or supranational institutional structure does not comply with the constitutional settlement or with fundamental procedural rights.

324. *Reflexive regulatory coopetition's nuanced operationalization in practice* – The systems of EU competition law and financial law supervision do not naturally confirm the *reflexive regulatory coopetition* narrative read into the constitutional principles of European integration. Whilst the legislative frameworks allow for institutionally heteronomous frameworks to emerge, the Court of Justice will be primarily responsible for balancing cooperation and competition and for scrutinizing choices made at the EU level that would frustrate such balance. Should the Court of Justice entertain reflexive regulatory coopetition as a blueprint for constitutional actions, these features would require particular justification from the Union Institutions involved. The Court could in that understanding be called upon to mandate institutional reconfiguration, as the arrangement in force would not allow the institutional settlement identified here fully to emerge. The systems of mandated and delegated market supervision developed previously demonstrate particularly problematic features that are questionable from a regulatory coopetition perspective. The *operational maxims* identified – and the reflexive regulatory coopetition reading underlying them – have not always fully or explicitly been taken into account in that respect.

The institutionally heteronomous network model underlying EU competition law enforcement reflects the most stable constitutional framework by virtue of the direct supervision mandate read into Article 103-105 TFEU. That framework allowed for a constitutional regime of 'decentralized' law enforcement to take shape and for a supporting *European Competition Network* and an even more supporting *Advisory Committee* to engage national authorities into an EU-wide enforcement framework.

The system established on the basis of these provisions is not however entirely compliant with the reflexive regulatory coopetition regime grounded in supranationally determined 'conflict' rights structuring the coopetitive relationships among supranational and national enforcement levels. Firstly, the procedures for allocation of supervisory competences within the network have merely been regulated in a Network Notice and an accompanying Joint Statement. Whilst the Commission maintains a right to withdraw a case from a national authority, it does not however have to follow an elaborate procedure in which conflictuous claims can effectively be heard.[1529] The ECN's commitment to communicating allocation decisions[1530]

[1528] On the role of individuals in the federal structure of EU law, see A. Ward, *Individual Rights and Private Party Review in the EU* (Oxford, Oxford University Press, 2nd Edition, 2007), 500 pp. See also A. Hinarejos, *Judicial Control in the European Union* (Oxford, Oxford University Press 2009), 4-6.
[1529] See nr. 59 of this dissertation.

cannot eliminate the lack of full-fledged cooperative conflict rights in the light of which national authorities can interact within a constitutionally explicit level playing field. At the same time, the continuous operations of the ECN also demonstrate that such full-fledged rights are by no means necessary to ensure the allocation of supervisory powers in particular cases. On the contrary, the network itself and the constitutional *tolerance* supporting its operations serves as a means to enable alternative federal conflict resolution mechanisms to take shape. In that understanding, a reflexive regulatory coopetition framework would not directly mandate the establishment of full-fledged cooperative 'rights'. It would merely tolerate such rights to come to being *in the absence of softer conflict resolution techniques*. Secondly, the European Commission has no constitutional powers to impose a particular institutional template on national competition authorities. Whilst the Commission decision-making framework presumes the incorporation of national authorities in an EU-determined system of enforcement, Articles 103-105 do not seem to allow for the harmonization of the institutional organization of national competition authorities. The Court's *Vebic* judgment explicitly confirmed this approach and only allowed for particular principles of adequate institutional organization to emerge. These principles still allow for a variety of institutional templates to remain in place across the national legal orders. At the same time, these templates encourage the European Commission to reconsider its own institutional framework and the need for due process segregation or separation of different enforcement functions reflected therein.[1531] From that perspective, the Court of Justice is explicitly called upon to strike a balance between regulatory cooperation and institutional competition. The Court has not however explicitly stated it is doing so. Advocate General Kokott nevertheless highlighted to that balance in her Opinion in the *Toshiba* case. She stated that the 'aim of enforcing the competition rules on the European internal market as uniformly and effectively as possible is achieved in Regulation No 1/2003 not by establishing exclusive competences for individual competition authorities but rather by having the European Commission and the national competition authorities cooperate and coordinate their activities within a network'.[1532] In that understanding, it would be the Court's role to *enable* such balance and to *restrain* national authorities from impeding effective cooperation and coordination. The mandate to determine standards for the 'effective' day-to-day cooperation would in that image remain with the Court. The latter institution will thus be responsible for the concrete outlining and delimiting of a reflexive regulatory coopetition framework, within the confined determined by the EU constitution and the legislative choices underlying Regulation 1/2003.

The Court's mandate can in that regard be frustrated by the EU constitutional framework itself. The centralized notification regime prevalent in the concentration control framework confirms that position. It denounces a reflexive and integrated regulatory regime and establishes a formal dual market supervision framework instead. The explicit justification of such framework on the basis of Article 352 TFEU allows to break away from the reflexive regulatory coopetition mode read into Articles 103-105 TFEU. References to such additional constitutional bases provide a political instrument to avoid a reflexive coopetition regime to come into being to the fullest extent. The Court could still provide for a more integrated supervisory approach in this realm through a validation of the Commission interpretive referral notice, but will always be bound by the non-reflexive coopetition reading supporting and structuring Article 352 TFEU.[1533] The Institutions' reference to that provision

[1530] See nr. 59 of this dissertation. See also http://ec.europa.eu/competition/ecn/news.html for publication of these outcomes.
[1531] F. Bignami, note 278 and P. Van Cleynenbreugel, note 526 for overviews in that regard.
[1532] Opinion of A.G. Kokott in Case C-17/10, *Toshiba*, para 83.
[1533] See nr. 130 of this dissertation.

demonstrates the open-ended nature of the EU Treaty framework itself and the ways in which it can be relied on to establish systems that do not incorporate a full preference for regulatory coopetition.

These issues should not however detract attention from the relative constitutional stability EU competition law provides for the operationalization of regulatory coopetition. The explicit constitutional mandate entrusted upon the Commission *and the national competition authorities* to interact and engage upon coordinated supranational enforcement particularly allows for a reflexive regulatory coopetition template to emerge in practice. The limited conflict 'rights' structure and the coopetitive balancing role attached to the Court of Justice emphasize that the constitutional framework require further operationalization to allow institutional heteronomy to emerge in practice. The Court's future role is fundamental in that regard, as it allows to shape conflict and adaptation rights in the shadows of the constitutional arrangements reflected in Article 103 TFEU and the obligation to ensure complete judicial review as a matter of EU constitutional law.

Compared to the network regime in EU competition law, EU financial services supervision is still in the process of being built. It correspondingly suffers from the lack of a clear-cut and confining constitutional mandate which allows for a meaningful demarcation of regulatory coopetition as a balance between supranational cooperation and national autonomy. The open-ended nature of Article 114 TFEU could therefore be read to accommodate an institutional delegation mandate, but it could equally be understood as allowing for more intense supranational arrangements *to the extent necessary for the establishment or functioning of the Internal Market*.[1534] In that reading – which could presently be identified in the EU's regulatory approach towards credit rating agencies and trade repositories – the EU level would serve as an exclusively responsible market regulator rather than as a complementary systemic supervisor. The ESA and ESFS structures nevertheless confirm a preference for supranational cooperative rights. These rights include conflict, control and institutional adaptation rights. The latter category has not however been confirmed by the Court of Justice, but could be implied in the *De Larosière* Report's reference to a *Twin Peaks* preference. In identifying a broader reading, the Institutions read a broader mandate into Article 114 TFEU than a reflexive regulatory coopetition would seem to promote. The Court will not however have an opportunity to consider the constitutionality of such approaches, as no case has been lodged in that regard. The Court is presently only called upon to consider the scope of Article 114 in relation to discretionary consumer financial protection enforcement powers.[1535] These powers emphasize cooperation and supranational decision-making as a means to avoid unfettered regulatory competition and could therefore fit a reflexive coopetition framework read into Article 114 TFEU.

The establishment of a Banking Union *prima facie* appears to confirm that position. The establishment of a single supervisory mechanism that would replace diverse national supervisory authorities as enforcement bodies effectively dismantles any competition in the institutional organization of national superivsory powers that was retained in the ESA Regulations' operations. The establishment of the proposed single supervisory mechanism nevertheless takes place outside the realm of Article 114 TFEU. It will be based upon Article 127(6) TFEU, which allows for prudential supervisory powers to be attributed to the European Central Bank in relation to credit institutions and other financial institutions.[1536] At

[1534] See nr. 194 of this dissertation.
[1535] See pending case C-270/12, mentioned in note 927.
[1536] Article 127(6) requires unanimity among the Member States. This implies that non-Eurozone Member States will have to agree upon the proposed Eurozone banking supervision reforms. The unanimity requirement might

the same time however, the proposed regime only extends to the *Eurozone* Member States and leaves the ESFS structure in place. National supervisory authorities maintain supervisory powers in non-participating EU Member States. In participating EU Member States, national authorities remain competent for supervising conduct of business rules and for the provision of prudential information to be delivered to the European Central Bank. Their limited – subordinate – role would theoretically still leave room for diverging institutional organization features that could contribute to a more efficient provision of prudential information to the newly established ECB prudential supervision department.[1537] As such, the coopetitively structured system grounded in Article 114 TFEU would remain in place, albeit within the confines of a more intensely regulated supranational prudential supervision framework. The single supervisory mechanism will not replace the supranational cooperative system in place, but will rather complement it.

The coopetitive nature of Article 114-created EU agencies can nevertheless be confirmed by Article 291 TFEU. According to that provision, the Member States shall adopt all measures of national law necessary to implement legally binding Union acts. In the light of that provision, Article 114 TFEU serves as a tool to operationalize that provision by incorporating Member States' implementing powers within an Internal Market establishment or functioning framework. Doing so allows for the establishment of supranationally structured bodies that facilitate such inclusion. In that image, the ESFS and the supranational cooperative rights underlying it facilitate a reflexive regulatory coopetition scheme that aligns with the general constitutional mandate of Member States to implement EU law. The same provision also allows the Commission to intervene where uniform conditions for implementing legally binding Union acts are necessary. In these instances, the European Commission can adopt regulatory standards or could be called upon to implement EU law. Nothing in the wording of Article 291 TFEU would seem to impede the establishment of a supranational agency as an intermediate body between the European Commission and the Member States, especially if such body only adopts binding individual decisions on the basis of primary and secondary Union law. In that understanding, the implementing role attributed to the Member States in Article 291 TFEU should be retained as a matter of EU constitutional law, unless *uniform conditions are necessary*. The necessity judgment of such uniformity should lie with the Institutions and ultimately with the Court of Justice. The latter could rely on Article 291 to justify the need for coopetitively structured mechanisms and could sanction more uniform mechanisms in deviation of such mechanisms. At present however, no case law confirms this approach. This lack of case law problematizes the viability of a regulatory coopetition mandate underlying Article 114 TFEU.

325. *Shaping reflexive regulatory coopetition as a constitutional endeavour*– The reconfigured principles of institutional heteronomy provide a roadmap to understand the route the EU is currently taking. The identification of common principles structuring market supervision should not however be taken as an absolute one way road towards exclusively mandated by EU law.[1538] As this section demonstrated, EU constitutional provisions remain sufficiently open-ended and nothing would seem to impede a more intense full-fledged or primary centralization of supervisory competences at the EU level. At the same time, it should

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posit less problems than it did in relation to the ESA creation, see E. Wymeersch, The European Financial Supervisory Authorities or ESAs' in E. Wymeersch, K. Hopt and G. Ferrarini (eds.), note 37, 240.

[1537] See for that justification, E. Wymeersch, note 742, 7-8.

[1538] It could indeed be argued that the identification of common or convergence-oriented principles does not however exclude or detract from the efficiencies of divergence identified, see F. Chirico and P. Larouche, note 7, 487 and P. Larouche, note 1360, 2; see also M. De Visser, note 23, 471 referring to 'regulatory emulation in this respect.

also be clear that these provisions do not operate in isolation from more general principles of regulatory decision-making at the EU level. Whilst these principles ensure the legitimacy and procedural propriety of new EU law standards, the operational maxims outlined here reflect an additional set of structural principles governing the institutionalization of supranationally structured market supervision arrangements.

The framework of reflexive regulatory coopetition limits the different institutional roles identified. Only if and to the extent that a background image of *reflexive regulatory coopetition* image guides and structures EU constitutional developments would the identified principles serve as a descriptive explanatory device and a normative institutional design toolkit for the development of supranational supervision structures across different sectors. In that way, the constitutional settlement and resulting institutional initiatives directly incorporate economic considerations giving shape to reflexive regulatory coopetition. The allocation of institutional competences within that system reflects the roles of different actors in bringing about the fulfilment of such principles and in the maintenance of a continuous reflexive diversity supported by EU law. In doing so, EU law itself shapes a balance between supranational cooperation and national competition among supervisory authorities. The institutional settlement resulting from such balanced cooperation and competition allows to determine how EU law allows regulatory coopetition to take shape.[1539]

[1539] Compare to A. Goucha Soares, note 1260, 144: 'Competition between legal orders, as stated above, is an essentially prospective approach to the forms of relationship between national law and European Community law. In other words, it is a suggestion of a regulatory strategy which the Community legal order ought to adopt in order to meet obligations arising from application of the principle of subsidiarity. Whence its nature as an alternative to the dominant understanding of the function of harmonisation of Community legislation, which in its traditional model would be destined to replace State regulatory prerogatives. Although there is a certain margin for differences among those who favour competition between legal orders as to the scope of the Community regulatory provisions, and particularly on whether the latter ought to constitute a minimum common harmonised body and later be the object of national complementary measures, or whether they should only guarantee the conditions for an operative mutual recognition between the different national regulatory provisions and accept a more enhanced idea of the resulting challenge of implementing a pure regulatory competitiveness of a neo-liberal nature, the fact is that this discussion has a fundamental place in the restructuring of the Community regulatory strategy' (references ommitted). The constitutional framework outlined here specifically applies that reasoning to the institutional organization of supranationally structured market supervision regimes.

Part IV. Heteronomous regulatory coopetition as an explanatory framework for institutional evolutions across market regulation sectors

326. *Introduction to this part* – The reconfigured constitutional principles of institutional heteronomy serve as benchmarks for the analysis, evaluation and future predictions surrounding institutional arrangements of EU market supervision in different sectors. New sector-specific market supervision structures established will be confined to cooperatively structured specific national authorities operating within a formalized EU network that operates as a second resort intervention mechanism. The EU network will be able to commandeer national authorities, as will the EU judiciary. National authorities will have to adapt their institutional operations to the needs of EU intervention, i.e. the establishment of a competitive race towards the best institutional framework encapsulating both cooperative EU integration and competitive national regulatory standards.

This part extends the analytical application of the constitutional framework of institutional heteronomy to other areas of EU law. Building on the directly and indirectly mandated market supervision dichotomy, it demonstrates how the identified reconfigured constitutional principles guide market supervision developments in newly mandated and delegated sectors. It will be argued that these sector-specific developments confirm the emergence of a singularly structured institutional framework of heteronomous market supervision arrangements. That framework reflects the constitutional translation of EU market integration grounded in institutional heteronomy and regulatory coopetition.

The approach adopted in this part is not consistently historical. It rather seeks to demonstrate how the framework of institutional heteronomy and its limits also serve to explain previous institutional evolutions in the realm of EU market supervision. In doing so, this part effectively seeks to demonstrate that the constitutional framework of institutional heteromy provide a blueprint for the institutional design of supranationally structured market supervision arrangements.

327. *Overview of this part* – The part comprises two chapters. A first chapter outlines the emergence of supranationally structured product authorization and consumer protection mechanisms as examples of indirectly mandated market supervision. It particularly explores the institutional framework surrounding the authorization of chemical products and the supervision of these authorized products. A European Chemicals Agency has been established on the basis of Article 114 TFEU to complement the roles of national supervisory authorities in that regard. A second example comprises the emergence of supranational consumer law enforcement mechanisms. Despite the gradual extension of EU-wide regulatory standards, a very limited EU-structured market supervision regime emerged here. The EU-structured 'market supervision' regime consists of a soft enforcement network that assembles national enforcement authorities. Whilst the emergence of the network resulted in the emergence of particular national supervisory authorities in some Member States, it did not directly mandate an EU-assimilated supervision structure to be implemented across these Member States.

The second chapter considers the emergence of directly mandated market supervision regimes. It argues that regulatory frameworks enabling the liberalization of particular economic sectors and the ensuing establishment of supranationally structured supervisory regimes have indirectly been mandated by Article 106 TFEU. On the basis of that mandate, differently structured sections have been established. The chapter particularly focuses on the institutional arrangements accompanying the liberalization of electronic communications and energy.

328. *No discussion of economic governance* – The chapter does not discuss the emerging constitutional framework of EU economic governance in response to Member States' budgetary problems.[1540] The nature, structure and scope of these initiatives differ from the 'market supervision' frameworks discussed throughout this dissertation. First of all, mechanisms directed at budgetary supervision address the Member States in their capacity as contributors to the EU integration project.[1541] Not unlike rules on State Aid, private market operators are only indirectly affected by the budgetary controls imposed on these Member States.

Secondly, the institutionalization and refinement of budgetary supervision is taking place and being negotiated both within and outside the confines of the EU Treaty framework.[1542]

[1540] In that respect however, EU law directly commandeered Member States into adapting their national economic and budgetary systems. For a very striking example, see Council Decision 2010/320/EU of 10 May 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, [2010] O.J. L145/6. The decision included conditions such as law introducing a progressive tax scale for all sources of income and a horizontally unified treatment of income generated by labour and capital assets or a law repealing all exemptions and autonomous taxation provisions in the tax system, including income from special allowances paid to civil servants. The decision has since been amended or updated. A consolidated version can be found at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2010D0320:20110712:EN:HTML.

[1541] These actions occurred despite the Treaty's 'no bail out' clause, see Article 125(1) TFEU, which states that The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. See for a general overview, M. Ruffert, 'The European Debt Crisis and European Union law', 48 *Common Market Law Review* (2011), 1777-1806; D. Adamski, 'National power games and structural failures in the European macroeconomic governance', 49 *Common Market Law Review* (2012), 1325-1329; N. De Sadeleer, 'The New Architecture of the European Economic Governance: A Leviathan or a Flat-Footed Colossus?', 19 *Maastricht Journal of European and Comparative Law* (2012), 354-382 and E. Chiti and P.G. Teixeira, 'The constitutional implications of the European responses to the financial and public debt crisis', 50 *Common Market Law Review* (2013), 683-708. The EU particularly strengthened its budgetary supervision procedures through its so-called six-pack. That six pack includes Regulation 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, [2011] O.J. L306/1; 33; Regulation 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, [2011] O.J. L306/8; Regulation 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, [2011] O.J. L306/12; Regulation 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, [2011] O.J. L306/25; Regulation 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, [2011] O.J. L306/33 and Council Directive 2011/85 of 8 November 2011 on requirements for budgetary frameworks of the Member States, [2011] O.J. L306/41. Additionally, it includes a Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. On that Treaty, see Editorial, 'Some thoughts concerning the Draft Treaty on Reinforced Economic Union', 49 *Common Market Law Review* (2012), 1-14.

[1542] See Council Regulation 407/2010 of 11 May 2010 establishing a European Financial Stabilisation Mechanism, [2010] O.J. L118/1, based on Article 122(2) TFEU. Article 122(2) states that where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.The upgraded assistance system does not affect a pre-existing system of assistance to non-Eurozone Member States. Advocating a case-by-case basis to establish the legality of financial assistance, see M. Ruffert, note 1541, 1787. The adoption of this Regulation does not affect the

Participating Member States are acting as constituent Treaty-making bodies rather than as implementing bodies of supranational law. Newly established EU-wide emergency bodies do not as such control markets, but rather supervise states as structural entities facilitating the emergence of these markets across the European Union.

Thirdly, the scope of budgetary control is inherently attached to the common currency and its governance – the so-called *Eurozone* group.[1543] The mechanisms discussed in this part rely on the EU constitutional framework to establish supervisory structured not merely confined to the Eurozone Member States, but to all participating Member States.

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existence of a separate assistance framework ensuring financial assistance to non-euro Member States under a balance of payments programme, see Article 143 TFEU and Council Regulation 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments, [2002] O.J. L53/1. See also D. Adamski, note 1541, 1330. Additionally, a non-EU European Financial Stability Facility had been established, see http://www.efsf.europa.eu/attachments/efsf_articles_of_incorporation_en.pdf. The EFSF had been established as a private legal person – a 'société anonyme' – in accordance with Luxembourg law. As a legal person, the EFSF concluded a framework agreement with all seventeen Eurozone Member States. The EFSF only provided financial assistance to Eurozone Member States and up to a committed €440 billion. It offered bonds in the financial markets that were backed by the pooled Member States' credit guarantees. The credit facility has so far supported Greece, Spain, Portugal and Ireland. The EFSF is being replaced by a European Stability Mechanism, see Treaty establishing The European Stability Mechanism between The Kingdom Of Belgium, The Federal Republic Of Germany, The Republic Of Estonia, Ireland, The Hellenic Republic, The Kingdom Of Spain, The French Republic, The Italian Republic, The Republic Of Cyprus, The Grand Duchy Of Luxembourg, Malta, The Kingdom Of The Netherlands, The Republic Of Austria, The Portuguese Republic, The Republic Of Slovenia, The Slovak Republic And The Republic Of Finland, available at http://www.esm.europa.eu/pdf/esm_treaty_en.pdf. The ESM is based on a newly introduced Article 136(3) TFEU, stating that 'Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality'. The German Bundesverfassungsgericht ruled in favour of the constitutionality of the Treaty establishing a European Stability Mechanism based on the provision and held it to be compatible with German constitutional law. Whilst the judgment of 12 September 2012 concerned the Treaty and not Article 136(3), it indirectly related to the scope of that legal basis as a matter of national constitutional law. For the decision of the Bundesverfassungsgericht, see http://www.bundesverfassungsgericht.de/en/decisions/rs20120912_2bvr139012en.html. On the constitutionality of inserting Article 136(3) TFEU, see Case C-370/12, *Pringle*, judgment of 27 November 2012, nyr. For comments on that judgment, see B. De Witte and T. Beukers, 'Annotation of Case C-370/12, *Thomas Pringle* v. *Government of Ireland, Ireland, The Attorney General*, Judgment of the Court of Justice (Full Court) of 27 November 2012', 50 *Common Market Law Review* (2013), 805-848. See also V. Borger, 'The ESM and the European Court's Predicament in *Pringle*', 14 *German Law Journal* (2013), 113-139 and P.-A. Van Malleghem, '*Pringle*: A Paradigm Shift in the European Union's Monetary Constitution', 14 *German Law Journal* (2013), 141-168.

[1543] The Eurozone is represented by the Eurogroup, an informal gathering of the Finance Ministers of the Member States who share the Euro, see http://eurozone.europa.eu/eurogroup. That group does not however enjoy specific legal status as a matter of primary EU law. The President of the Eurogroup nevertheless has a consultative voice in the ESM. See Article 5(1) ESM Treaty.

Chapter 1. Indirectly mandated market supervision extended

329. *Overview of this chapter* – This chapter explores how the institutional delegation mandate read into Article 114 TFEU served as an instrument for establishing second resort supranational intervention mechanisms in other subfields of EU Internal Market law. These structures allow for the supervision of product authorization legislation in the realm of chemical products (1.) and for enhanced consumer protection enforcement (2.). The chapter analyzes institutional evolutions in both fields and seeks to explain how the constitutional principles of institutional heteronomy serve as enabling and restraining devices for the prediction and evaluation of such initiatives. In both instances, it will be argued that the institutional delegation mandate reflected in Article 114 TFEU allows for more integrated institutional solutions.

1. Product authorizations in the Internal Market: the case of chemicals regulation

330. *Product authorizations in the Internal Market* – The Treaty framework's free movement entitlements do not reflect an unfettered right to have every product produced marketed in any Member State. Supranationally structured procedures governing the authorization of hazardous products prior to their entry into and marketing onto the Internal Market provided a remedy in that regard. This section particularly outlines the market supervision regime established in the wake of the EU's REACH Regulation concerning the authorization of chemical products.[1544] The elements and principles of institutional heteronomy provide benchmarks that allow to explain the supranational institutional arrangements accompanying REACH.

a. Heteronomy precursors: towards EU-wide product authorization and risk assessment systems

331. *Gradually intensified supranational intervention* – The authorization of presumably hazardous products gradually evolved from a nationally regulated field to an intensly structured supranational framework. In the light of the specific nature of different hazardous products, tailored product authorization mechanisms emerged at the supranational level. Their institutional setup varied from a Union-wide authorization conducted by the European Commission, Union-wide authorizations resulting from composite or mixed administrative proceedings and mutual recognition of national authorizations.[1545] In all instances, an authorization procedure was necessary to carry out a preliminary risk assessment prior to Internal Market marketing or production. European agencies have come to play an essentially supporting role in that regard. This subsection sketches the frameworks underlying the authorization of foodstuffs and medicinal products.

332. *Foodstuffs authorization* – The regulation of foodstuffs in the European Union has been the subject of increasing harmonization.[1546] With a view to ensuring a high level of protection

[1544] Regulation (EC) 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, [2007] O.J. L136/3 (hereinafter referred to as REACH).

[1545] R. Schütze, note 586, 1412, referring to the idea of executive subsidiarity underlying authorization procedures and the inclusive role of both the national and supranational levels in that regard.

[1546] See for a summary overview, I. Scholten-Verheijen *et al, Roadmap to EU Food Law* (Den Haag, SDU Uitgevers, 2011), 49-120. The current basic framework can be found in Regulation 178/2002 of the European Parliament and Council of 28 January 2002 laying down the general principles and requirements of food law,

of human health and consumers' interest in relation to food[1547], particular food additives[1548], 'novel food'[1549] and products based on genetically modified organisms[1550] have to be authorized before being marketed within and across the Member States.[1551]

The responsibility for the authorization procedure of novel foodstuffs lies with the national food safety authority to which the application for authorization has been made.[1552] During the authorization process, other Member States and the European Commission can object to the authorization.[1553] In that instance, the Commission will have to adopt the final decision on the matter.[1554] Authorization decisions need to be taken in the light of the latest scientific evidence and the precautionary principle.[1555] A Commission authorization decision is individual in scope and only allows the particular applicant to market the product. A similar product by a different marketeer would require a new application.[1556]

The European Food Safety Authority (EFSA) collects the scientific evidence and assists the Commission in its authorization decisions.[1557] It does not however directly authorize or

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establishing the European Food SafetyAuthorityand laying down procedures in matters of food safety, [2002] O.J. L31/1. On the compatibility of national authorization frameworks with EU (free movement) law, see C. Macmaoláin, *EU Food Law. Protecting Consumers and Health in a Common Market* (Oxford, Hart, 2007), 49-54.

[1547] Article 1 Regulation 178/2002: This Regulation provides the basis for the assurance of a high level of protection of human health and consumers' interest in relation to food, taking into account in particular the diversity in the supply of food including traditional products, whilst ensuring the effective functioning of the internal market. It establishes common principles and responsibilities, the means to provide a strong science base, efficient organisational arrangements and procedures to underpin decision-making in matters of food and feed safety.

[1548] Council Directive 89/107/EEC on the approximation of the laws of the Member States concerning food additives authorized for use in foodstuffs intended for human consumption, [1989] L40/27. For animal food additives, see Regulation (EC) 1831/2003 of the European Parliament and of the Council of 22 September 2003 on additives for use in animal nutrition, [2003] O.J. L268/29.

[1549] Novel food encompasses foods and food ingredients that have not been used for human consumption to a significant degree in the EU before 15 May 1997, see Article 1(2) Regulation 258/97 of the European Parliament and Council of 27 January 1997 concerning novel foods and novel food ingredients, [1997] O.J. L43/1 (hereinafter referred to as Novel Foods Regulation). In that instance, a particular authorization procedure is in force.

[1550] See Regulation 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed, [2003] O.J. L268/1.

[1551] This section will only discuss the general authorization procedure prevailing in the novel foods Regulation. That Regulation allows for the interplay between national and supranational authorization procedures. For a similar overview, see also Regulation 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, [2006] O.J. L93/12, outlined in R. Schütze, note 586, 1421-1422. In more specific instances, supranational authorization by the Commission is the only authorization possible, see e.g. Article 1(1) Regulation 1831/2003 stating that 'the purpose of this Regulation is to establish a Community procedure for authorising the placing on the market and use of feed additives and to lay down rules for the supervision and labelling of feed additives and premixtures in order to provide the basis for the assurance of a high level of protection of human health, animal health and welfare, environment and users' and consumers' interests in relation to feed additives, whilst ensuring the effective functioning of the internal market'.

[1552] Article 4(1) Novel Foods Regulation entrusts the Member State in which the additive is to be first placed on the market. See also Article 6(2).

[1553] Article 6(4) Novel Foods Regulation.

[1554] Article 7(1) and 13 Novel Foods Regulation. See also Article 12 Novel Foods Regulation for ex post authorization actions to be envisaged by Member States, which eventually require the Commission's intervention.

[1555] The precautionary principle in EU Food law and in the context of risk management in particular is explicitly referred to in Article 7 Regulation 178/2002.

[1556] See on the scope of authorization decisions, I. Scholten-Verheijen, note 1546, 84-90.

[1557] Article 22(2) Regulation 178/2002.

prohibit the use or marketing of particular ingredients or products.[1558] It rahter provides scientific opinions which will serve as the scientific basis for the drafting and adoption of Union measures and with a view to support Member States in the fields falling within its mission.[1559] As an independent intermediate body, it aims to coordinate the risk assessment, risk management[1560] and risk communication functions residing either at the Commission or the Member States' levels.[1561] Established on the basis of Article 114 TFEU, the EFSA is governed by a management board, an executive director, an advisory forum and scientific committees consisting of different panels.[1562] Contrary to the ESAs, EFSA does not comprise a Board of Supervisors assembling all national supervisors. Only the Advisory Forum is composed of representatives from each Member State.[1563]

333. *Medicinal products authorization* – Medicinal products for human and veterinary use have been subject to a similar regulatory structure at the EU level. A 1993 medicinal products authorization regime foresaw the authorization of particular medicinal products by national authorities, supported by the European Agency for the Evaluation of Medicinal Products (EMEA).[1564] EMEA had been established on the basis of Article 352 TFEU.[1565] That framework has subsequently been modernized and upgraded in Regulation 726/2004.[1566] Regulation 726/2004 transformed the EMEA into the European Medicines Agency (EMA) and justified its particular function on the basis of Article 114 TFEU. As a matter of substance, the Regulation did not however transform EMA's supporting role in the authorization process.

The 2004 regulatory framework for the authorization of medicinal products distinguishes a centralized authorization procedure from decentralized authorization procedures and mutual recognition procedures.[1567] Decentralized procedures allow for the registration for authorization of a particular medicinal product in one particular Member State. In case an

[1558] See E. Vos and F. Wendler, 'Food Safety Regulation at the EU Level' in E. Vos and F. Wendler (eds.), *Food Safety Regulation in Europe. A Comparative Institutional Analysis* (Antwerp, Intersentia, 2006), 74.

[1559] As a result EFSA Opinions do not constitute actionable measures against which an appeal on the basis of Article 263 TFEU can be lodged, see for that position . This does not however imply that EFSA opinions cannot be taken into account by the litigating parties and the Court, see for recent examples of that approach, Joined Cases C-439/05 P and C-454/05 P, *Land Oberösterreich v Commission,* [2007] ECR I-7141, para 63-64; Case T-71/10, *Xeda International SA and Pace International LLC v Commission*, judgment of 19 January 2012, nyr, para 116; Case T-262/10, *Microban v Commission*, judgment of 25 October 2011, nyr, para 66 to name but a few examples.

[1560] The EFSA does not however directly engage in risk management itself. It rather facilitates the flows of information to make such assessments a reality, see E. Vos and F. Wendler, note 1558, 89.

[1561] Article 22(8) Regulation 178/2002.

[1562] Article 24 Regulation 178/2002.

[1563] Article 27(1) Regulation 178/2002.

[1564] Council Regulation 2309/93 of 22 July 1993 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products, [1993] O.J. L214/1.

[1565] See the preambles to Regulation 2309/93: Whereas the Treaty does not provide, for the adoption of a uniform system at Community level, as provided for by this Regulation, powers other than those of Article [352 TFEU].

[1566] Regulation 726/2004 of the European Parliament and the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, [2004] O.J. L136/1, referring to Article 95 EC.

[1567] Recitals 7 and 17 Regulation 726/2004. Article 3 of that Regulation outlines which products are subject to centralized authorization. The general decentralized framework is set out in Article 6 Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, [2001] O.J. L311/67. A similar procedure has been set out for veterinary use medicinal products, see Directive 2001/82/EC of 6 November 2001 on the Community code relating to veterinary medicinal products, [2001] O.J. L311/1.

application is made in two or more Member States, this decentralized procedure is complemented by a mutual recognition procedural framework.[1568] That framework allows for the recognition of the medicinal product in one reference Member State, followed by an additional evaluation by other Member States concerned. If that additional evaluation results in disagreement among the concerned Member States[1569], the case will be referred to EMA for advice and to the Commission for a final authorization or prohibition decision.[1570] High-technology and new substance medicinal products nevertheless always benefit from a singularly structured supranational authorization procedure in which the Commission grants a marketing authorization that extends to the Internal Market.[1571] Supervision of these marketing authorizations remains in the hands of competent national supervisory authorities.[1572]

EMA does not play a directly intervening role in that regard. It is responsible for coordinating the existence of scientific resources put at its disposal by Member States for the evaluation, supervision and pharmacovigilance of medicinal products.[1573] EMA does not however enjoy binding regulatory or individual decision-making powers.[1574] It merely assists with the evaluation of authorization applications. It shall provide the Member States and EU institutions with the best possible scientific advice on questions relating to the evaluation of the quality, safety and efficacy of medicinal products for human or veterinary use.[1575] It also coordinates Member States' supervisory practices[1576] and facilitates the dissemination of information on potential adverse reactions to such products.[1577] EMA shall also work together with EU agencies, scientific committees or national authorities to resolve scientific points of conflict. To that extent, it shall submit to the Commission and publish documents clarifying clarifying the scientific points of conflict.[1578] EMA encapsulates two scientific committees: the Committee for Medicinal Products for Human Use and the Committee for Medicinal Products for Veterinary Use.[1579] Each Member State appoints one member and one alternate to each Committee, for a renewable three-year term.[1580] In addition, EMA is governed by a Management Board, in which each Member State appoints one representative and in which two Commission and two European Parliament representatives take part. Members are appointed for renewable three-year terms.[1581] The Management Board adopts the procedural rules governing the Committees' operations.[1582]

334. *Elements of institutional heteronomy* – In both instances, the product authorization structure is predominantly conducted at the national level. The Commission nevertheless retains a subsidiary authority in adopting individual authorization decisions. EU agencies do

[1568] Article 28 Directive 2001/83/EC.
[1569] Disagreement should be comprehended as the (intended) refusal of one Member State to recognize the authorization decision adopted in the reference state, see Article 29 Directive 2001/38/EC.
[1570] Article 33 Directive 2001/83/EC. See also R. Schütze, note 586, 1412.
[1571] Recital 6 Regulation 726/2004.
[1572] Article 18 Regulation 726/2004.
[1573] Article 55 Regulation 726/2004.
[1574] Its opinions are therefore not amenable to judicial review. That does not however imply that the Commission can deviate from the opinion without proper reasoning, see Case T-13/99, *Pfizer Animal Health SA*, para 196-200.
[1575] Article 57(1) Regulation 726/2004.
[1576] Article 57(1)(c) Regulation 726/2004.
[1577] Article 57(1)(d) Regulation 726/2004.
[1578] Article 59(3) Regulation 726/2004.
[1579] Article 56(1)(a) and (b) Regulation 726/2004.
[1580] Article 61 Regulation 726/2004.
[1581] Article 65 Regulation 726/2004.
[1582] Article 66 Regulation 726/2004.

not operate as market supervisors in their own right, but basically structure and facilitate cooperation and interaction between the supranational and national regulatory levels. Both agencies are EU legal persons and can be held accountable as a matter of EU law[1583], but cannot overall adopt binding EU law decisions.[1584] The supplementary role these agencies play also explains reliance on Article 114 TFEU to justify their establishment. Contrary to regulatory agencies established within the same timeframe – such as the *Office for the Harmonisation of the Internal Market* (OHIM) and the *Community Plant Variety Office* (CPVO) – , EFSA and EMA do not adopt binding decisions and could not be considered stand-alone bodies supporting newly established supranational stand-alone rights.[1585] They are rather woven into an existing substantive internal market framework and structure the operations and enforcement of that framework. In that image, Article 114 TFEU posited a more appropriate legal basis.[1586]

The framework for product authorizations reflects tangible features of a heteronomous supervision system in at least three respects. First, the authorization systems presuppose a *dispersed unity of policymaking*. EU law determines the extent to which authorizations can take place and in what ways nationally authorized products can benefit from mutual recognition and free movement. Second, EU law and national law are somehow interrelated, but in a hierarchical way. National authorization procedures operate by virtue of EU law and the disagreement of one Member State or the European Commission suffices to commence a centralized authorization procedure at the EU level. The EU thus enjoys a right of second-resort supranational intervention and is able to exercise that right to the detriment of decentralized authorization applications. It equally structures the supervision mandates of national authorities. As such, EU law provides for a *complementary supranational supervision mechanism*. Third, the system reflects a *hierarchical quasi-duality*. The EU level – by means of a Commission authorization procedure – can directly and indirectly[1587] withdraw an authorization application from the national authorities and replace it with a supranational authorization procedure. A fourth feature – and essential constitutional ingredient in order to establish an institutionally heteronomous regime as identified in earlier chapters – is less prominently present. That feature refers to *cooperative incentives* that govern actual or potential conflicts between national and supranational orders. Whilst it could be argued that the withdrawal of particular authorization applications from national authorities comprises such cooperative conflict resolution mechanism, the actual cooperative involvement of Member States in a supranational setting is rather limited. Whilst fundamental procedural rights have served to remedy the lack of similar cooperation rights in the field of EU competition law, dedicated attention to such rights is not prevalent in the authorization

[1583] Article 46(1) Regulation 178/2002 and Article 71 Regulation 726/2004.
[1584] S. Griller and A. Orator, note 30, 13 refer to them as pre-decision making agencies.
[1585] See Council Regulation 40/94 of 20 December 1993 on the Community trade mark, [1994] O.J. L11/1, replaced by Council Regulation 207/2009 of 26 February 2009 on the Community Trade Mark, [2009] O.J. L78/1; Council Regulation 2100/94 of 27 July 1994 on Community Plant Variety Rights, [1994] O.J. L227/1, and based upon Article 352 TFEU. It could be argued that since the substantive rights had to be established on the basis of Article 352 TFEU, the latter provision also provided the only appropriate basis for Union bodies entrusted with the registration, implementation and coordinated supervision of these newly granted rights. In doing so, the establishment of such bodies would indeed fall within the scope of Article 352 as outlined in Case C-436/03, *European Parliament* v *Council of the European Union (European Cooperative Society)*, para 44-45.
[1586] Most remarkably however, EMEA was originally established on the basis of Article 352 TFEU, as it was unclear whether Article 114 could indeed serve to establish a supporting supranational agency. See the legal basis of Regulation 2309/93, note 1564.
[1587] Its indirect mode of action is triggered by a Member State objecting to another Member State's preliminary report on a novel food ingredient in Article 6(4) Novel Foods Regulation. See Article 29 Regulation 726/2004 in the realm of medicinal products.

frameworks. Cooperative rights there mainly serve to restrain national authorities, rather than enabling them in their particular roles. No mechanism is in place with which national authorities or courts can hold the Commission directly to account. The creation of a decision-making agency would have enabled cooperation to come more directly to the fore within its Board of Supervisors' decision-making procedures. The coordinating role of the supranational bodies in the *supervision* of authorization decisions also remains vague. A framework governing supranational intervention options and the interplay between supranational and national authorities is lacking.

335. *Principles of institutional heteronomy* – The constitutional principles governing the operations of EU market supervision regimes are also partly applicable to the product authorization mechanisms. Firstly, product authorizations remain 'shared' among national and supranational authorities. Whilst the EU regulatory frameworks have long deferred to national institutional autonomy, the 2004 medicinal product reforms indirectly invited Member States to establish independent medicinal authorization authorities.[1588] These authorities have been necessary to ensure the effective and transparent flow of decentralized authorization procedures. In that image, the field of shared administrative competences is transformed into Member States' autonomy being compliant with EU demands. Secondly, authorization mechanisms reflect second-resort supranational intervention. By allowing for decentralized procedural mechanisms and supranational intervention in cases of disagreement, the principle of subsidiarity as second-resort intervention has indeed been operationalized. Thirdly and fourthly, the principle of proportionality as pro-actively commandeered intervention supported by institutional obstacle pre-emption is somewhat less developed in this respect. Member States' authorities have not explicitly been nudged into a specific institutional format. A direct and judicially enforced framework in which the Court of Justice intervenes in the institutional organization of national and supranational authorities' operations could nevertheless emerge in that regard, as the Court proves willing to consider the role of agency opinions in the adoption of Commission authorization decisions. Nothing would seem to impede the Court from identifying similar principles of interaction in relation to national authorities relying on supranational agency opinions. Doing so would result in the development of an intertwined supranational *supervision* framework complementing composite authorization procedures.

Fifthly, the authorization framework can only to a limited extent be captured by the supranational cooperative rights narrative. The Commission can intervene to withdraw an authorization procedure from the national level. National authorities have been offered an opportunity to intervene in and object to another national authority's decision-making process. The authorization regime does not however reflect an entirely *integrated* and cooperatively structured image. Actions to resolve conflicts are structured within a consistently *dual* system. An authorization decision will be taken at either the EU or the national levels and conflicts between both levels are to be solved by reference to one level bearing the final decision-making authority. Supranational agencies serve as brokers of interest rather than as instruments through which cooperative rights can be structured. The lack of a parallel authorization procedure between the supranational and national levels exacerbates these consequences. As a consequence, the emergence of mutual cooperative rights in which supranational and national authorities are effectively intertwined cannot be

[1588] See Article 61(1) and (5) Regulation 726/2004, emphasizing the need for competent authorities in order to establish cooperation links between the supranational and the national levels. Directive 2001/83/EC could be understood to incorporate a similar preference for specific competent authorities. The regulatory framework does not however incorporate a legal obligation imposed on the Member States for establishing such authorities.

identified as an institutional condition underlying the functioning of foodstuffs and medicinal authorization regimes.

b. Establishing heteronomous product authorization *supervision mechanisms*: REACH

336. *Extending institutional heteronomy in the REACH Regulation* – Despite the lack of more explicit cooperative rights and incentives and Court-induced institutional obstacle pre-emption examples, basic features of institutional heteronomy can indeed be found in the product authorization schemes. These features have indeed more recently been further developed, as the REACH example aptly demonstrates. REACH presents a supranational framework for the registration, evaluation, authorization and restriction of chemical products and substances. Established by a 2006 Regulation on the basis of Article 114 TFEU, REACH aims to improve the functioning of the Internal Market by guaranteeing the free movement of chemical substances and at the same time maintaining a high level of protection of human health and the environment.[1589] REACH is based on the principle that it is for manufacturers, importers and downstream users to ensure that they manufacture, place on the market or use substances that do not adversely affect human health or the environment.[1590] The same Regulation also provides for the establishment of the European Chemicals Agency (ECHA), which role is to ensure the effective management of the technical, scientific and administrative aspects of REACH at the Union level.[1591] Whilst the agency gains new and more intensified powers compared to other 'product authorization' agencies, the Commission ultimately remains responsible for the authorization of chemical substances at the EU level.[1592]

337. *Overview of REACH* – The REACH framework was set up to maintain an overview of hazardous chemical products used in the manufacturing and marketing processes. It proposes an elaborate regulation, evaluation and authorization framework.

Any manufacturer, producer or importer of a substance[1593] needs to submit a registration to the ECHA.[1594] The mandatory registration submission needs to contain specific and detailed information.[1595] REACH nevertheless allows for specific derogations and exemptions from

[1589] Article 1(1) REACH.

[1590] Article 1(3) REACH. This is underpinned by the precautionary principle. The adoption of REACH completes a long-winding process of partial harmonization and industry and political calls for a more enhanced regulatory framework. For an overview of that process, see J. Scott, 'From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction', 57 *American Journal of Comparative Law* (2009), 897-942. For an understanding of REACH as a multilevel organizational framework, see V. Heyvaert, 'The EU Chemicals Policy: Towards Inclusive Governance?' in E. Vos (ed.) *European risk governance: its science, its inclusiveness and its effectiveness* (CONNEX - Network of Excellence Report Series 06, 2008), 185-221.

[1591] Recital 15 REACH Regulation. See also J. Scott, 'REACH: Combining Harmonisation with Dynamism in the Regulation of Chemicals' in J.Scott (ed.), *Environmental Protection: European Law and Governance* (Oxford, Oxford University Press, 2009), 56-91.

[1592] Recital 22 REACH Regulation.

[1593] See Article 3 REACH: substance means a chemical element and its compounds in the natural state or obtained by any manufacturing process, including any additive necessary to preserve its stability and any impurity deriving from the process used, but excluding any solvent which may be separated without affecting the stability of the substance or changing its composition. REACH does not however apply to specific authorization regimes in the realm of food and medicinal products, as Article 2 makes clear.

[1594] Article 5 REACH, coining registration as a no data, no market approach. See also V. Heyvaert, 'No data, no market. The future of EU chemicals control under the REACH Regulation', 9 *Environmental law review* (2007), 201-206.

[1595] Article 10 REACH.

that obligation.[1596] Market participants are required to interact within a substance information exchange forum (SIEF).[1597] SIEFs comprise informal networks in which information about particular substances will be shared. The ECHA coordinates the operations of these SIEFs.[1598] Within three weeks of the submission date, the ECHA is called upon to undertake a completeness check of the submission.[1599] In case of completeness, the ECHA shall register the substance. If the submission is incomplete, the ECHA shall allow for a reasonable deadline to complete the submission.[1600] If a registrant fails to comply with that deadline, the agency shall reject the registration.[1601] Registration decisions are ECHA decisions and are subject to internal appeal and judicial review.[1602] Similar appeals are also possible against decisions on exemptions to register, on the sharing of data and on the obligations to provide information on testing practices.[1603]

A complete registration of a substance only comprises the starting point for evaluation processes.[1604] In addition to being registered, a substance – as well as the dossier supporting the substance – has to be tested and evaluated.[1605] Once again, REACH provides for detailed obligations and conditions surrounding such tests. Information exchange among market participants and coordinated by the ECHA is essential to avoid unnecessary testing duplications.[1606] The ECHA is responsible for coordinating the substance evaluation process. In doing so, it will rely on the competent authorities of the Member States.[1607] Different Member States' authorities will 'specialize' in particular substances and act as competent authorities for the evaluation of these substances.[1608] On the basis of the tests conducted by competent national authorities, the ECHA will draft a decision, against which Member States can object.[1609] In cases of disagreement[1610], a Member State Committee operating within the ECHA will be called upon to reach an agreement. Agreement results in an evaluation decision being adopted by the ECHA.[1611] Failure to reach such unanimous agreement will on the other hand result in the Commission being called upon to adopt an evaluation decision.[1612] The registrant concerned will also be involved and will have the opportunity to comment on the

[1596] Article 9 and 22 REACH.
[1597] Article 29(1) REACH: the involvement of SIEF is only for particular phase-in products and does not extend to all substances.
[1598] Article 29(2) REACH.
[1599] Article 20(2), second subparagraph REACH. A deadline of three weeks is granted in case of phase-in substances.
[1600] Article 20(2), third subparagraph REACH.
[1601] Article 20(2), fourth subparagraph REACH.
[1602] Article 20(5) REACH.
[1603] Article 27(7) and Article 30(5) REACH.
[1604] According to Article 21 REACH, registration of a product allows for the manufacture and/or import of a substance.
[1605] Article 40(1) REACH.
[1606] Recitals 49 and 54 REACH.
[1607] Article 45 REACH.
[1608] Article 45(2) REACH.
[1609] Article 51 REACH. A competent national authority can also require more information and adopt an evaluation decision on the basis of such requested information in accordance with Article 52 REACH. The same procedural framework as in Article 51 REACH underlies this framework as well.
[1610] Disagreement means a submitted proposal for amendment, see Article 51(2) REACH. In that case, the ECHA will have to redraft its decision prior to submitting it to the Member State Committee.
[1611] See Article 76(1)(e) REACH.
[1612] Article 51(7) REACH

draft decision.[1613] ECHA evaluation decisions can also be appealed and reviewed in conformity with an internal appeal and external judicial review procedure.[1614]

Some substances – of very high concern[1615] – can only be marketed within the Internal Market once it obtained Union-wide authorization.[1616] The European Commission is responsible for taking decisions on applications for authorizations.[1617] Although the Commission retains the final authority in that regard, applications for authorization shall be made to the ECHA.[1618] The Agency' Committees for Risk Assessment and Socio-Economic Analysis shall subsequently give their draft opinions within ten months of the date of receipt of an application.[1619] Before proceeding, the applicant will have an opportunity to comment on these draft opinions.[1620] The Committees will adopt a final opinion which will be submitted to the Commission and the Member States.[1621] The Commission subsequently adopts a draft authorization and – assisted by a Comitology Committee – a final decision.[1622]

REACH also provides for restrictions on the manufacturing, marketing and usage of dangerous substances.[1623] Decisions restricting a particular substance are adopted by the Commission, following the preparation of a file by the ECHA.[1624] A restriction process can also be initiated by the Member States.[1625] A Member State decision will be limited in scope and effects to the territory of a particular Member State. These decisions can subsequently be pre-empted by a Commission decision. Commission decisions restrict the manufacturing, marketing or usage of a product throughout the European Union. The ECHA only has a preparatory role to play in the adoption of Commission decisions. It does not intervene in the adoption of Member State restrictive decisions.

c. The European Chemicals Agency: a more intense supranational gatekeeper

338. *Introduction* – The REACH Regulation attributes an imporant role to the newly established European Chemicals Agency (ECHA). This new body is on the one hand premised on its 'authorization'-predecessors, as it predominantly plays and advisory role in the authorization process.[1626] On the other hand however, it also functions as a market supervision body in its own right, ensuring the registration and evaluation processes. This subsection analyzes the institutional tools enabling the ECHA's market supervision role. It considers the legal basis justifying its establishment, the legal structure of cooperative rights governing its institutional functioning and supporting internal appeal and external judicial review mechanisms. That inquiry will allow to assess to what extent the institutional heteronomy framework can provide guidance and background in this regard.

[1613] Article 51(1) REACH.
[1614] Article 51(8) REACH.
[1615] See J. Scott, note 1591, 66 for a succinct overview in that regard.
[1616] Article 56(1) REACH.
[1617] Article 60(1) REACH.
[1618] Article 62(1) REACH.
[1619] Article 64 REACH.
[1620] Article 64(5) REACH.
[1621] Article 64(5) REACH.
[1622] Article 64(8) REACH.
[1623] Article 67 REACH.
[1624] Article 69-73 REACH.
[1625] Article 69(4) REACH.
[1626] Article 55 REACH. See J. Scott, note 1591, 56, arguing that *[t]he European Agency does not stand high at the apex of a hierarchically organized system for the regulation of chemicals. It forms part of a system which is intensely fractured.*

i. Legal basis

339. *Article 114 TFEU as a legal basis* – Since it accompanies the adoption of an extensive substantive legal framework, the ECHA has been justified on the basis of Article 114 TFEU.[1627] Article 114 TFEU serves as the sole legal basis, just like similar product authorization mechanisms in food and medicinal products.[1628] According to the REACH recitals, the ECHA 'should be central to ensuring that chemicals legislation and the decision-making processes and scientific basis underlying it have credibility with all stakeholders and the public. The Agency should also play a pivotal role in coordinating communication around this Regulation and in its implementation'.[1629] In that understanding, the ECHA plays a fundamental supporting and enabling role for both the European Commission and Member States' authorities

340. *Operational support* – Unlike the ESA Regulations, REACH does not provide any additional justification for its reliance on Article 114 as a legal basis. The supporting function of a framework in itself grounded in Article 114 TFEU would seem to suffice in that regard. That approach is comparable to other product authorization regulations. In the latter regulations however, the newly created or upgraded EU agency did only enjoy supporting powers. The ECHA on the other hand has particular binding individual decision-making options, which could indeed result in the agency adversely affecting the positions of market operators and Member States. The Court's *Enisa* judgment did not directly extend to such binding decision-making agencies as constitutionally allowed for under Article 114 TFEU.[1630]

Although ECHA's establishment predates the ESA Regulations, the supranational operational support framework outlined in the latter's preambles could also serve to justify ECHA's reliance on Article 114 TFEU. The ECHA does not directly authorize particular substances. That decision is left to the European Commission. In cases of disagreement, evaluation decisions can be withdrawn from the agency and taken by the Commission as well. Only with regard to the registration process does the agency remain entirely independent in its decision-making practice. At the same time however, the agency has no discretion in accepting a registration application that complies with all requirements posited by the REACH Regulation.[1631] The agency in that respect only acts as a registry and not as a market supervisor. It is therefore *subsumed* to the Commission's decision-making powers. That is also clear from REACH's mandate to Member States to put in place effective monitoring and control mechanisms.[1632] National legal orders are responsible for monitoring compliance with and enforcing the provisions of REACH. The ECHA only plays a coordinating and subordinate role in that regard. It serves to *guide* the operations of national enforcement authorities and as an assembly point to collect and distribute information regarding particular substances.[1633] It provides the best possible scientific and technical advice on questions

[1627] The Recitals contain no justification whatsoever for the establishment of the agency grounded in Article 114 TFEU. The incorporation of the agency in a general substantive regulatory framework that falls within Article 114's substantive delegation mandate also contributes to the justification of a Union body on the basis of that provision. See note 782.
[1628] With the exception of the 1993 EMEA founding Regulation, which was based upon Article 352 TFEU, see note 1564.
[1629] Recital 95 REACH.
[1630] See nr. 156 of this dissertation.
[1631] Article 20(3) REACH.
[1632] Recital 121 REACH.
[1633] Its Member State Committee plays a particular role in that regard, as well as its Forum, see Article 76 REACH.

relating to chemicals.[1634] It equally *protects* Member States' prerogatives as market operators have to make risk assessments themselves. ECHA serves as a forum for Member States to exchange information on and to coordinate activities related to the enforcement of chemicals regulation.[1635] By distributing the results of particular assessments to national authorities and through ECHA-established databases[1636], national authorities can take particular enforcement actions should non-compliance with REACH appear. At the same time, the agency is structured to *guarantee* the continuous involvement of national actors. The establishment of a Member State Committee ensures that national representatives can provide opinions and have a direct role in the functioning and operations of the ECHA.[1637] These guarantees limit the powers attached to the ECHA and render it less vulnerable to constitutional infringement attacks. Whilst the Regulation does not as such provide elaborate justifications, the elements for justifying reliance on Article 114 TFEU can nevertheless be detected in its recitals and provisions.

At the same time, and not unlike the 'national operational support' mandate read in Article 103(2) TFEU, the Regulation also places the European Commission at the top of the chemicals supervision framework. Despite not being mandated so by the Treaty framework, REACH effectively allows the Commission to be ultimately responsible for the authorizations and restrictions of chemical products. The roles of national legal orders are subordinate in that regard, but nevertheless remain important to make the system function effectively. On the one hand, Member States remain responsible for the day-to-day supervision of chemicals authorizations. In case of changing circumstances, they can initiate restriction procedures and be assisted by the ECHA in doing so, unless and until the Commission decides to adopt a restriction decision itself. Member States thus retain particular competences that allow them to act in cases where the Commission does not deem such action necessary. On the other hand, the Commission has an exclusive power to grant authorizations for particular substances of very high concern. Producers, importers or manufacturers will have to apply for such authorization with the Commission.[1638] Member States are not entirely excluded from this process and its subsequent enforcement stage however. First, Member States intervene through the operations of the supporting Committees and the Member State Committee that provide opinions to the ECHA and/or the Commission.[1639] Second, Member States have directly been mandated to supervise and enforce the authorization decisions and enable compliance with REACH and to ensure that market operators comply with their responsibilities to manage the risks of substances.[1640] In doing so, Member States are directly responsible for market supervision in these stages. The Commission would only be able to intervene in Member States' supervision practices through its general infringement procedure in Article 258 TFEU.

341. *Operational support as justification* – A reading of Article 114 TFEU as incorporating an institutional delegation mandate to a particular supranational supporting supervision body serves to explain ECHAs' supporting powers structure. A reading of national operational support also underlying that provision serves to justify the Member States' continuous roles in

[1634] Article 77 REACH.
[1635] Article 77(4) REACH and the role of the Forum in that regard.
[1636] Article 77(2)(e) REACH.
[1637] Article 76 REACH.
[1638] Article 60(1) REACH.
[1639] Article 76 REACH.
[1640] Article 125 REACH. Article 126 REACH obliges the Member States to lay down the provisions on penalties applicable for infringement of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented The penalties provided for must be effective, proportionate and dissuasive.

enforcing the authorizations granted by the Commission. Despite significant supranational regulation of chemical substances, the execution, supervision and enforcement of that framework remains partly with the Member States. As supervisory competences are effectively shared among the national and supranational levels, the establishment of a specialized supranational agency could be deemed a necessary precondition for integrated administration and enforcement practices. In that understanding, the operational support reading underlying Article 114 TFEU could also be relied on to justify and explain the establishment of the ECHA.

ii. Institutional functioning

342. *ECHA as a cooperative network structure* – The ECHA exemplifies the cooperative network structure reflected by other market supervision agencies, especially the ESAs. The ECHA consists of a Management Board, a Member State Committee, a Forum for the Exchange of Information on Enforcement and a Board of Appeals. It equally incorporates the Committee for Risk Assessment and the Committee for Socio-Economic Analysis.[1641] Both Committees provide technical and scientific support and adopt opinions in that respect.[1642] The Forum on the other hand serves as an institutionalized network within an agency. It aims to spread good practice, coordinates harmonized enforcement projects, identifies working strategies and examines proposals for restrictions with a view to advising on enforceability.[1643] An Executive Director is responsible for the day-to-day functioning of the agency[1644] and is supported by a Secretariat, which undertakes work related to the registration and evaluation procedures and information provision. It is responsible for the maintenance and creation of databases on authorizations, substances and classifications of substances. The Secretariat also provides technical, scientific and administrative support for the Committees and the Forum and ensures appropriate coordination between these bodies.[1645]

The Management Board is composed of one representative from each Member State, a maximum of six representatives appointed by the Commission and two independent persons appointed by the European Parliament. Among the Commission appointees feature three individuals from interested parties without voting rights.[1646] Members are appointed for a once-renewable four year term.[1647] The Management Board basically develops the annual working programme, approves the budget and adopts the rules and procedures of the agency.[1648] The Committees consist of at least one member per Member State that nominated candidates. A maximum of two members per Member State is allowed for.[1649] The Member State Committee constitutes an exception to that rule: it comprises only one member per Member State.[1650] Committee members serve renewable three year terms and reflect a broad range of expertise within their ranks.[1651] Since Committee members represent the Member States whilst acting in a supranational setting, Member States are mandated to provide adequate scientific and technical resources to the Committee members they nominated.[1652]

[1641] See for that overview, Article 76 REACH.
[1642] Article 76(1)(c) and (d) and Article 77(3) REACH.
[1643] Article 77(4) REACH.
[1644] Article 83(1) and 84REACH.
[1645] Article 77(1)(g) and 77(2) REACH.
[1646] Article 79(1) REACH.
[1647] Article 79(3) REACH.
[1648] Article 78 REACH
[1649] Article 85(1)-(2) REACH.
[1650] Article 85(3) REACH.
[1651] Article 85(4) REACH
[1652] Article 85(6) REACH.

The Committee functioning explicitly recognizes the national status of its members. These Members are nevertheless called upon to act in the common interest of the EU. The Regulation therefore prohibits the giving of instructions incompatible with their independent advisory tasks to members of the Committees for Risk Assessment and Socio-Economic Analysis.[1653] Such directions may be given to Member State Committee members, as they are supposed to reflect the views of their respective Member States.[1654] Committees strive to adopt decisions by consensus. In case such consensus cannot be attained, separate majority and minority opinions will be adopted and published.[1655]

The Forum also comprises one member per Member State, appointed for a renewable three year term.[1656] The members of the Forum shall be supported by the scientific and technical resources available to the competent authorities of the Member States. Each Member State competent authority shall facilitate the activities of the Forum and its working groups. The Member States shall refrain from giving the Forum members, or their scientific and technical advisers and experts any instruction which is incompatible with the individual tasks of those persons or with the tasks and responsibilities of the Forum.[1657] The individual members have to ensure that there is appropriate coordination between the tasks of the Forum and the work of their Member State competent authority.[1658]

343. *Supranational cooperative rights* – Whilst the Committees and the Forum mainly function as advisory and coordinating bodies, their institutional operations are structured by the same kind of supranationally established cooperative rights which also underlie the ESAs and EU competition law enforcement regimes. Member States are – by virtue of supranational law – entitled to participate in the supervision and enforcement of EU law. To that extent, Member States' national institutional autonomy becomes a tool to shape and mould national administrative authorities or departments to fulfil a particular EU law function. At the same time, supranationally established rights entitle a supranational enforcement agency to intervene in the supervision and enforcement stage, either as a second-resort enforcement actor or as a coordinating mechanism. EU law once again determines the extent of such intervention and in doing so, contributes to the translation of loyal cooperation between the EU and Member State levels into specific constitutionally sanctioned EU rights. In the REACH regime, national authorities are not only entitled to engage in day-to-day supervision. They are also entitled to cooperate within the ECHA. ECHA cooperation nevertheless presents more than a mere entitlement. From a supranational perspective, it enables the integration of and coordination between national authorities in the common venture of establishing and maintaining an internal market for chemical substances. In that image, national administrative departments or authorities are mandated to comply with and execute EU law requirements, which might result in institutional adaptations to national structures to ensure such compliance.[1659] Qualifying EU-national interactions in the realm of ECHA operations as cooperative rights presents an opportunity to incite national legal transformations. Although REACH does not directly impose such national adaptations, they could appear as a result of ensuring REACH compliant-structures or Court of Justice case

[1653] Article 85(7) REACH.
[1654] Article 85(7) REACH *a contrario*.
[1655] Article 85(8) REACH.
[1656] Article 86(1) REACH.
[1657] Article 86(3) REACH.
[1658] Article 86(2) REACH.
[1659] For a similar argument in the realm of indirectly mandated financial market supervision, see nr. 220 of this dissertation.

law. Policy space is thus created for national institutional recalibration initiatives to be structured by EU law.

iii. Judicial review

344. *Internal Board of Appeal Review* – The REACH framework devotes particular attention to internal appeal and external judicial review procedures. ECHA decisions concerning registration and evaluation are amenable to review by a Board of Appeal established within ECHA. The REACH Regulation specifies that the Board of Appeal comprises a Chairman and two other members, appointed by the ECHA Management Board on the basis of a list of candidates proposed by the European Commission. The candidates shall be appointed on the basis of their relevant experience and expertise in the field of chemical safety, natural sciences or regulatory and judicial procedures.[1660] Board of Appeal members are appointed for a once-renewable five year term.[1661] During their appointment, they cannot perform other duties within the ECHA and they cannot be removed except by Commission decision in case of serious circumstances.[1662] Board members act as first-instance administrative law judges. This means that they have to refrain from taking part in appeal proceedings in which they have a personal interest or to which they have contributed as either representatives or addressees of or as participants in the decision on appeal.[1663]

Any natural or legal person may appeal against a decision addressed to that person, or against a decision not addressed to that person, which directly and individually concerns him.[1664] Appeals have suspensive effect[1665] and should be lodged within three months following notification or knowledge of a particular adverse decision. The categories of decisions amenable to Board of Appeal review are restricted to specific ECHA decisions. These decisions relate to exemptions from the general obligation to register for product and process orientated research and development, rejections of registrations, the sharing of existing data in the case of registered substances, the sharing of data involving tests, the examination of testing proposals and compliance checks of registrations and substance evaluation.[1666] A Regulation outlines the Board of Appeal's rules of procedure.[1667] In its case law, the Board explicitly held that the elements in an application for appeal must be sufficiently clear and precise to enable the Agency to prepare its defence and for the Board of Appeal to rule on the appeal.[1668] The exact degree of precision and detail nevertheless vary from case-to-case and depend on the complexity of the issues and claims raised.[1669]

A Board of Appeal procedure is not exclusively judicial in scope and remains attached to the administrative decision-making stage. The Chairman of the Board of Appeal will – following the initiation of an appellate procedure – have to consult with ECHA's Executive Director. If the Executive Director considers the appeal to be admissible and well-founded, he may rectify

[1660] Article 89(3) REACH.
[1661] Article 90(1) REACH.
[1662] Article 90(4) REACH.
[1663] Article 90(5)-(6) REACH.
[1664] Article 91(1) REACH.
[1665] Article 91(2) REACH.
[1666] Article 91(1) REACH.
[1667] Commission Regulation 771/2008 of 1 August 2008 laying down the rules of organisation and procedure of the Board of Appeal of the European Chemicals Agency, [2008] O.J. L206/5. The Regulation refers to the submission of documents, evidence, the organization of hearings and time limits.
[1668] See Case A-004-2011, *Kronochem GmbH*, decision of 7 October 2011, para 48.
[1669] *Ibidem*, para 50.

the decision within thirty days of the appeal being filed.[1670] As such, the Board of Appeal functions as a mechanism to allow for the administrative rectification of particular decisions.[1671] It should be remembered that such rectification does not constitute a decision of the Board of Appeal, but rather an opportunity for the Secretariat to re-issue a decision fraught with formal or substantive defects. The Board of Appeal will subsequently adopt a decision formally closing the appeal.[1672] The review stage therefore only proceeds to the extent that the Executive Director considers the appeal either inadmissible or unfounded or refuses to rectify a decision. In that case, the Chairman of the Board of Appeal examines the admissibility of the appeal.

In case of admissibility, the Chairman shall remit the case to the Board for substantive examination. Parties shall be entitled to make an oral presentation during that procedure. If the Board deems the appeal well-founded, it may exercise any power which lies in the competence of the ECHA or remit the case to the competent ECHA body for further action.[1673] The Board of Appeal thus enjoys full jurisdiction to replace an agency decision with one of its own, as long as that decision remains within the confines of acceptable ECHA decisions.[1674] From that perspective, administrative continuity exists between the Agency and the Board.[1675] The Board explicitly confirmed this when it held that 'when called upon to decide on an appeal related to a registration pursuant to the REACH Regulation, the Board of Appeal is conducting an ex parte procedure and it may[…] consider all circumstances and facts applicable during the administrative procedure that led to the adoption of the contested decision. As such, and by reason of the concept of administrative continuity, the examination of the appeal by the Board of Appeal is not limited to the arguments of facts and law raised by the parties'.[1676] The principle of administrative continuity nevertheless also results in the subordination of the Board to the legal framework of REACH. This implies that the Board cannot as such assess the legality of the REACH Regulation in itself. Claims arguing that REACH rules on registration are in breach of the principle of proportionality can only be considered by the Courts.[1677]

345. *Supplementary Court intervention* – The Board of Appeal stage presents a necessary precondition for access to the EU judiciary. The REACH Regulation explicitly states that a Court action may be brought in accordance with Article 263 TFEU or Article 265 TFEU contesting a decision taken by the Board of Appeal or, in cases where no right of appeal lies before the Board, by the ECHA itself.[1678] This also implies that the Court only has a power to annul a contested decision, resulting in a remit of the case to the ECHA which will then have to adopt a final rectified decision on the matter. The ECHA is required to take the necessary measures to comply with any judgment by the Court.[1679]

At present, four appeals have been decided on by the General Court. Most remarkable, these judicial appeals have never followed on a Board of Appeal decision. They rather concerned

[1670] Article 93(1) REACH.
[1671] For an example, see Case A-002-2011, *Feralco (UK) Ltd.*, decision of 31 March 2011, para 2.
[1672] See Case A-001-2009, *Specialty Chemicals Coordination Center sa/nv*, decision of 30 October 2009; Case A-001-2011, *Feralco Deutschland GmbH*, decision of 31 March 2011; Case A-002-2011, note 1671.
[1673] Article 93(3) REACH.
[1674] This is also evident from case law on other Boards of Appeal, e.g. in OHIM, see Case A-001-2010, *N.V. Elektriciteits – Produktiemaatschappij Zuid-Nederland EPZ*, decision of 10 October 2011, para 33.
[1675] On administrative continuity, see also Case T-163/98, *Procter & Gamble v OHIM* (*Baby-Dry*), para 38.
[1676] Case A-001-2010, note 1674, para 37.
[1677] Case A-004-2011, note 1668, para 66.
[1678] Article 94(1)-(2) REACH.
[1679] Article 94(3) REACH.

presumed decisions that were not amenable to Board of Appeal review. In all instances, the General Court held the actions for annulment inadmissible.[1680] At the same time, eight Board of Appeal decisions have been adopted, none of which resulted in a judicial appeal.[1681] The outcome of these decisions have varied between a rectification by the Executive Director and resulting withdrawal of the appeal[1682], a decision dismissing an appeal grounded in the breach of proportionality[1683] and one decision annulling an ECHA decision for failure to meet the standards required by the fundamental right to good administration reflected in the Charter.[1684] In these instances, the Board of Appeal relies on the Court's case law on good administration and on other Boards' scope of review standards to identify its own scope for administrative action.[1685]

346. *Towards institutional adaptations?* – The emerging Board of Appeal and Court decisions contain the starting point for future institutional evolutions towards truly integrated administration structures. Not unlike competition law enforcement, the Board and the Courts have been granted a mandate to identify, define and shape the procedural framework structuring substantive law claims. The ECHA Board of Appeal's references to the idea of administrative continuity and to the principle of good administration attest to a similar institutional development. At present, supranational actors are shaping the field within which the ECHA is able to function. Although the Courts have presently refrained from directly intervening in this matter, the existence of a judicial review framework provides a direct invitation for them to do so. The ECHA Board of Appeal's willingness to transpose administrative standards from other subfields of EU law is promising in that regard. By allowing for the establishment of a judicially sanctioned and structured administrative decision-making field at the supranational level, national authorities will equally be enticed to adapt their institutional structures. The administrative decision framework – as developed at the supranational level by supranational actors – can indeed subsequently be retranslated into national institutional requirements imposed as a matter of supranational law. The *Vebic* judgment in EU competition law presents a fine example of that approach.[1686] Just like the ESAs, the establishment of a judicial review framework in REACH facilitates such approach and allows for fundamental procedural rights that require translation to come to the fore more directly. Given the Board of Appeal's pro-active fundamental procedural rights posture in that

[1680] Case T-1/10, *Polyelectrolyte Producers Group GEIE (PPG) and SNF SAS v European Chemicals Agency*, Order of 21 September 2011, nyr; Case T-268/10, *Polyelectrolyte Producers Group GEIE (PPG) and SNF SAS v European Chemicals Agency*, Order of 21 September 2011, nyr; Case T-343/10, *Etimine SA and AB Etiproducts Oy v European Chemicals Agency*, Order of 21 September 2011, nyr; Case T-346/10, *Borax Europe Ltd v European Chemicals Agency*, Order of 21 September 2011, nyr; two of these orders have been appealed and are currently pending as Cases C-625/11 P and C-626/11 P. In addition, Cases T-93/10-T-96/10, *Bilbaína de Alquitranes, SA, Cindu Chemicals BV, Deza a.s., Industrial Química del Nalón, SA, Koppers Denmark A/S, Koppers UK Ltd, Rütgers Germany GmbH, Rütgers Belgium NV and Rütgers Poland Sp. Z o.o. v European Chemicals Agency;* Case T-245/11, *ClientEarth and International Chemical Secretariat v European Chemicals Agency* and Case T-177/12, *Spraylat v European Chemicals Agency* are still pending. On REACH governance and the Courts, see M. Bronckers and Y. Van Gerven, 'Legal Remedies under the EC's new Chemicals Legislation REACH: testing a new model of European governance', 46 *Common Market Law Review* (2009), 1823-1871.

[1681] More appeals have been announced, see for an overview, http://echa.europa.eu/about-us/who-we-are/board-of-appeal/announcements.

[1682] Case A003-2011, *BASF SE*, decision of 27 May 2011; Case A006-2011, *5N PV GmbH*, decision of 30 November 2011; Case A002-2012, *BASF SE*, decision of 21 June 2012.

[1683] Case A004-2011, , note 1668, para 69.

[1684] Case A-001-2010, note 1674.

[1685] Case A-001-2010, note 1674, para 42.

[1686] See nr. 119 of this dissertation.

regard, the development of a basis for a more integrated institutional functioning system could indeed be identified.

iv. Towards institutional heteronomy

347. *Principles of institutional heteronomy* – ECHA's operations within REACH can be read as applications of the constitutional principles governing institutional heteronomy. The structuring of EU-national interactions through the prism of cooperative rights allows to establish a constitutionally sanctioned framework in which national institutional adaptations can be demanded as a matter of EU law.

Firstly, the institutional setup of the ECHA as an intermediate coordinating structure between national enforcement and Commission authorizations confirms the idea of second-resort supranational intervention. In this context – not unlike the competition law enforcement context –EU law reserves particular competences exclusively to the Commission. The granting of authorizations – just like the assessment of concentrations with a Union dimension – is deemed essential at the supervisory level as a pre-emptive control mechanism before substances can be marketed. Once a substance has been authorized, Member States are mandated to enforce the authorization and to adopt proper supervisory and enforcement policies.[1687] The ECHA serves to coordinate these policies and to design a singular supranationally structured framework in which such coordination takes place. In that image, the ECHA serves as a second-resort intervention body aiming to converge different national policies. Contrary to the ESAs however, the ECHA does not have binding decision-making powers to impose compliance on particular Member States' authorities. In the present constitutional structure of EU integration, such institutional commandeering would not however be deemed unconstitutional, as long as this remains a second-resort solution. The principle of second-resort intervention read into Article 114 TFEU is therefore not applied to its fullest extent here.

Secondly, the principle of pro-active commandeering can be detected in the REACH and ECHA operations, albeit to a limited extent. REACH itself mandates national authorities to supervise the EU regulatory framework and to participate in the Forum to attain coordinated supervisory strategies. In doing so, REACH implicitly commands national authorities to adapt to the realities of an EU-wide authorization system and to attune their institutional organization to the requirements of such a regime. The development of coordinated strategies within the Forum could equally result in national institutional adaptations.[1688] From that point of view, REACH engages national authorities in a 'race'-like structure in which they can compete with each other to become the most attractive supervisor of EU law. As mentioned before, the inclusion of national authorities into a network facilitates mutual dialogue, exchange of best practices, mutual control and the nudging of particular institutional practices into more desirable EU alternatives.[1689] The Forum therefore facilitates a soft commandeering of national authorities' practices. At the same time however, the lack of direct ECHA intervention powers in national authorities limits the scope of direct EU commandeering of national institutional practices. The REACH framework leaves the national institutional autonomy of Member States more directly in place than the competition law and ESA structures do. Only the Court would in this constellation be able to commandeer national authorities.

[1687] Article 125 REACH.
[1688] Article 77(4)(d) REACH.
[1689] Nr. 351 of this dissertation. See also M. De Visser, note 23, 500.

Thirdly, the REACH framework grants room to institutional obstacle pre-emption. By including national authorities within the ECHA supervision and enforcement framework, these national authorities or enforcement structures face directly applicable EU law restraining their operations. National authorities are thus unable to act in contravention of such directly applicable rules. These rules limit the scope of national institutional autonomy and thus serve to allow a more direct intrusion of EU supervisory principles into national authorities' operations. The same caveat limiting the scope of pro-active commandeering is nevertheless in place here as well. Since the ECHA itself is limited to commandeer national authorities' institutional practices, the technique of institutional obstacle pre-emption itself grows limited to when the Court would engage upon such commandeering, with a view to bring convergence in the application of fundamental EU procedural rights at the EU and national levels.

Fourthly, as outlined above, the ECHA framework reflects a specific set of cooperative rights through which both the ECHA and national authorities can interact and define a procedural space for policy convergence. These cooperative rights on the one hand confirm the dual nature of the chemicals enforcement system, but on the other integrate both levels into a singular supranationally structured supervisory framework. By their very nature, these cooperative rights effectively integrate supranational and national actors, but also allow room for modifications to the institutional equilibrium established by the present regulatory framework. Cooperative rights in that regime effectively serve as tools for supranational authorities to directly intervene in the institutional organization of national enforcement structures called upon to apply EU law.

Fifthly, the abovementioned analysis demonstrates that supervisory powers are indeed effectively shared between the EU and its Member States. The institutional equilibrium supporting the sharedness of supervisory powers is not however directly attuned to enabling national institutional adaptations within an integrated supranational framework. REACH develops a firm distinction between the role of national authorities, the European Commission and the ECHA as institutionalized network between these bodies. That division of competences is also related to the different nature of supervisory tasks attributed to both levels. The Commission supervises and enforces preliminary authorization standards while national authorities supervise and enforce the regulatory framework in relation to authorized substances and products. The rather clear distinction between supervisory tasks relate to that distinction. At the same time, the establishment of the ECHA and its Forum ensure that national and supranational authorities convene with a view to develop common approaches. The outcomes of Forum meetings do not however contain binding EU decisions, but rather present soft law recommendations addressed to national authorities. As such, the scope of the Forum lies not in national institutional adaptations, but rather in ensuring convergence. National institutional adaptations might result from Forum interactions, but are not as such directly enabled by the Forum or the ECHA for that matter.

348. *Institutional heteronomy as explanatory framework* – The constitutional principles governing institutional heteronomy in both EU competition law and EU financial market supervision serve as useful benchmarks to evaluate the current state of 'integrated administration' projected in the REACH framework. The previous chapter demonstrated that these principles could serve as an explanatory framework for the state of market supervision enabled by the ECHA. At the same time, application of these principles to that framework demonstrated that the REACH supervision regime is rather based on a clear division of tasks (authorization – supervision) and ensuing division of powers between different levels (supranational – national). Whilst the ECHA and its Forum serve as instruments for

convergence, the scope for directly mandated national institutional adaptations remains limited, as does the emergence of a truly integrated administrative framework governed by institutional heteronomy.

349. *Institutional heteronomy as constitutional design* – From a normative point of view, it could nevertheless be argued that the constitutional principles of institutional heteronomy might serve as enabling and restraining benchmarks for upgrading the ECHA supervision system to a more integrated and supranationally structured market supervision regime. The application of these principles would result in enabling either the ECHA directly to intervene and supersede particular Member States' authorities decisions or to allow the Court of Justice to commandeer national authorities in adopting a converging institutional posture. At present, the emerging Board of Appeal case law is already designing an administrative decision-making policy sphere governed by supranational fundamental procedural rights imposed upon the ECHA.[1690] The Court could foster the transposition of such supranational principles into national legal orders. In that way, the supervisory system could gradually develop into a more directly integrated and supranationally structured whole.

350. *Reflexive regulatory coopetition as an exogenous constitutional design standard* – The *reflexive regulatory coopetition* understanding serves to justify limits on the ECHA's operations. Three justifications can be developed in that regard.

Firstly, full-fledged authorization powers in the hands of a supranational agency would be difficult to square with the *Meroni* limits consistently referred to by the European Commission and the Court.[1691] Circumscribed registration and evaluation powers, as well as support in the day-to-day supervision conducted at the national level could on the other hand fall within the scope of Article 114 TFEU. Although these actions might to some extent go beyond the limits imposed in *Meroni*, the 'operational support' reading of Article 114 TFEU allows to circumvent these limits by reading a delegation from the Member States to the supranational level into the emergence of the ECHA. In that image, the entrustment of the Commission with registration and evaluation powers would be more difficult to justify, as the Member States retain these essentially implementing powers in accordance with Article 291 TFEU. The establishment of an agency as an intermediary body between these levels would allow for the regulation of national competition without encroaching upon the institutional and organizational autonomy of the Member States. Just like the ESAs, the ECHA could thus be justified as a means to enable both cooperation and competition. The Institutions provide a balance in that respect, which will have to be further struck by the Court of Justice.

Secondly, national authorities are directly included into the EU enforcement and supervision framework. REACH does not replace these authorities, but mainly complements them. Although the framework does not directly mandate significant institutional adaptations, it invites national supervisors to adapt their operations in accordance with EU law requirements. ECHA's Forum particularly enables institutional convergence among these regulators to emerge. In doing so, the ECHA serves as a mediating device between the national authorities and the European Institutions, facilitating cooperation and competition. The constitutional principles on which the agency has been established in that image serve to structure and enable governance mechanisms to emerge within the confines of ECHA.

[1690] See nr. 344-345 of this dissertation.

[1691] Even though these considerations should not come into play here, see for that argument, nr. 200 of this dissertation.

Thirdly, the establishment of an appellate system effectively includes market operators in the supranationally structured framework through the appellate system. Market operators can appeal registration decisions to the Board of Appeal, which operates in accordance with the principle of administrative continuity.[1692] The Board additionally serves as an example for national judicial review procedures to take further shape. The REACH framework effectively mandates Member States to impose penalties for the non-application of REACH standards.[1693] As national authorities are called upon to apply and enforce EU law, the 'rule of law' guarantees imposed as a matter of EU law will apply as well. In that understanding, the appellate review system might serve as an institutional benchmark against which national review systems can be judged on their compliance with EU law. At the same time, REACH does not impose a singular national institutional template in that respect. It allows different national institutional formats to remain in place and to incorporate a particular set of EU-wide institutional obligations.[1694] In doing so, it contains features allowing the Court to structure national institutional arrangements in compliance with EU law. This set-up may promote an institutional race among national authorities to develop the most effectively complying EU law institutions. The Court will once again be called upon to define and circumscribe the notion of effectiveness in that regard.

2. Institutional arrangements in EU consumer protection regulation

351. *Introduction* – Consumer protection regulation has become a focal point of attention for the European Commission grasping with diversified and divergent national contract law regimes that remain somewhat aloof to top-down harmonization proposals.[1695] Relying on Article 114 TFEU[1696], the EU institutions gradually developed a supranationally structured

[1692] See Article 20(5) REACH.
[1693] Article 126 REACH.
[1694] For an argument that global interconnectedness and the EU's role in the global regulation of chemicals may also come into play, see V. Heyvaert, 'Globalizing regulation: reaching beyond the borders of chemical safety', 36 *Journal of Law and Society* (2009), 110-128. Heyvaert argues that local preferences would tend to be forgotten in a globalizing rule-based setting. This may also result in allowing for less regulatory experimentation. As a result, weaknesses of a dominant framework tend to be exacerbated. That position equally applies to EU law and the limited scope for diversity across Member States. It could be argued that REACH limits regulatory diversity remains to choices in the institutional organization of market supervision bodies. In doing so, it could nevertheless be argued that it supports the furthering of a reflexive regulatory coopetition institutional market supervision framework. More regulatory approximation could therefore result in more institutional varieties and a competitive framework in which these varieties can take shape.
[1695] The project and process of harmonizing, coordinating and structuring national private law regimes in a common European whole gave rise to a significant amount of literature which transcends the scope of this dissertation. For guidance and directions and an overview of many Commission initiatives and scholarly proposals, see among many others, W. Van Gerven, 'Codifying European Private Law? Yes if…', 25 *European Law Review* (2002), 156-176; F. Caffagi (ed.), *The Institutional Framework of European Private Law* (Oxford, Oxford University Press, 2006), 352 pp. H. Collins, *The European Civil Code: the way forward* (Cambridge, Cambridge University Press, 2008), 288 pp. See additionally K. Gutman, 'The Commission's 2010 Green Paper on European Contract Law: Reflections on Union Competences in light of the Proposed Options', 7 *European Review of Contract Law* (2011), 151-172.
[1696] On the intertwinement between consumer protection and the Internal Market and for a critique of the instrumentality of consumer law to the Internal Market in that regard, see P. Nebbia and T. Askham, *EU Consumer Law* (Richmond, Richmond Law & Tax, 2007), 11 and S. Weatherill, *EU Consumer Law and Policy* (Cheltenham, Edward Elgar, 2005), 14. Article 12 TFEU nevertheless explicitly states that Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities. Article 169 builds on that approach and holds that [i]n order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests. It more specifically refers to Article 114 TFEU as a legal basis to take action

substantive rulebook focused on harmonized consumer protection standards. Despite supranational substantive law innovations and adaptations, the institutional framework for the enforcement of consumer law protection largely remained a matter of national institutional autonomy. This subsection demonstrates that substantive harmonization is considered an important prerequisite for more direct supranational institutional initiatives. It briefly outlines the road to substantive harmonization governing this field, as well as the Court's role in including national judges to develop a single regulatory framework capable of being enforced. The Court's initiatives to bring more institutional harmony within this field have also been accompanied at the institutional level by the emergence of a consumer protection cooperation network (CPC). Whilst the CPC network is most certainly not a European agency, it presents the basic elements for a future institutional heteronomy framework. Constitutional principles of institutional heteronomy could in that image serve as institutional design benchmarks guiding the development of more enhanced supranational solutions.

a. Substantive law harmonization and the judicial construction of a consumer-friendly remedial atmosphere

352. *Public and private law harmonization* – The approximation of national consumer protection laws occurs in different areas that transcend traditional public and private law distinctions.[1697] The public law/private law distinction nevertheless constitutes a useful instrument to grasp the scope of substantive law harmonization that has taken place with a view to protect the consumer. On the one hand, significant harmonization initiatives have taken place in the realm of unfair commercial practices. Harmonized rules have as a result determined the scope of legal and illicit practices anyone engaging in business with consumers should adhere to. On the other, EU law harmonized the private law frameworks structuring commercial practices by imposing particular contractual obligations and reliance on contractual clauses in business-to-consumer contracts.

i. 'Public law': unfair commercial practices and diminishing national autonomy

353. *Unfair commercial practices regulation* – Unfair commercial practices have become the subject of intense supranational regulation. The Court's case law on the free movement of goods and services and the recognition of mandatory consumer protection requirements have been instrumental in identifying an EU prohibition on unfair commercial practices.[1698] Particular EU Directives equally restricted specific selling methods, methods of advertising and commercial practices.[1699] These Directives have subsequently been incorporated or

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on. As a result, consumer protection regulation directly falls within the constitutional delegation mandate outlined in that provision.

[1697] See B. Keirsbilck, 'The interaction between consumer protection rules on unfair contract terms and unfair commercial practices: *Perenič ová and Perenic*', 50 *Common Market Law Review* (2013), 256, referring to the complementary nature of public and private consumer law directives.

[1698] For an overview in that regard, see B. Keirsbilck, *The New Law of Unfair Commercial Practices and Competition Law* (Oxford, Hart, 2011), 29-67.

[1699] Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, [1984] O.J. L250/17; Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, [1985] O.J. L372/31; Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concernign misleading advertising so as to include comparative advertising, [1997] O.J. L290/18; Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, [2002] O.J. L271/16. More specific Directives have also been adopted in the realm of food and other products, see B. Keirsbilck, note 1698, 84-85.

encapsulated a more general unfair commercial practices Directive (UCP Directive). This UCP Directive aims to establish unfirom rules at Union level relating to unfair commercial practices.[1700] It envisions a maximum harmonization framework[1701], in which both businesses and consumers should be able to rely on a single regulatory structure based on clearly defined legal concepts regulating all aspects of unfair commercial practices across the EU.[1702] Moving away from negative integration, the UCP Directive bluntly states that unfair commrcial practices shall be prohibited.[1703] The Directive subsequently incorporates a general definition of and ban on unfair commercial practices[1704], accompanied by a list in Annex of practices that under all circumstances are to be regarded as unfair.[1705] The 'black list' of unfair practices imposes a ceiling on Member States. Practices included therein are per se prohibited and should therefore no longer be allowed under national law. Practices not mentioned in the black list on the other hand can no longer be prohibited per se as a matter of national law.[1706] More stringent national laws should as a result be disapplied or removed from the national legal orders. In addition, the Directive explicitly states that Member States cannot restrict the freedom to provide services or the free movement of goods on the basis of national mandatory requirements 'for reasons falling within the field approximated by' the UCP Directive.[1707] The identification and supervision of commercial practices and the enforcement of the ban placed on them is entrusted to the Member States.

354. *The Court's case law* – The Court's case law on the UCP Directive confirms the limited scope for diverging national regulatory frameworks. In *VTB-VAB and Galatea*, the Court held that the 'per se' unfair practices list in the annex to the UCP Directive contains the only per se unfair commercial practices national legal orders can retain and enforce. A Belgian prohibition on combined sales did not fall within the per se list and could not therefore be prohibited as a matter of course.[1708] A similar provision laying down a general prohibition on

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On misleading and comparative advertising, see also Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, [2006] O.J. L376/21.

[1700] Recital 5 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] O.J. L149/22. See for analysis, H. Collins, 'The Unfair Commercial Practices Directive', 1 *European Review of Contract Law* (2005), 417-441.

[1701] See Article 3(5) UCP Directive: For a period of six years from 12 June 2007, Member States shall be able to continue to apply national provisions within the field approximated by this Directive which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonisation clauses. These measures must be essential to ensure that consumers are adequately protected against unfair commercial practices and must be proportionate to the attainment of this objective. The review referred to in Article 18 may, if considered appropriate, include a proposal to prolong this derogation for a further limited period. See also B. Keirsbilck, note 1698, 182.

[1702] Recital 12 UCP Directive. To that extent, the effect will also be to eliminate the barriers stemming from the fragmentation of the rules on unfair commercial practices harming consumer economic interests and to enable the internal market to be achieved in this area.

[1703] Article 5(1) UCP Directive.

[1704] Article 5(2) UCP Directive: A commercial practice shall be unfair if: (a) it is contrary to the requirements of professional diligence, and (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

[1705] Annex I to the UCP Directive entitled: commercial practices which are in all circumstances considered unfair.

[1706] Article 5(5) UCP and Recital 17 Directive. B. Keirsbilck, note 1698, 386.

[1707] Article 4 UCP Directive.

[1708] Joined Cases C-261/07 and C-299/07, *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV* [2009] ECR I-2949, para 56 and 61-62.

announcements of price reductions and those suggestive of such redutions in the period preceding the period of sales has equally been held contrary to the UCP Directive's regime.[1709] *Plus* effectively confirmed that approach and reiterated that Article 4 UCP Directive effectively prohibits Member States from adopting a more stringent national rule.[1710] The judgment in *Mediaprint* confirmed that posture.[1711] In so interpreting, the Court of Justice enables a single regulatory framework. It also establishes itself at the apex of harmonized unfair commercial practice law, as it will retain the final authority on how national authorities and courts are to apply the UCP Directive across the Member States.[1712]

355. *Establishing national enforcement frameworks* – In accordance with the principle of national institutional autonomy, Member States ought to ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of the UCP Directive in the interests of consumers.[1713] To that extent, these Member States have to include legal provisions under which persons or consumer interest organizations can take legal action[1714] against unfair commercial practices before a national judge or can bring such unfair commercial practices before an administrative authority competent to decide on complaints or to initiate legal proceedings.[1715] The establishment of national authorities is not however obligatory. Courts or administrative authorities should as a matter of national law also be able to require a trader to furnish evidence as to the accuracy of factual claims related to commercial practices and to be able to consider claims as factually inaccurate. As such, the Directive directly establishes procedural principles governing the scope of review entertained by national administrative authorities and courts.[1716]

The Directive also commandeers particular principles of institutional organization on these authorities should Member States decide to establish one.[1717] First, administrative authorities have to be composed so as not to cast doubt on their impartiality. Second, these authorities should have adequate powers to monitor and enforce the observance of their decisions on complaints effectively. Third, they should give reasons for their decisions. In addition, when enforcement powers are exclusively exercised by an administrative authority, 'provision must be made for procedurers whereby improper or unreasonable exercise of its powers by the

[1709] Case C-126/11, *INNO NV v Unie van Zelfstandige Ondernemers VZW (UNIZO) and Others*, Order of 15 December 2011, nyr; Case C-288/10, *Wamo BVBA v JBC NV and Modemakers Fashion NV*, Order of 30 June 2011, nyr.
[1710] Case C-304/08, *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH*, [2010] ECR I-217, para 54.
[1711] Case C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG v "Österreich"-Zeitungsverlag GmbH*, [2010] ECR I-10909.
[1712] In that respect, fears have been expressed that the Court would be abandoning a pro-consumer point of view in favour of a pro-unfair commercial practice perspective. Whilst unfair commercial practices included into the UCP Directive are presumed to reflect a consumer interest, it could equally be argued that they allow the Court less leeway to consider pro-consumer Member State justifications, see B. Keirsbilck, note 1698, 386, relying on the blacklist for that argument. For an analysis of the Court's pro-consumer stance in the realm of EU consumer 'private law', see V. Trstenjak and E. Beysen; 'European Consumer Protection Law: *Curia semper dabit remedium?*', 48 *Common Market Law Review* (2011), 95-124. Pro-consumer interpretations are also often interpreted in contrast with pro-trader approaches, see Opinion of Advocate General Trstenjak to Joined Cases C-261/07 and C-299/07, para 71.
[1713] Article 11(1), first subparagraph UCP Directive.
[1714] Article 11(1), second subparagraph UCP Directive: Legal action includes orders of cessation or prohibition of imminent practices.
[1715] *Ibidem.*
[1716] Article 12 UCP Directive.
[1717] Article 11(3) UCP Directive.

administrative authority or improper or unreasonable failure to exercise the said powers can be the subject of judicial review'.[1718]

The UCP Directive significantly curtails the principle of national institutional autonomy in the realm of unfair practices law enforcement. Whilst it leaves the Member States a choice between an administrative or judicial model of enforcement, it effectively imposes institutional requirements on the functioning of these models. In doing so, the UCP Directive is more demanding compared with Regulation 1/2003. Article 35 of the latter also leaves a choice of enforcement models, but does not directly impose additional institutional or procedural requirements. The UCP Directive therefore provides the Court of Justice with hands-on provisions allowing for direct scrutiny and adapt the institutional operations of national enforcement authorities in this realm. The maximum harmonization scope of the Directive extends the legitimacy of Court intervention in these matters.

ii. Private law: unfair contract terms and EU 'public interest'

356. *Private law regulatory intervention* – EU law intervention in the realm of private law – consumer contracts – more gradually evolved and remained more attuned to minimum harmonization. On the one hand, this more limited scope is related to the questionable competences of the EU to establish a body of private law[1719] and to the diversified nature and legal traditions reflected in national private law regimes. EU consumer law intervention in the realm of private law has therefore always remained ancillary to existing bodies of national contract law.[1720]

Following early consumer protection provisions in the realm of product safety and ensuing liability[1721] and in addition to the adoption of harmonizing instruments related to specific types of consumer contracts[1722], Directive 93/13/EEC provided a harmonized framework of unfair commercial contract clauses.[1723] The Directive holds that a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of

[1718] Article 11(3), final subparagraph UCP Directive.

[1719] See K. Gutman, note 1695 for background on these problems and for further references in this regard.

[1720] On the interactions with the EU contract law initiatives in that regard, see J. Hurdik, 'The system of consumer law on its way to integration into the system of private law' in H. Schulte-Nölke and L. Tichý (eds.), *Perspectives for European Consumer Law. Towards a Directive on Consumer Rights and Beyond* (Munich, Sellier, 2010), 117-126.

[1721] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, [1985] O.J. L210/85.

[1722] See in that regard among others, Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, [1987] O.J. L42/48 (later replaced by Directive 2008/48, [2008] O.J. L133/66; Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, [1990] O.J. L158/59; Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, [1994] O.J. L280/83 (later replaced by Directive 2008/122/EC, [2008] O.J. L33/10); Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, [1997] O.J. L144/19; Directive 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, [1999] O.J. L171/12; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), [2000] O.J. L178/1. Directive 2002/65, note 1699 also contains harmonizing provisions. Most recently, see Directive 2011/83 of the European Parliament and of the Council on consumer rights, [2011] O.J. L304/64. S. Weatherill also refers to the payment services Directives in this regard, see S. Weatherill, note 1045, 1280.

[1723] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, [1993] O.J. L95/29 (UCT Directive).

good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.[1724] The Directive contains an indicative and non-exhaustive list of terms deemed unfair.[1725] The non-exhaustive nature of that list implies that Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.[1726] At the same time, the Directive obliged Member States to ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. To that extent, national law should include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.[1727]

357. *The Court's case law* – The Court's case law on the obligations imposed on national courts in applying Directive 93/13/EEC-transposed national law nevertheless hints at a diminished scope for national 'procedural' autonomy. In its *Océano Grupo* judgment, the Court held that the Directive seeks to address the imbalance between the consumer and the seller or supplier by positive action unconnected with thea ctual parties to the contract.[1728] It is therefore incumbent on national courts to maintain such balance. Maintaining such balance means that national law should be interpreted to allow for a national court to determine of its own motion whether a term of a contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before national courts.[1729] In *Mostaza Claro*, the Court referred to the notion of public interest to justify national court's intervention on the basis of EU law in that regard. A national rule impeding the annulment of an arbitral award because the consumer did not invoke the voidness of the arbitration procedure during the arbitral proceedings could not therefore remain in place.[1730] A national court should at all times be able to invoke of its own motion the EU rule banning unfair consumer contract terms.[1731] This is nevertheless only if and to the extent that a court is required to conduct similar public policy reviews of its own motion in accordance with national law.[1732] A similar obligation has subsequently also been read in more specific

[1724] Article 3 UCT Directive.
[1725] See Article 3(3) UCT Directive and the accompanying annex.
[1726] Article 8 UCT Directive.
[1727] Article 7(2) UCT Directive.
[1728] Joined Cases C-240/98 – 244/98, *Océano Grupo Editorial SA v Roció Murciano Quintero (C-240/98) and Salvat Editores SA v José M. Sánchez Alcón Prades (C-241/98), José Luis Copano Badillo (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98)*, [2000] ECR I-4941, para 27.
[1729] *Océano Grupo*, para 29.
[1730] Case C-168/05, *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, [2006] ECR I-10421, para 39.
[1731] Case C-243/08, *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi,* [2009] ECR I-4713. The Court in para 32 nevertheless demands that the national court has – in accordance with national law – the legal and factual elements necessary for that task at its disposal.
[1732] Case C-40/08, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, [2009] ECR I-9579, para 59; That does not however mean that such reviews have to be available as a matter of national consumer contract law. In Case C-147/08, *Jürgen Römer v Freie und Hansestadt Hamburg*, [2011] ECR I-3591, para 54-55, it was explicitly held that national courts should be doing so even if in that particular case such analysis could normally only be engaged upon on the explicit request of the parties involved. Advocate General Trstenjak makes a distinction between jurisdiction clauses that might be considered unfair and substantive clauses, see Opinion of A.G. Trstenjak to Case C-618/10, *Banco Español de Crédito SA v Joaquín Calderón Camino*, judgment of 14 June 2012, nyr, para 41.

consumer contract directives.[1733] National law may extend the scope of review beyond that obligation.[1734] In any case, national judges remain responsible for the actual assessment of the unfairness of a particular term.[1735] In accordance with the terms of the Directive, these judges are only able to assess the unfairness and relinquish the binding effects of these terms. The Court explicitly stated that national judges are not allowed as a matter of EU law directly to modify the terms of the contract rather than proclaiming them non-binding.[1736]

The Court's 'public interest' approach to unfair consumer contract terms facilitates the emergence of procedurally heteronomous intervention into national legal orders. Although the consumer contract Directives only reflect(ed) minimum standards, the Court has not refrained from interpreting and determining – on a general level – the scope of unfair contractual terms. As a result, these minimum standards have served as flexible and open-textured provisions that allow for more direct intrusion into national legal orders. Since national judges are mandated to effectively apply the prohibition on unfair terms, the Court is able directly to restrain national procedural autonomy in that regard.

358. *Supranationally structured national enforcement features* – At the same time, Directive 93/13/EEC equally incorporates particular provisions envisaging public agencies enforcing EU consumer law.[1737] As national public authorities are granted a particular role in the enforcement of 'private law' disputes, the Court's mandate to modify the scope of national procedural autonomy could equally extend to the national institutional autonomy of Member States. In order to make the public enforcement of unfair contract terms a reality, the Court could equally impose particular organizational obligations on national authorities acting within the realm of Directive 93/13/EEC.

359. *Targeted harmonization and its institutional consequences* – More recent regulatory initiatives have moved away from the minimum harmonization approach.[1738] The 2011 'Consumer Rights' Directive is a case in point. That Directive effectively imposes full harmonization into particularly *targeted*[1739] sector-specific regimes, but leaves the scope of both national contract law and Directive 93/13/EEC largely unaffected.[1740]

The gradual transition to maximum harmonization into particular fields of consumer contract law will nevertheless result in an even more significant commandeering role for the Court of Justice. The Court will be able to delineate the scope of action in which only the EU can take

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[1733] See e.g. Case C-429/05, *Max Rampion and Marie-Jeanne Godard, née Rampion v Franfinance SA and K par K SAS*, [2007] ECR I-8017.

[1734] Case C-484/08, *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc),* [2010] ECR I-4785, para 49; Case C-453/10, *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.*, judgment of 15 March 2012, nyr, para 36; Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, judgment of 26 April 2012, nyr, para 44.

[1735] Case C-137/08, *VB Pénzügyi Lízing Zrt. v Ferenc Schneider*, [2010] ECR I-10847, para 56; Case C-76/10, *Pohotovosť s.r.o. v Iveta Korčkovská,* [2010] ECR I-11557, para 63.

[1736] Case C-618/10, *Banco Español de Crédito SA v Joaquín Calderón Camino*, para 71.

[1737] Article 7 UCT Directive.

[1738] See for an overview, S. Weatherill, note 1045, 1284.

[1739] On targeted maximum harmonization in EU consumer law, see again S. Weatherill, note 1045, 1285.

[1740] The Consumer Rights Directive inserts a new Article 8a into the UCT Directive, which states that Where a Member State adopts provisions in accordance with Article 8, it shall inform the Commission thereof, as well as of any subsequent changes, in particular where those provisions extend the unfairness assessment to individually negotiated contractual terms or to the adequacy of the price or remuneration; or, contain lists of contractual terms which shall be considered as unfair. The Commission shall ensure that the information referred to in paragraph 1 is easily accessible to consumers and traders, inter alia, on a dedicated website. The Commission shall forward the information referred to in paragraph 1 to the other Member States and the European Parliament. The Commission shall consult stakeholders on that information.

action. As a result, national courts are turned into direct EU enforcement mechanisms. In that respect, the development of maximum harmonization will also spur procedural approximation. In order for private parties to bring their claims before these bodies and with a view to ensure the effective application of fully harmonized EU law, national courts could also be structured in accordance with particular EU requirements of good institutional organization. Not unlike EU consumer 'public law', the EU's determination of structures of national procedures might therefore affect the institutional organization of courts applying supranationally structured procedures.

b. Coherent enforcement: the emergence of enforcement networks and specialized national authorities

360. *Nationally structured market supervision* – Whilst Article 114 TFEU has been interpreted to justify maximum substantive law harmonization in consumer law as essential to the functioning of the Internal Market, institutional developments in this area have been developing at a slower pace. The Commission has not been endowed with particular investigative, prosecutorial, supervision or enforcement powers in the realm of consumer law. At present, no specific EU consumer law supervisory body – except for the policymaking Commission Directorate General – has been established. So far, Article 114 TFEU has not been read as an institutional delegation mandate to establish a particular supranational agency structure enabling EU-Member State cooperation. The supervision of unfair commercial practices and the enforcement of EU consumer contract law are rather entirely left to both national authorities and courts. The Commission can only indirectly address supervisory shortcomings through its Article 258 TFEU infringement procedure.

361. *Supranational intervention into nationally structured market supervision* – The basic principle of national institutional autonomy governing the supervision and enforcement of EU consumer law has nevertheless not been absolute. First, the UCP Directive especially contains institutional obligations imposed on national authorities and courts.[1741] Second, the Commission can always initiate infringement proceedings against Member States that fail to take appropriate action in the realm of consumer law enforcement.[1742] Third and most notably, EU consumer law initiatives have long sought to make the enforcement of supranational enforcement initiatives more effective at the national levels. To that extent, specific procedural harmonization initiatives have been adopted. Directive 2009/22/EC on injunctions for the protection of consumer interests sought to bring about a harmonized procedural framework in which injunctive relief for infringements of EU consumer law could be sought.[1743] According to that Directive, each Member State had to take the measures necessary to ensure that, in the event of an infringement originating in that Member State, any qualified entity – consumer interest organizations included[1744] – from another Member State where the interests protected by that qualified entity are affected by the infringement, may

[1741] See nr. 355 of this dissertation.
[1742] On the basis of the procedure outlined in Article 258 TFEU.
[1743] Originally Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, [1998] O.J. L166/51, replaced by Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, [2009] O.J. L110/30.
[1744] Article 3 Directive 2009/22/EC: For the purposes of this Directive, a "qualified entity" means any body or organisation which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring that the provisions referred to in Article 1 are complied with, in particular: (a) one or more independent public bodies, specifically responsible for protecting the interests referred to in Article 1, in Member States in which such bodies exist; and/or (b) organisations whose purpose is to protect [consumer interests], in accordance with the criteria laid down by the national law

seize a particularly designated court or administrative authority able to demand injunctive relief against such practices.[1745] Based on Article 114 TFEU, the Injunctions Directive created a regime of procedural minimum harmonization that allowed for a single remedy to be available to foreign – non-national – consumer interest organizations.[1746] It did not however envisage a supranational institutional structure supporting that newly established remedy.

362. *The supranational consumer protection cooperation network* – A concrete institutional step towards a supranationally coordinated market supervision response has been developed in Regulation 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.[1747] That Regulation is based on Article 114 TFEU and aims to facilitate cooperation between and interaction among different national enforcement bodies.[1748] According to the Regulation, the protection of consumers from intra-Union infringements requires the establishment of a network of public enforcement authorities[1749] throughout the Union and these authorities require a minimum of common investigation and enforcement powers to apply EU consumer law effectively with a view to deter sellers or suppliers from committing intra-Union infringements.[1750]

The Regulation only applies to intra-Union infringements. To be qualified as an intra-Union infringement, an act or omission needs first of all to transgress provisions of the laws that protect consumer interests.[1751] These laws comprise a set of transposed Directives and Regulations and capture all unfair commercial practices and consumer contract term Directives presently adopted at the EU level.[1752] Second, the action or omission contrary to such laws need to (likely) harm the collective interests of consumer residing in a Member State or Member States other than the Member State where the act or omission originated or took place, where the responsible seller or supplier is established or where evidence or assets pertaining to the act of omission are to be found.[1753] Coordinated enforcement structures therefore only come into play if multiple Member State territories can be related to any act or omission contrary to transposed EU consumer law provisions.[1754]

To facilitate trans-border enforcement, the Regulation establishes a consumer protection cooperation (CPC) network.[1755] Whilst not a supranational agency[1756], the CPC network

[1745] Article 2 Directive 2009/22/EC.
[1746] On the limited role of that remedy in enabling private organizations as enforcement bodies, see C. Hodges, 'Collectivism: Evaluating the effectiveness of public and private models for regulating consumer protection in W. van Boom and M. Loos (eds.), *Collective enforcement of Consumer Law* (Groningen, Europa Law Publishing, 2007), 215 and references included therein. See also G. Betlem, 'Public and private transnational enforcement of EU consumer law' in the same volume, arguing at 49 that public authorities will have to be granted locus standi before foreign courts, if these authorities have been designated as qualified entities under the Injunctions Directive scheme.
[1747] Regulation 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), [2004] O.J. L364/1 (hereinafter referred to as CPC Regulation).
[1748] Recitals 1-2 CPC Regulation.
[1749] Recitals 3 and 18 CPC Regulation. Such action should necessarily be taken at the Union level, since Member States cannot ensure cooperation and coordination by acting alone.
[1750] Recital 6 CPC Regulation.
[1751] Article 3(b) CPC Regulation.
[1752] Article 3(a) CPC Regulation refers to Directives as transposed into the internal legal order of the Member States and the Regulations listed in the Annex. An annex effectively lists these Directives and Regulations.
[1753] Article 3(b) CPC Regulation. For multiple interpretations of that concept, see G. Betlem, note 1746, 43.
[1754] G. Betlem, note 1746, 41.
[1755] C. Poncibò, 'Networks to Enforce European Law: The Case of the Consumer Protection Cooperation Network', 35 *Journal of Consumer Policy* (2012), 182.

incorporates divergent national authorities and structures them within an emerging supranational supervision mandate. The Regulation obliges each member State to designate the competent authorities and a single liaison office. A competent authority is any public authority established either at national, regional or local level with specific responsiblities to enforce the laws that protect consumers' interests.[1757] Competent authorities need to be entrusted with a set of minimum enforcement powers, including carrying out on-site inspections, requiring the cessation of particular practices or undertakings not to engage upon such practices.[1758] Whilst the CPC Regulation allows for more than one authority in each Member State to be responsible for consumer law enforcement, it also requires the designation of a single liasion office, i.e. the public authority in each Member State responsible for coordinating the application of the cooperative provisions of the Regulation within that Member State.[1759] Competent authorities need to be endowed with sufficient enforcement powers, but exercise them in conformity with national law.[1760]

A Commission Communication provides an overview of single liaison offices and competent authorities. It shows a varied institutional landscape of EU consumer law enforcement. Federally-structured Member States like Germany and Spain attribute particular enforcement competences to regional authorities. Germany's federal *Bundesamt für Verbraucherschutz nd Lebensmittelsicherheit* serves as a liaison office, but has to share enforcement powers with decentralized authorities. Some Member States –the Netherlands, the United Kingdom, Ireland, Sweden, Finland, Hungary, Poland, Bulgaria, Romania – have independent consumer agencies responsible for the enforcement and application of EU consumer law. Other Member States – Belgium, France, Portugal – have a department or directorate within the central administration acting as a single enforcement body.[1761] In instances where a single enforcement agency exists, specific consumer Directives related to financial services or air travel passenger rights can still fall within the enforcement jurisdiction of specialized market supervision bodies in those sectors.[1762] Such specialized national authorities or departments would have to liaise with the single liaison office for the purposes of ensuring coordinated enforcement within the confines of the CPC Regulation.

Whatever institutional format Member States rely on, they have to ensure that these authorities have adequate resources available to fulfil their role.[1763] With a view to enhance cooperation, officals may be exchanged.[1764] Member States may also, in cooperation with the

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[1756] Somewhat ironically, Recital 18 CPC Regulation directly refers to the principle of proportionality not to establish an agency. References to that principle precisely did justify the emergence of supranational agencies in product authorization and financial market supervision cases by incorporating it into the institutional mandate of Article 114 TFEU. On whether public enforcement is truly necessary – and for a balanced proposal in that regard, see R. Van den Bergh, 'Should consumer protection law be publicly enforced? An economic perspective on EC Regulation 2006/2004 and its implementation in the consumer protection laws of the Member States' in W. van Boom and M. Loos (eds.), note 1746, 179-205.

[1757] Article 3(c) and Article 4 CPC Regulation.

[1758] Article 4(6) CPC Regulation.

[1759] Article 3(d) and 4(1) CPC Regulation.

[1760] Article 4(4) CPC Regulation.

[1761] These data were extracted from Commission communication pursuant to Article 5(2) of Regulation (EC) No 2006/2004 of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws, concerning the competent authorities and single liaison offices, [2011] O.J. C260/1.

[1762] Germany is an example in that regard, see Communication, at 11-12. See for other examples, C. Poncibò, note 1755, 184 referring to confusing fragmentation operating across the Member States' consumer enforcement bodies.

[1763] Article 4(7) CPC Regulation.

[1764] Article 16(2)-(3) CPC Regulation.

Commission, carry out common activities aimed at supporting consumer advice, enhancing access to justice and maintaining enforcement statistics.[1765]

363. *Mutual assistance structured within the network* – The CPC Regulation outlines a nuanced framework of mutual assistance obligations, in which ccompetent authorities shall be obliged to exchange information related to particular requests or without requests. In that latter case, a competent authority notifies other authorities and the Commission of a (potential) intra-Union infringement that came to its attention.[1766] Most generally, all competent authorities are required[1767] to coordinate their market surveillance and enforcement activities and to exchange all information necessary to achieve such coordination. Information communicated may nevertheless only be used for the purposes of ensuring compliance with EU consumer protection law and is governed by an EU-standard of professional secrecy.[1768] Exchanged information shall be stored in a database maintained by the Commission.[1769] A particular – applicant – authority can request via intermediation of the different single liaison offices[1770] another – requested – authority located in a different Member State to take all necessary enforcement measures to bring about the cessation or prohibition of the intra-Union infringement without delay and in a proportionate, efficient and effective way.[1771] A requested authority may refuse to comply with a request for information or enforcement measures in only limited circumstances.[1772] In case an authority cannot invoke one of these circumstances and agrees to cooperate, both the applicant and requested authority will have to deliberate and agree on the measures to be taken in that regard.[1773] The applicant authority may refer to matter to the Commission, asking for its non-binding opinion in respect of the requested authority's refusal.[1774] In case of disagreement, the Commission can again adopt an opinion.[1775] A requested authority can also delegate particular enforcement roles to a

[1765] Article 17 CPC Regulation.
[1766] In this case, no information needs to be exchanged if criminal investigations or judicial proceedings have already been initiated or final judgment has already been passed in respect of the same intra-Community infringements and against the same sellers or suppliers before the judicial authorities in the Member State of the requested or applicant authority, see Article 15(4) CPC Regulation.
[1767] Article 9(1) CPC Regulation: the CPC Regulation refers to 'shall'
[1768] Article 13(1) CPC Regulation.
[1769] Article 13(3) CPC Regulation.
[1770] Article 12(2) CPC Regulation.
[1771] Article 8(2) CPC Regulation.
[1772] See Article 15(2) CPC Regulation: A requested authority may refuse to comply with a request for enforcement following consultation with the applicant authority, if:(a) judicial proceedings have already been initiated or final judgment has already been passed in respect of the same intra-Community infringements and against the same sellers or suppliers before the judicial authorities in the Member State of the requested or applicant authority; (b) in its opinion, following appropriate investigation by the requested authority, no intra-Community infringement has taken place;(c) in its opinion the applicant authority has not provided sufficient information in accordance with Article 12(1) except when the requested authority has already refused to comply with a request under paragraph (3)(c) in relation to the same intra-Community infringement. For information requests, see Article 15(3): A requested authority may refuse to comply with a request for information if: (a) in its opinion, following consultation with the applicant authority, the information requested is not required by the applicant authority to establish whether an intra-Community infringement has occurred or to establish whether there is a reasonable suspicion it may occur; (b) the applicant authority does not agree that the information is subject to the provisions on confidentiality and professional secrecy set out in Article 13(3); (c) criminal investigations or judicial proceedings have already been initiated or final judgment has already been passed in respect of the same intra-Community infringements and against the same sellers or suppliers before the judicial authorities in the Member State of the requested or applicant authority.
[1773] Article 8(4)-(5) CPC Regulation.
[1774] Article 15(5), second sentence CPC Regulation.
[1775] Article 8(5), second sentence CPC Regulation.

designated body having a legitimate interest in the cessation or prohibition of intra-Union infringements.[1776] These other bodies may be consumer organizations.[1777]

When competent authorities become aware that an intra-Union infringement harms the interests of consumers in more than two Member States, the competent authorities concerned shall coordinate their enforcement actions and requests for mutual assistance via the single liaison office. In particular they shall seek to conduct simultaneous investigations and enforcement measures. The competent authorities shall inform the Commission in advance of this coordination and may invite the officials and other accompanying persons authorized by the Commission to participate in any investigative measure taken in that regard.[1778]

The Regulation also mandates the establishment of a Member State Committee to assist the Commission in its coordination tasks.[1779] In its latest report on the application of the CPC Regulation, the Commission maintained that 'the Committee plays a central role for the CPC Network. It provides […] a platform for discussion of trends in consumer protection; contributes to developing a of common standards and guidelines […] and gives operational orientations to the CPC Network in the form of annual Enforcement Action Plans'.[1780] At the same time, the Commission recognized that many national authorities did not yet use the CPC network.[1781] Since the network does not in itself feature a 'corporate identity', – something a full-fledged EU supervisory body would – the organization only exerts a weak influence on the highly diversified national institutional regimes.[1782]

364. *National institutional adaptations?* – Uniform enforcement needs attached to a well-functioning CPC network could nevertheless serve to impose particular substantive and organizational modifications on national enforcement authorities. Whilst Member States remain at liberty to designate particular authorities or courts to function as competition authorities, these national institutions will have to ensure that the CPC network operates effectively and contributes to the transborder enforcement of the Internal Market. In order to achieve that aim, it would not seem unreasonable to require institutional adaptations at the national level. The particular minimum powers that need to be available within the different authorities might therefore result in Court-mandated institutional adaptations at the national level. The scope of Regulation 2006/2004 is nevertheless limited to intra-Union infringements. Such a limited scope grants the Court little leeway to propose direct national institutional adaptations that only indirectly touch upon intra-Union enforcement. At the same time, the lack of a supranational 'exemplary' model, such as the Commission in EU competition law or the ESAs in financial supervision, somehow impede the availability of a

[1776] Article 8(3) *juncto* 4(2) CPC Regulation.
[1777] See Recital 14 CPC Regulation, stating that consumer organizations play an essential role in terms of consumer information and education and in the protection of consumer interests, including in the settlement of disputes. These organizations should therefore be encouraged to cooperate with competent authorities to enhance the application of this Regulation. See also Article 11(3), stating that Member States shall encourage cooperation between the competent authorities and any other bodies having a legitimate interest under national law in the cessation or prohibition of intra-[Union] infringements to ensure that potential intra-[Union] infringements are notified to competent authorities without delay.
[1778] Article 9(2) CPC Regulation.
[1779] Article 19(1) CPC Regulation.
[1780] Report from the Commission to the European Parliament and the Council on the application of Regulation (EC) 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), 12 March 2012, available at http://ec.europa.eu/consumers/enforcement/docs/comm_biennial_report_2011_en.pdf, 6-7.
[1781] Report, 6.
[1782] Report, 10.

reference framework in which institutional organization principles could be devised. From that perspective, the CPC Regulation presents a rather limited framework for national institutional adaptations.[1783]

c. Constitutional heteronomy as (future) institutional design

365. *Elements of institutional heteronomy in EU consumer protection coordination* – The institutional framework of EU consumer law enforcement does not neatly fit in the features of institutional heteronomy identified in the previous parts of this dissertation.

Firstly, the gradual development towards extensive minimum harmonization and maximum harmonization initiatives most certainly reflects a *unity of policymaking* approach that resembles the EU's approach in competition law and that goes beyond the dispersed unity that currently governs EU substantive financial regulation. EU consumer policy is taking shape at the supranational level. National legal orders are required to adapt their national public and private law structures to accommodate new supranational consumer rights or to enable the erosion of particular national protective standards for the sake of a unified consumer policy within the Internal Market. In the image of incremental maximum harmonisation, national enforcement authorities are increasingly operating by virtue of an EU structured regulatory mandate. In that image, supranational law would be able directly to coordinate and structure the frameworks of enforcement supporting maximally harmonized national legal provisions.

Secondly, the system of EU consumer protection also demonstrates a tendency towards *hierarchical quasi-duality* of national and supranational legal provisions. EU consumer harmonization initiatives have specifically been *targeted* to overcome limits to free movement rights by fully harmonizing parts of consumer law. These targeted initiatives replace diverging national law standards. The obligations for national authorities to be able to adopt particular infringement or cessation decisions and to participate within the CPC network are examples of that approach. Although supranational and national law remain two distinct spheres, they are interrelated and function in a somewhat unified framework.

Thirdly however, the system of EU consumer law only embryonically incorporates *cooperative incentives* that have been or could be translated in actual *cooperative rights*. At present, the consumer law enforcement system encourages *horizontal* cooperation between a panoply of national authorities.[1784] At the same time, it seeks to centralize the assembling of information in the hands of the Commission, which also maintains powers to issue non-binding opinions with regard to cooperation and enforcement assistance requests governed by the CPC Regulation. A set of *vertical* cooperation rights, in which the Commission or a specialized supranational enforcement agency has the option to withdraw a case from national authorities and to end an infringement at the supranational level is so far non-existent.[1785] The incentives for national enforcement authorities to cooperate are as a result also weakened. Not being represented in a supranational Board of Supervisors or influential Advisory Committee somehow allows national authorities to remain predominantly national in scope and

[1783] Article 21 CPC Regulation mandates that every two years from the date of entry into force of this Regulation, the Member States shall report to the Commission on the application of this Regulation. The Commission shall make these reports publicly available. These reporting obligations could constitute a basis for future institutional organization convergence. At present however, such convergence is not taking place.
[1784] See particularly Articles 8 and 15 CPC Regulation.
[1785] Only the Member States can be held liable through Article 258 TFEU.

operations. The Commission effectively recognized this limit in its report on the operations of the CPC Regulation.[1786]

Fourthly, a system of *complementary systemic supervision* is lacking in this field. The lack of a specific supranational enforcement body leaves the concrete day-to-day and general enforcement policymaking strategies only at the national level and results in difficulties in developing a coherent set of enforcement priorities. It could therefore more generally be argued that although the substantive law conditions enabling the emergence of institutionally heteronomous frameworks are present in EU consumer law, the particular institutional preconditions necessary for such a system to flourish have not been fully taken into account.

366. *Constitutional principles as institutional design benchmarks* – Whilst the features of institutional heteronomy do not appear throughout the organizational framework of EU consumer law enforcement, the constitutional principles shaping an institutionally heteronomous framework could nevertheless serve as benchmarks for the development of and limitations placed on future institutional evolutions in this field. In that respect, the future of EU consumer law enforcement can be predicted along the following lines.

Firstly, the principle of second-resort intervention already underlies the emergence of the CPC Regulation. Based on Article 114 TFEU, the CPC Regulation builds on the institutional delegation mandate read in that provision. It is however well-known that this institutional delegation mandate significantly transcends the establishment of supranational networks of national authorities in which the Commission only plays a rather marginal role. The examples in financial supervision demonstrate that specific agencies – or the Commission for that matter – could be entrusted with specific enforcement powers that allow for second-resort intervention in cases where national authorities' day-to-day supervision threatens to undermine the goals of both regulatory cooperation among authorities and of effective application of EU law. A more full-fledged supranational structure could therefore indeed be envisaged. That structure should nevertheless only complement and not replace national authorities as primary enforcement agents of EU consumer law.

Secondly, the establishment of a supranational body in which national authorities are to some extent represented would be facilitated and legitimized by pro-active Court intervention. The involvement of a body established by EU law would also extend the involvement of the Court of Justice in the *institutional organization* of EU consumer law enforcement. Whether or not such developments would be deemed desirable from a national institutional autonomy point of view, they would most certainly allow for the development of judicially established commands that would diminish national autonomy but enable convergence across diverging institutional operations. The EU legislature's willingness to intervene in the operations of national enforcement structures and to commandeer them into a supranationally desirable structure would seem to facilitate and justify the creation of a supranational body that is precisely aimed at integrating these diverging national structures. Judicial commands provided could in that regard enable a reflexive context in which an institutional race among national authorities can be triggered.

Thirdly, the technique of institutional obstacle pre-emption would a necessary toolbox to enable such commands to be taking shape. At present, both stricter and more lenient national consumer protection laws are already pre-empted by fully harmonized EU law provisions. In the same way, supranational provisions can pre-empt national general contract law or procedural law provisions that would present obstacles to the effective application and

[1786] Report, 10.

enforcement of such principles.[1787] The technique of obstacle pre-emption having taken shape in the procedural realm indicates the Court's willingness to remove obstacles to the effective enforcement. That tendency would be likely to continue in case a supranational enforcement structure would be in place.

Fourthly, the CPC Regulation effectively makes a start at identifying cooperative rights. Member State authorities have the right to request information or enforcement cooperation from fellow national authorities situated in different Member States. These cooperative rights are nevertheless structured within a rather voluntary and limited framework of intra-Union infringements. As a result, actual or potential conflicts can often remain lingering in the absence of concrete supranational intervention options. Both the examples of competition law enforcement and financial supervision demonstrate that such vertical cooperative rights are not only possible, but also essential to facilitate second-resort intervention and to enable economically justified commandeering. More intense developments of such rights would be enabled through the establishment of a second-resort supranational intervention body. That body would nevertheless have to grant leeway to existing national authorities and institutional formats in order to allow for the creation of a supranationally structured 'rights' approach to take shape.

Fifthly, EU consumer law enforcement operates in a constitutional framework of shared regulatory competences. These shared competences are not however attuned to encouraging national institutional adaptations and to including national authorities within a supranational supervision structure. As such, the scope for direct supranational involvement in the national legal order is somehow diminished. The CPC Regulation still emphasizes the existence of national authorities as distinguished from and not integrated into a supranationally structured enforcement framework. If and to the extent that the EU Treaty framework and the institutional delegation mandate read into Article 114 TFEU project a reading of reflexive regulatory coopetition, the establishment of such integrated administrative market supervision structure would nevertheless be deemed desirable as a matter of EU constitutional law.

367. *Concluding remarks* – The present institutional context of EU consumer law enforcement leaves significant room to national enforcement authorities without direct support from a supranational institutional framework. The framework nevertheless reflects elements of institutional heteronomy that could be furthered into supranationally structured institutional arrangements. The constitutional principles governing institutional heteronomy are guiding in that respect, as they would allow for a reflexive regulatory coopetition-oriented structure to appear as a complement to varying national enforcement regimes. In that structure, these varying institutional regimes would be called upon to converge and interact within a reflexive cooperative framework. At the same time, such framework would allow for increased competition between the national authorities to take shape within a supranationally structured scheme.

[1787] See for a recent example Case C-618/10, *Banco Español de Crédito SA v Joaquín Calderón Camino,* para 57: 'Directive 93/13 must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which does not allow the court before which an application for an order for payment has been brought to assess of its own motion, in limine litis or at any other stage during the proceedings, even though it already has the legal and factual elements necessary for that task available to it, whether a term concerning interest on late payments contained in a contract concluded between a seller or supplier and a consumer is unfair, in the case where that consumer has not lodged an objection'. In this case, a Spanish national provision has been pre-empted by virtue of the obligations imposed on national courts in the enforcement of Directive 93/13/EC.

Chapter 2. Directly 'mandated' regulatory coopetition

368. *Introduction to the chapter* – The direct presence of 'constitutionally mandated' *market operator* supervision within the Treaty framework is rather limited beyond the sphere of EU competition law. The very idea of regulating competition in conjunction with Member States' authorities nevertheless also guides and structures the liberalization of sectors that have – for various reasons – remained less open to competition. The ambitious programmes of market liberalization spurred by EU law have indeed relied on the identification of a constitutional obligation to promote competition law within these sectors as well.[1788] In that constellation, the governments' roles shifted from being direct market operators to being guardians of the liberalization process. Although EU (competition) law does not as such mandate the privatization of publicly organized economic sectors[1789], publicly held undertakings were at the very least called upon to face competition from privately structured market operators. To accommodate and guarantee the competition among these public and private operators, independent national supervisory authorities have been established as a matter of EU law.

369. *Overview of this chapter* – This chapter analyzes these 'directly' mandated supervision structures in the sectors of electronic communication and energy. Both sectors are chosen for their established and well-developed institutional frameworks structuring market supervision. The chapter argues that the establishment of national supervisory authorities constitutes a preliminary step for the development of a supranationally structured market supervision framework grounded in regulatory coopetition and institutional heteronomy. The first section discusses the constitutional 'mandate' to organize market operator supervision in this respect. A second section outlines the emergence of supranationally structured supervision mechanisms in the fields of electronic communications and energy. The gradual development of EU-structured supervision resulted in the establishment of national regulatory authorities operating under the guidance of the European Commission. More recently, the Commission's role has partially been replaced by EU-wide market supervision structures. These new structures are justified on the basis of Article 114 TFEU and its institutional delegation mandate, despite being mandated by the Treaties and Article 106 TFEU. A third section outlines how the institutional heteronomy principles structure and mandate the institutional

[1788] According to Karel van Miert, liberalization has been an unavoidable consequence of the establishment of the Internal Market, as a system based on competition and free circulation of goods, services, people and capital is at odds with systems based on national monopolies, see K. van Miert, 'Liberalization of the Economy of the European Union: The Game is not (yet) Over', in D. Geradin (ed.), *The Liberalization of State Monopolies in the European Union and Beyond* (The Hague, Kluwer, 2000), 1. That policy argument has subsequently been translated into the constitutional language of competition and market liberalization. The actual decision to liberalize markets – as engaged upon by the European Commission in the 1980s – did not find a clear-cut mandate in the Treaty framework, see P. Larouche, *Competition Law and Regulation in European Telecommunications* (Oxford, Hart, 2000), 4, citing technological developments and a rising demand for particular services resulted in the Commission giving shape to a telecommunications liberalization package.

[1789] See Article 345 TFEU, which explicitly states that The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership. That provision explicitly allows for public ownership regimes to remain in force, see W. Devroe, 'Privatizations and Community Law: Neutrality versus Policy', 34 *Common Market Law Review* (1997), 268, who points to a difference between the static constitutional principle reflected in that provision and the reality shaped by Commission policies. For Commission policies focused on demonopolization, see the same contribution, at 289-297. The Court of Justice equally contributed to the emergence of competition in monopolized sectors, see A. Gardner, 'The Velvet Revolution: Article 90 and the Triumph of the Free Market in Europe's Regulated Sectors', 16 *European Competition Law Review* (1995), 78-86. For a more recent perspective, see E. Szyszczak, *The Regulation of the State in Competitive Markets in the EU* (Oxford, Hart, 2007), 6.

organization of market liberalization supervision and how a future format of railway liberalization supervision could take shape in that respect.

1. From national industries to supranationally regulated competition

370. *From state-regulated sectors…* – The establishment of an Internal Market not only supported the free movement of private economic operators. It also sought to bring competition in sectors that had– for political or economic reasons – remained closed for new competitors.[1790] In most instances, these closed sectors had either been governed by State-supported private monopolies or by the States themselves acting as public monopolists.[1791] Sectors such as electricity and natural gas distribution, railway transport had been administred by State departments as parts of that Member State's administration. As Member States determined the conditions of operation – frequencies, rates, access – within these sectors, private competitors faced significant barriers to or no options for entry into the market for services potentially underlying these state-regulated economies.[1792]

371. … *over network industries* … – State regulation into these sectors had been justified to overcome the network industry effects of so-called natural monopolies.[1793] Given the infrastructural investments – the provision of communication cables, railway tracks etc. – and the excessive personal and societal costs associated with it for each undertaking to provide these investments separate from each other, the establishment of railway, telecommunications, electricity and gas distribution networks has often been considered to represent a natural monopoly. The first undertaking willing to invest its capital in the development of a network of railway tracks, communication cables or energy distribution systems obtained an advantage over potential future entrants, as these features constitute the essential facilities necessary for conducting economic activities in a particular industry.[1794] Having made the costs of developing these networks, operators could effectively benefit from the network industries emerging as a result. The concept of 'network industries' refers to a bundle of complementary goods and services for which consumers shop.[1795] Since a consumer cannot buy telecommunication services in its pure form, she might subsidiarily want to obtain access to a telecommunication network capable of delivering such service. As goods (telecommunication access through infrastructure) and services (the ability to engage in telecommunication with other persons) cannot effectively be separated in the eye of the consumer, they need to be

[1790] See for these reasons the Commission 1987 Green Paper – Towards a Dynamic European Economy – Green Paper on the development of the common market for telecommunications services and equipment, 30 June 1987, COM(87)290 final, available at http://aei.pitt.edu/1159/1/telecom_services_gp_COM_87_290.pdf, 3, urging for a supranational market for telecommunications services to come to being.

[1791] See D. Geradin, 'Introduction' in D. Geradin (ed.), note 1788, ix.

[1792] See in the realm of telecommunications, Commission 1987 Green Paper, 5.

[1793] For a concise definition of a natural monopoly, see A. Ogus, note 1318, 78, who defines a natural monopoly as a situation in which average production costs decline in the long run as output increases. This is mainly due to a high amount of preliminary costs involved prior to production.

[1794] On the notion of essential facilities in this understanding – and its development into an essential facilities doctrine in EU competition law, see A. Capobianco, 'The essential facility doctrine: similarities and differences between the American and European approach', 26 *European Law Review* (2001), 554, for an assessment of how essential facilities could also be used as a tool to *promote* and *enable* competition. See also A. Lipsky and J. Gregory Sidak, 'Essential Facilities', 51 *Stanford Law Review* (2009), 1221, connecting essential facilities to natural monopoly.

[1795] On network industries, see O. Shy, *The economics of network industries* (Cambridge, Cambridge University Press, 2001), 332 pp. See in the realm of energy, M. Albers, 'Competition law issues arising from the liberalization process' in D. Geradin (ed.), *The Liberalization of Electricity and Natural Gas in the European Union* (The Hague, Kluwer, 2001), 4, referring to the integrated downstream – upstream energy provision frameworks.

bought and sold as a single whole. A single package of goods and services would thereby ensure that goods and services are compatible with each other and would allow a natural monopolist to profit from its investments.

State regulation of such *networked* natural monopolies has been justified as a remedy for negative externalities produced by network industries' effects. State regulation would be able to allow for universal network access, would ensure that tariffs for such services would not be overly high and would structure universal rates reflecting cross-subsidization among different geographical reasons as a matter of public interest.[1796] At the same time, State regulation guaranteed a monopolist having made a significant investment to remain the sole provider of networked goods and services. The monopolist would have no incentive to create artificial barriers to entry and to engage in the inefficient wasting of resources in doing so.[1797]

In some instances however, State regulation of a particular industry also appeared in network industries that did not bear the characteristics of a natural monopoly. The airline industry – and the trucking industry in the U.S. – are examples of a direct political choice not grounded in natural monopoly theory.[1798] Airlines and trucking companies do not normally own their infrastructure (airports, roads) and as such do not directly profit from a single network structure. States nevertheless decided to regulate frequencies, tariffs and access *as if* these sectors functioned as network industries' structured natural monopolies.

372. … *to EU-induced market liberalization* – EU law has taken a schizophrenic stance towards regulated network industries. Whilst the EU Treaties have never prohibited the emergence or existence of State-monopolies in networked industries, the establishment of an elaborate *supranational* competition law framework and the *prohibited abuse of dominant economic positions* did not contribute to the maintenance of State-regulated network industries.[1799] Article 106 TFEU (ex-Article 90 (later 86) EC) seeks to regulate the existence of such State-regulated industries as a matter of competition law. It states that in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109. That provision does not define what special or exclusive rights entail or how they should be conceived. At its most basic level however, the provision declares that such undertakings are principally bound by EU competition law.

The second paragraph of Article 106 nevertheless provides for an exception. For those undertakings providing 'services of general economic interest' or having the character of a revenue-producing monopoly, EU competition rules only apply in so far as their application does not obstruct the performance, in law and in fact, of the particular tasks assigned to such undertakings. That provision is equally fraught with uncertainty relating to its scope and role.

[1796] See on these state-backed strategies, D. Geradin, note 1791, ix.

[1797] See O. Shy, note 1795, 6, highlighting these frequently invoked justifications as not always sufficient to justify governmental regulation *per se*.

[1798] A. Aman jr., 'Deregulation in the United States: Transition to the Promised Land, a New Regulatory Paradigm, or Back to the Future?' in D. Geradin (ed.), note 1788, 265.

[1799] See Article 102 TFEU: any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. On the application of that provision to networked industries, see P. Larouche, note 1788, 165-283; M. Albers, note 1395, 4-11; P. Nihoul, *Les télécommunications en Europe. Concurrence ou organisation de marché?* (Louvain-La-Neuve, Presses universitaires de Louvain, 2005), 197-312 for examples of such analysis. See also A. Bavasso, 'Electronic Communications: A New Paradigm for European Regulation?', 41 *Common Market Law Review* (2004), 87-118.

Firstly, it does not define the notion of 'services of general economic interest' and 'revenue-producing monopoly'.[1800] It is commonly assumed that services of general economic interest relate to 'universal services obligations', i.e. the obligation to provide everyone access to particular minimum services.[1801] Secondly, the provision does not clearly evoke a balancing test in which different values or legal principles can be operationalized. The Court of Justice has applied a proportionality test to assess whether public service exemptions would indeed be necessary to justify the non-application of EU competition law. In other cases however, the Court refrained from doing so.[1802] Thirdly, Article 106(2) needs to be read in conjunction with Article 14 TFEU and Protocol No 26 on Services of General Interest. Article 14 mandates the European Parliament and the Council to establish the basic principles and conditions which enable national services of general economic interest to remain in place. In doing so, EU institutions are not to prejudice the competences of Member States […] to provide, to commission and to fund such services. Protocol No 26 confirms that approach.[1803] To the

[1800] See U. Neergaard, 'Services of general economic interest under EU law constraints' in D. Schiek, U. Liebert and H. Schneider (eds.), note 13, 193. See also and more generally U. Neergaard, 'Services of general (economic) interest: What aims and values count?' in U. Neergaard, R. Nielsen and R. M. Roseberry (eds.), *Integrating Welfare Functions into EU Law: From Rome to Lisbon* (Copenhagen, DJOEF Forlag, 2009), 191-225; T. Bekkedal, 'Article 106 TFEU is Dead. Long Live Article 106 TFEU' in E. Szyszczak, J. Davies, M. Andenas and T. Bekkedal (eds.), *Developments in Services of General Interest* (The Hague, T.M.C. Asser Press, 2011), 61-102 for an overview. See additionally, G. Davies, 'What Does Article 86 Actually Do?' in M. Krajewski, U. Neergaard and J. Van de Gronden (eds.), note 100, 51-66. For earlier accounts, see J. L. Buendia Sierra, *Exclusive Rights and State Monopolies under EC Law. Article 86 (formerly Article 90) of the EC Treaty* (Oxford, Oxford University Press, 2000), 498 pp. For background, see T. Prosser, *The Limits of Competition Law. Markets and Public Services* (Oxford, Oxford University Press, 2005), 121-152.

[1801] See for that position, W. Devroe, ' "Universele dienstverlening" als nieuwe manier van denken?', 48 *SEW – Tijdschrift voor Europees en Economisch Recht* (2000), 82-95; U. Neergaard, 'Services of General Economic Interest: The Nature of the Beast' in M. Krajewski, U. Neergaard and J. Van de Gronden (eds.), note 100, 20-26. For a more general understanding, see L. Hancher and P. Larouche, 'The coming of age of EU regulation of network industries and services of general economic interest' in P. Craig and G. De Bùrca (eds.), note 51, 743-782.

[1802] See on the conflicting presence of tests in the Court's case law, J. Baquero Cruz, 'Beyond Competition: Services of General interest and European Community law' in G. De Búrca (ed.), *EU Law and the Welfare State: In search of solidarity* (Oxford, Oxford University Press, 2005), 171. See also U. Neergaard, note 1800, 182-185. See also T. Prosser, note 1800, 174-206, identifying public service obligations in market liberalization frameworks.

[1803] See Protocol No. 26 on Services of General Interest. The Protocol first of all restates the EU's position on Services of General *Economic* Interest: The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users; the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations; a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights. It then continues to state that the provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest. The Protocol does not however define the notion of *non-economic* services of general interest or the authority responsible for making that distinction at the supranational level. A proposed Directive on Services of General Interest could remedy many uncertainties. The adoption of such a Directive is nevertheless highly unlikely at present, see S. Wernicke, 'Taking Stock: The EU Institutions and Services of General Economic Interest' in M. Krajewski, U. Neergaard and J. Van de Gronden (eds.), note 100, 74. See also S. Rodrigues, 'Towards a General EC Framework Instrument Related to SGEI? Political Considerations and Legal Constraints' in M. Krajewski, U. Neergaard and J. Van de Gronden (eds.), note 100, 255-266 and T. Prosser, note note 1800, 153-173. On the Commission's 2011 SGEI package and its implications, see W. Sauter, 'The Commission's new SGEI package: the rules for state aid and the compensation of services of general economic interest', *TILEC Discussion Paper 2012-018,* available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2044680; D. Geradin, 'Public Compensation for Services of General Economic Interest: An Analysis of the 2011 European Commission

extent that Member States adopt basic principles and conditions, the justificatory approach in Article 106(2) would no longer apply to such 'harmonized' field.[1804] In that understanding, Article 106(2) does not impede the harmonization of national public service provisions.

373. *Article 106(3) as constitutional trigger* – The third paragraph is most relevant for the purposes of this dissertation, since it incited a drive to liberalize nationally regulated industries. It mandates the Commission to ensure the application of the provisions of this Article. To that extent, the latter shall, where necessary, address appropriate directives or decisions to Member States. Article 106(3) has been read as a constitutional mandate enabling the European Commission to re-orient State-structured monopolies towards a more competitive environment.

The Commission explicitly relied on that provision in the 1980s in the wake of the Internal Market completion programme. According to *Larouche*, Article 106(3) from then on served as a means for the European Commission to extend its supervision over nationally structured industries and to engage upon adopting legislation forcing these industries to open up for competition.[1805] The scope of that provision has nevertheless been the subject of diverging interpretations. The Commission originally read into this provision a mandate directly to supervise and enforce Article 106(1) against national industries. In that understanding, the Commission would be able to promote, synchronize and accelerate national regulatory transformations towards liberalization.[1806] It equally read into that provision an obligation of surveillance and a duty to act to ensure compliance with Article 106. In that understanding, the Commission would have been able to adopt individual decisions mandating a national industry to be liberalized in a specific modus. To the extent that the Member State failed to comply with that liberalization decision, Article 106(3) would serve as a direct mandate to adopt an infringement decision.[1807]

The Court of Justice nevertheless held that Article 106(3) only allowed for the Commission *to specify general obligations under Article 106(1) by adopting Directives*.[1808] Member States' non-compliance could only be addressed through the infringement procedure in Article 258 TFEU.[1809] The obligation to specify the general obligations under Article 106(1) was therefore only limited to establishing the conditions under which particular sectors could be opened for competition. Article 106(3) Directives were only able to create conditions that would allow for competition.[1810] Nothing did however seem to impede that the Commission would include specific enforcement mechanisms into these Directives.[1811]

374. *Article 114 TFEU as liberalization enabler* – Whilst the opening of markets and the granting of access to essential facilities has been initially justified on the basis of Article 106(3), competition in these sectors has also become the subject of replacing supranational

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Framework', *TILEC Discussion Paper 2012-023,* available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2031564.

[1804] M. Ross, 'Article 16 EC and Services of General Interest: From Derogation to Obligation?', 25 *European Law Review* (2000), 22-38; S. Wernicke, note 1803, 70-71.

[1805] P. Larouche, note 1788, 40 and 53-60.

[1806] See 1987 Green Paper, 186: 'It may use, as appropriate, its mandate under Article 90(3) of the Treaty to promote, synchronise and accelerate the on-going transformation.

[1807] See also P. Larouche, note 1788, 41, referring to the proposal for a 1987 Directive implementing the Open Network Provision.

[1808] Case C-202/88, *France v Commission*, [1991] ECR I-1223, para 17.

[1809] P. Larouche, note 1788, 43, determines that to be the Council's position.

[1810] Case C-202/88, *France v Commission*, para 18.

[1811] P. Larouche, note 1788, 54-55.

regulatory standards.[1812] These 'regulatory' rules determine access, frequencies and rates in network industries as a matter of supranational law aimed at harmonizing diverging national legal conditions. Such provisions have as a result been adopted on the basis of Article 114 TFEU.[1813] It has convincingly been demonstrated that both 'competitive' and 'regulatory' approaches are essentially complementary within a single 'market integration' framework within EU law. A competition approach is often contrasted with a regulatory approach. Whilst competition is meant to open up industries for potential competitors and to establish a competitive sphere, regulation serves as an interventionist device to make that sphere work appropriately.[1814] Because of its market integration focus, EU competition does not however *per se* exclude regulation.[1815] Liberalization predominantly serves as a device to re-regulate national industry structures at the supranational level. As a result of that position, liberalization initiatives have been grounded on both Article 106(3) and Article 114 TFEU, without marking a clear boundary between both provisions.[1816]

375. *Towards supranationally tailored institutional features of EU regulated competition* – The EU re-regulation approach equally projected institutional adaptations. This feature is most directly manifested in the liberalization of electricity and gas. In these sectors, Article 114 TFEU served as a basis European networks of (national) transmission operators – undertakings responsible for the transmission of electricity and gas offered by distributors[1817] – to coordinate market liberalization efforts. These networks were to increase cooperation and coordination among transmission system operators and to provide for the coordinated implementation of new regulatory standards.

The liberalization and harmonization directives directly mandated national institutional adaptations in different industry sectors.[1818] Previously operating government-sponsored monopolists or government entities were obliged to denounce their monopoly functioning by allowing competitors to use particular network structures they invested in. In addition, new national regulatory bodies have been established to supervise and enforce EU regulatory principles and to ensure that national industries could function in accordance with these principles. EU regulatory frameworks therefore effectively imposed requirements of independence, transparancy, reasoned decision-making and appellate review on the operations of such newly established supervisors. Beyond these principles, national authorities could be structured in accordance with national institutional autonomy.

376. *Preliminary conclusion* – The system of market liberalization established on the basis of Articles 106(3) and 114 TFEU allowed for 'regulated competition' to take shape. Whilst the Commission has explicitly been mandated to enable market liberalization through Article 106(3), that provision did not directly allow it to take enforcement actions against national industries. Rather, that provision comprises an indirect supervisory mandate that allows the Commission to develop regulatory standards and impose enforcement structures on Member States. The Commission's mandate is nevertheless limited to the adoption of opening-up-for-competition standards. Additional regulatory standards had to be adopted on the basis of Article 114 TFEU. As a result of that approach, the Commission could no longer act as a

[1812] P. Nihoul, note 1799, 477.
[1813] Case C-202/88, *France v Commission*, para 25, referring to Article 114 TFEU as more general in power than the specific Article 106(3) TFEU.
[1814] See S. Breyer, note 1, 1.
[1815] In contrast with U.S. law, see P. Nihoul, note 1799, 465-467.
[1816] P. Nihoul, note 1799, 552 for a conceptualization in that regard.
[1817] P. Larouche, note 1788, 61-70 for an overview in the realm of telecommunications.
[1818] References can be found in the examples relied on in subsection 2 of this section.

primary responsible market supervision body governing the introduction of regulated competition across the Member States. Quite on the contrary, newly established national regulatory authorities were to ensure the smooth introduction and transposition of regulatory regimes in each individual Member State. The Commission's role was relegated to a mere infringement overseer in accordance with Article 258 TFEU.

2. The gradual emergence of supranational supervisors in EU communications and energy law

377. *From national to supranational authorities* – Whilst the establishment of national regulatory authorities has been imposed as a matter of EU secondary law grounded in Articles 106(3) and 114 TFEU, the institutional organization and operations of these national authorities have mostly remained within the confines of EU-structured national institutional autonomy. Not unlike *Vebic*, the Court of Justice did intervene in some instances to consider whether or not national authorities complied with the regulatory framework and the extent to which national institutional adaptations were warranted on the basis of the supranational regulatory frameworks. In doing so, the emergence of fundamental procedural rights and inter-authority cooperation gained momentum. That momentum eventually resulted in proposals for and the establishment of supranational authorities. These authorities effectively incorporate national regulatory authorities within supranationally organized networks.

This section focuses in particular on the establishment of national regulatory authorities and the cooperation obligations imposed on them. It analyzes and evaluates the emergence of supranational supervisory bodies and the impact they (will) have on the development of cooperation rights among the supranational and national levels in the organization of 'liberalized' market supervision. The first subsection will discuss these evolutions in the realm of electronic communications. The second subsection will focus on EU energy supervision developments.

a. From NRAs to BEREC: supranational supervisory coordination in electronic communications

378. *National regulatory authorities and telecommunications liberalization* – The liberalization of electronic communications resulted in the adoption of new harmonized standards governing the operation of communication activities. Different regulatory packages have been adopted in that regard.[1819] The 2002 Framework Directive contains the basic EU regulatory framework currently in force. It builds on a proclaimed separation between the regulatory and operational functions of communications networks.[1820] Whilst Member States may manage the operations of communications networks, they equally have to provide for regulatory bodies to oversee the operations of that framework. In that image, national regulatory authorities have been granted an important role.[1821] According to the Framework

[1819] See for an overview prior to the current system, P. Nihoul, note 1799, 317-407 and L. Hou, *Competition law and regulation in the EU electronic communications sector: a comparative legal approach* (Ph.D. thesis KU Leuven – University of Leuven, 2011), 1-16. For an overview of the present system, P. Nihoul and P. Rodford, *EU Electronic Communications Law. Competition and Regulation in the European Telecommunications Market* (Oxford, Oxford University Press, 2nd Edition, 2011), 900 pp.

[1820] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), [2002] O.J. L108/33 (hereinafter referred to as 2002 Framework Directive). The Directive has been amended by Directive 2009/140/EC, [2009] O.J. L337/37 and Regulation 544/2009, [2009] O.J. L167/12. It has solely been based on Article 114 TFEU.

[1821] See D. Geradin, 'Institutional Aspects of EU Regulatory Reforms in the Telecommunications Sector: An Analysis of the Role of National Regulatory Authorities',1 *Journal of Network Industries* (2000), 5-32.

Directive and in accordance with such separated functions, 'Member States should guarantee the independence of the national regulatory authority or authorities with a view to ensuring the impartiality of their decisions. This requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States […]'.[1822]

That recital structures the emergence and powers of national regulatory authorities within a supranational frame. On the one hand, the EU level directly mandates the creation of national authorities to ensure the regulatory functions of EU market liberalization. These national authorities may – but should not – be structured as a collegiate body.[1823] EU law imposes particular requirements of independence and impartiality. These requirements are complemented by an obligation to recognize a right to appeal to a body –which may be a court – that is independent from a complainant and the regulatory authority involved.[1824] In addition, national regulatory authorities need to cooperate with the Commission and national authorities in other Member States.[1825] On the other, national authorities are structured within national constitutional frameworks and in accordance with the principle of national institutional autonomy.[1826] National legal orders remain at liberty to structure and organize the operations of such authorities to the extent that EU law did not directly commandeer particular requirements or did not provide a clear obligation to operationalize particular institutional principles in a singular EU-wide mould. The Framework Directive as a result formulates general constraints, leaving the functioning and identity of authorities to the Member States.[1827]

More specifically, the Framework Directive confirms that Member States are to guarantee the independence of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organizations providing electronic communication networks. This implies that national regulatory authorities need to function as specialized national agencies or independent administrative departments and need to be independent in their operations from the economic operators.[1828] If Member States retain ownership over such organizations, effective structural separation needs to be organized between regulatory and operational functions with a view to avoid the State intervening in the supervision of its own undertaking.[1829] In addition, national authorities cannot seek or take instructions from any other body in relation to the exercise of EU law competences.[1830] In particular, a national regulatory authority responsible for *ex-ante* market regulation or for resolution of disputes between undertakings should be protected against external intervention or political pressure liable to jeopardize its independent assessment of matters coming before it.[1831] According to

[1822] Recital 11 2002 Framework Directive. See also M. Zinzani, note 21, 166.
[1823] See Article 3(3a) second paragraph 2002 Framework Directive.
[1824] Article 4(1) 2002 Framework Directive.
[1825] Recital 37 2002 Framework Directive.
[1826] See Recital 11 2002 Framework Directive: 'In accordance with the principle of the separation of regulatory and operational functions, Member States should guarantee the independence of the national regulatory authority or authorities with a view to ensuring the impartiality of their decisions. This requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States or to the principle of neutrality with regard to the rules in Member States governing the system of property ownership laid down in Article 295 of the Treaty. National regulatory authorities should be in possession of all the necessary resources, in terms of staffing, expertise, and financial means, for the performance of their tasks'.
[1827] P. Nihoul and P. Rodford, note 1819, 30. See also M. Szydlo, note 218, 1142, explicitly referring to the principle of national institutional autonomy.
[1828] Article 4(2), first sentence 2002 Framework Directive.
[1829] Article 4(2), second sentence 2002 Framework Directive.
[1830] Article 3(3a) 2002 Framework Directive.
[1831] Recital 13, Directive 2009/140/EC. Such prohibition is also accompanied by an obligation to ensure that the head of a national authority or members of its collegiate body can be dismissied should they no longer fulfil the

Nihoul and Rodford, this obligation should especially be read as an impediment for *national* legislative bodies[1832] to give instructions to a regulatory authority or to act as NRA themselves.[1833] To ensure the impartial and transparent functioning of NRAs[1834], Member States are also required to publish the tasks undertaken by the NRA and to ensure that these tasks are clearly delineated from roles attributed to general competition or consumer protection authorities.[1835] More specific regulatory tasks can be found in the substantive regulatory parts of the Framework Directive[1836] and in the specialized Authorizations, Access and Universal Service Directives.[1837]

A 2009 adaptation explicitly inserted a 'penalties' provision into the Framework Directive. According to that provision, Member States shall lay down rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and the Specific Directives and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be appropriate, effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 25 May 2011 and shall notify it without delay of any subsequent amendment affecting them.[1838]

379. *Supranationally structured national regulatory procedures* – Procedures before NRAs are governed by principles of transparency, impartiality and timeliness.[1839] NRA decisions need to be based on objective criteria, should be reasoned and need to be adopted within a reasonable time-frame.[1840] Parties involved should have the opportunity to be heard. Consultation with affected parties prior to adopting general measures should be ensured[1841]

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conditions required for the performance of their duties. Being unable to resist political influence is such cause for dismissal. In addition, NRAs should enjoy independence in the determination and structuring of their budgets.

[1832] The adopted clarification in Article 3(3a) indeed appeared as a result of the questionable role of national parliaments as NRAs. That role was even further questioned in Case C-424/07, *Commission v Germany*, [2009] ECR I-11431 and Case C-389/08, *Base NV and others v. Ministerraad*, [2010] ECR I-9073, in which the independence and impartiality of NRAs was emphasized and the NRA role attributed to national parliaments questioned – but still allowed for. Szydlo argues that national parliaments can still be entrusted with NRA responsibilities, see M. Szydlo, note 1827, 1152. See also M. Szydlo, note 485, 815. For a contrasting point of view, see S. Weatherill, 'National parliaments as regulators of network industries: A reply to Marek Szydło', 10 *International Journal of Constitutional Law* (2012), 1167-1173. On the limits of supervisors' independence, see S. Lavrijssen and A. Ottow, 'Independent Supervisory Authorities: A Fragile Concept', 39 *Legal Issues of Economic Integration* (2012), 419-446.

[1833] P. Nihoul and P. Rodford, note 1819, 35.

[1834] Article 3(3) 2002 Framework Directive.

[1835] Article 3(4) 2002 Framework Directive.

[1836] See Articles 8-25 2002 Framework Directive.

[1837] Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), [2002] O.J. L108/7; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), [2002] O.J. L108/21; Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), [2002] O.J. L108/51.

[1838] Article 21a 2002 Framework Directive.

[1839] Article 3(3) 2002 Framework Directive.

[1840] See e.g. Article 20 2002 Framework Directive on dispute resolution between undertakings: existing obligations under this Directive or the Specific Directives between undertakings providing electronic communications networks or services in a Member State, or between such undertakings and other undertakings in the Member State benefiting from obligations of access and/or interconnection arising under this Directive or the Specific Directives, the national regulatory authority concerned shall, at the request of either party, and without prejudice to the provisions of paragraph 2, issue a binding decision to resolve the dispute *in the shortest possible time frame* and in any case within four months, except in exceptional circumstances.

[1841] Article 6 and Article 12 2002 Framework Directive.

and individual parties should have the opportunity to make their points of view known in writing and orally.[1842] In addition, Member States ought to ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may – but should not – be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise. Where the appeal body is not judicial in character, written reasons for its decision shall always be given. Furthermore, in such a case, its decision shall be subject to review by a court or tribunal within the meaning of Article 267 TFEU.[1843]

National review systems need to conform to these structures. The Framework Directive does not directly impose *participative judicial review* as a principle of the institutional organization of market supervision appeals in electronic communications. Whilst the participation of the NRA in appeals against its decisions seems related to requirements of 'natural administrative justice', these requirements are not mandated. In the wake of the Court's *Vebic* judgment, such principle is however likely to become an additional, judicially-established standard of market supervision organization.

The Framework Directive also entrusts NRAs with resolving disputes. In the event of a dispute in connection with obligations arising between undertakings providing electronic communications networks or services in a Member State, the national regulatory authority concerned shall, at the request of either party issue a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months except in exceptional circumstances. The Member State concerned shall require that all parties cooperate fully with the national regulatory authority. Member States may make provision for national regulatory authorities to decline to resolve a dispute through a binding decision where other mechanisms, including mediation, exist and would better contribute to resolution of the dispute in a timely manner.[1844] The decision of the national regulatory authority shall be made available to the public, having regard to the requirements of business confidentiality.[1845] In addition, such NRA decisions should not *preclude* either party from bringing an action before the courts.[1846] In the event of cross-border disputes, multiple NRAs shall jointly coordinate their efforts.[1847]

380. *Commission involvement* – NRAs thus serve as primary enforcement bodies of EU regulatory law in different legal orders. Despite their nationally structured institutional set-up, NRAs share a common EU mission. The Framework Directive recognizes and builds upon that mission. It states that Member States need to ensure that NRAs provide the Commission,

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[1842] See Case C-426/05, *Tele2 Telecommunication GmbH, formerly Tele2 UTA Telecommunication GmbH v. Telekom-Control-Kommission* [2008] ECR I-685, para 30 emphasizes the importance of the right to effective judicial protection to ensure an individual's rights. It could thus be argued that the procedural rights identified in other spheres of EU law – such as EU competition law – apply to the EU-grounded procedures conducted before NRAs.

[1843] Article 4(2) 2002 Framework Directive.

[1844] Article 20(1) and (2) 2002 Framework Directive.

[1845] Article 20(4) 2002 Framework Directive.

[1846] Article 20(5) 2002 Framework Directive. That does not *per se* imply the provision of judicial review against an NRA decision. At the very least however, a national court should be able to consider the dispute and to disregard the NRA decision in that regard.

[1847] Article 21 2002 Framework Directive.

after a reasoned request, with the information necessary for it to carry out its tasks under the Treaty. The information requested by the Commission shall be proportionate to the performance of those tasks. Where the information transferred refers to information previously provided by undertakings at the request of the national regulatory authority, such undertakings shall be informed thereof. To the extent necessary, and unless the authority that provides the information has made an explicit and reasoned request to the contrary, the Commission shall make the information provided available to another such authority in another Member State. The Commission thus serves as a information mediating body. Since national regulatory authorities have been mandated to cooperate with each other[1848], a similar system for bilateral information exchange has also been provided for.[1849] The Commission equally serves as a mediating body in that respect. In addition, the Commission is able to veto NRA decisions.[1850]

381. *ERG* – The Commission's consultation and supranational supervision role was considerably supported by the *European Regulators Group of Electronic Communications Networks and Services (ERG).*[1851] ERG comprised an informal EU-wide network of NRAs established by Commission Decision.[1852] It was to provide an interface between the Commission and the NRAs, with a view to ensure the consistent application of harmonized EU electronic communications law.[1853] Composed of the NRA heads and Commission representatives, the ERG also served as an advisory body that could be called upon by the Commission if so required.[1854] Its opinions did not however constitute EU (soft-)law and the open-ended nature of its mandate somehow impeded its effective functioning as a coordinating body amongst the NRAs and the Commission.

382. *BEREC* – In the light of the structural deficiencies of ERG – effectively operating outside the realm of EU law – proposals were developed to establish a European Electronic Communications Authority.[1855] Given the inherently national network infrastructure in

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[1848] Article 3(6) and 5(2) 2002 Framework Directive.
[1849] Article 5(2) 2002 Framework Directive.
[1850] See Article 7(4) 2002 Framework Directive and M. De Visser, note 23, 220-226.
[1851] An Independent Regulators Group predated the establishment of ERG. It continues to exist and is completely detached from Commission support, see M. Zinzani, note 21, 171-174.
[1852] See Commission Decision 2002/627/EC of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services, [2002] O.J. L200/38 (hereinafter referred to as ERG Decision).
[1853] Recital 5 and Article 3 ERG Decision.
[1854] See also Article 3 – as amended by Decision 2004/641/EC, [2004] O.J. L293/30: The Group shall advise and assist the Commission on any matter related to electronic communications networks and services within its competence, either at its own initiative or at the Commission's request. The limited role of ERG is also apparent from it being granted only half of a page in Nihoul and Rodford's first edition, see P. Nihoul and P. Rodford, *EU Electronic Communications Law. Competition and Regulation in the European Telecommunications Market* (Oxford, Oxford University Press, 2004), 19. See also A. Baudrier, 'The EU Regulatory Framework for Electronic Communications: Relevance and Efficiency Three Years Later', *Communications & Strategies* (2006), 129-130.
[1855] The Commission proposed the establishment of a full-fledged European Electronic Communications Market Authority (EECMA) in 2007, which would be able to override NRA Decisions in ways similar to the European Commission in EU competition law enforcement. See http://ec.europa.eu/information_society/doc/factsheets/tr3-eutelecommarketauthority.pdf for a general proposal. For a more concrete proposal, see Proposal for a Regulation of the European Parliament and the Council establishing the European Electronic Communications Markets Authority, COM(2007) 699 final, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0699:FIN:EN:HTML. See also http://europa.eu/legislation_summaries/other/l24116_en.htm for a summary. The proposal grounded the establishment of the Authority in Article 114 TFEU and specifically adhered to a supranational operational support logic: 'In the present regulatory framework, the authorisation of services is handled at Member State

electronic communications networks[1856], the establishment of a full-fledged EU agency was not deemed necessary or appropriate in the present regulatory framework[1857]. An alternative *Body of European Regulators for Electronic Communications (BEREC)* has therefore been created.[1858] BEREC provides an institutionally upgraded successor to ERG coordination.[1859] It is to act as an exclusive forum for cooperation among NRAs and between the NRAs and the Commission.[1860] Established on the basis of Article 114 TFEU[1861], BEREC's role is to develop and disseminate among NRAs regulatory best practices[1862], to provide assistance to NRAs on regulatory issues[1863], to deliver opninions on draft Commission decisions, recommendations and guidelines[1864], to issue reports and provide advice to the Commission, to deliver opinions to the European Parliament and the Council on any matter regarding electronic communications within its competence[1865], assist the institutions and NRAs in

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level and considerable discretion is given to the 27 NRAs, with a limited oversight and coordination role for the Commission. This means that the internal market is still a patchwork of 27 different regulatory systems. This hinders the development of cross-border services and operators are confronted with different or diverging operating conditions in similar circumstances. In practice, several regulatory issues dealt with by national regulators are common across the EU (e.g. regulatory treatment of new services, aspects of regulatory accounting, numbering issues, the functioning of equipment and services for disabled users travelling in the EU, etc.). For these areas, in order to promote economies of scale and a competitive internal market, it is of pivotal importance to develop a common EU practice and expertise to further consistency and, where appropriate, harmonisation. This requirement can be effectively and efficiently addressed only by improving the current institutional model and the balance between the responsibilities assigned to Member States, NRAs, and the Commission. This can be achieved only by action at Community level'. In addition, the establishment of a supranational authority would be a proportionate alternative: 'The creation of the Authority will integrate the cooperation among NRAs (currently within the ERG) within the Community system. There is clearly a need to improve the arrangements so that certain tasks currently carried out by the ERG – which is essentially a consultative forum of national regulators without the institutional capability to arrive at common decisions – are performed by a single specialised body at EU level, acting within the Community's institutional structure. In performing its tasks the Authority will provide the Commission with technical expertise and help in preparing regulatory decisions to further the internal market, which will be enhanced by the proposed incorporation of the work of ENISA on network and information security'.

[1856] Resulting from previously operating national monopolies.

[1857] M. Zinzani, note 21, 192.

[1858] Regulation 1211/2009 of the European Parliament and the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, [2009] O.J. L337/1 (hereinafter BEREC Regulation). See Recital 6: BEREC should neither be a Community agency nor have legal personality. BEREC should replace the ERG and act as an exclusive forum for cooperation among NRAs, and between NRAs and the Commission, in the exercise of the full range of their responsibilities under the EU regulatory framework. BEREC should provide expertise and establish confidence by virtue of its independence, the quality of its advice and information, the transparency of its procedures and methods of operation, and its diligence in performing its tasks. Zinzani referred to this structure as 'highly original', see M. Zinzani, note 21, 193.

[1859] Recital 8 BEREC Regulation. BEREC should continue the work of the ERG, developing cooperation among NRAs, and between NRAs and the Commission, so as to ensure the consistent application in all Member States of the EU regulatory framework for electronic communications networks and services, and thereby contributing to the development of the internal market. BEREC is still structured as a network. It has been set up to serve as a body for reflection, debate and advice for the European Parliament, the Council and the Commission in the electronic communications field, providing advice on its own initiative or at the request of these institutions. It should equally provide expertise and establish confidence by virtue of its independence, the quality of its advice and information, the transparency of its procedurers and methods of operation, and its diligence. Through the pooling of expertise, it should assist the NRAs without replacing the existing functions or duplicating work already being undertaken by them and should assist the Commission in the execution of its responsibilities.

[1860] See Recital 6 BEREC Regulation.

[1861] No justification whatsoever is offered for the Regulation's reliance on Article 114 TFEU.

[1862] Article 2(a) BEREC Regulation.

[1863] Article 2(b) BEREC Regulation.

[1864] Article 2(c) BEREC Regulation.

[1865] Article 2(d) BEREC Regulation.

relations, discussions, exchanges and dissemination of regulatory best practices to third parties.[1866]

BEREC comprises a Board of Regulators, in which each Member State has a representative.[1867] The Commission acts as an observer within the Board of Regulators. The Board shall act by a two-thirds majority of its members, unless otherwhise provided. Each member has one vote and decisions shall be made public and indicate the reservations of an NRA if it so requests.[1868] The Board delivers the opinions, provides the assistance and adopts the decisions relating to the performance of BEREC's functions.[1869] The BEREC Regulation only refers to the publication of *decisions*. The Body is not however capable of adopting formal decisions. It only provides advice, opinions, guidelines, recommendations and regulatory best practices.[1870] References to decisions in that regard should therefore be comprehended as all decisions, opinions, recommendations, guidelines, advices and regulatory best practices adopted in accordance with BEREC's rules of procedure.

Whilst BEREC's tasks have indeed been specified and incorporated in the basic regulatory framework[1871], BEREC itself is incapable of adopting binding decisions. Board of Regulators' 'decisions' are non-binding and NRAs and the Commission are to take utmost account of any opinion, recommendation, guidelines, advice or regulatory best practices adopted by it.[1872] Unlike the ESAs, no particular procedure is provided for notifying non-compliance with particular BEREC guidelines.

BEREC's inclusion into the EU institutional framework is ensured by its supporting Office.[1873] The Office constitutes a Union body with legal personality.[1874] It encapsulates a Management Committee and an Administrative Manager.[1875] The Office provides administrative assistance and support to the Board of Regulators.[1876] The Management Committee comprises one member per Member State and appoints and controls the Administrative Manager.[1877] The latter is responsible for heading the Office.[1878] The Office's

[1866] Article 2(e) BEREC Regulation.
[1867] Article 4(1) and (2) BEREC Regulation.
[1868] Article 4(9) BEREC Regulation.
[1869] Article 5(1) BEREC Regulation entrusts the Board with the adoption of Decisions relating to the performance of its functions.
[1870] See for an overview of tasks, Article 3(1) BEREC Regulation. See also Article 3(2), which allos BEREC to decide unanimously and upon a reasoned request from the Commission, to take on other specific tasks necessary for the accomplishment of its role within the scope of EU electronic communications law. Article 18 BEREC Regulation refers to transparency as a value underlying BEREC's 'decision-making' functions.
[1871] A particular example in that regard is the dispute resolution procedure provided in the Framework Directive, see Article 21(2) 2002 Framework Directive.
[1872] Article 3(3) BEREC Regulation. See also Article 3(3c) 2002 Framework Directive
[1873] The Office has only been inaugurated in October 2011, see Decision taken by common accord between the Representatives of the Governments of the Member States of 31 May 2010 on the location of the seat of the Office of the Body of European Regulators for Electronic Communications (BEREC), [2010] O.J. L156/12. See also http://berec.europa.eu/eng/berec_office/tasks_and_role/.
[1874] Article 6(1) and (4) BEREC Regulation. It enjoys the most extensive legal capacity accorded to legal persons under national law. It may acquire and dispose of movable and immovable property and be a party to legal proceedings.
[1875] Article 6(3) BEREC Regulation.
[1876] Article 6(2) BEREC Regulation. See also M. Zinzani, note 21, 211-212.
[1877] Article 7(2) BEREC Regulation.
[1878] Article 9(1) BEREC Regulation.

support operations are funded by its own budget. The Court of Justice can hold it liable for damages caused by it or its staff in the performance of their duties.[1879]

The establishment of BEREC and its accompanying Office effectively includes the NRAs within a supranationally structured enforcement framework. At the supranational level however, BEREC merely fulfils the role of an information distribution and enforcement coordination network. It provides an intermediate structure between the European Commission and the NRAs. BEREC is nevertheless more accountable to the EU framework. Day-to-day supervision and enforcement nevertheless firmly remain with the NRAs. The Commission mainly relies on BEREC to adopt new harmonized rules or to engage upon infringement proceedings against Member States. BEREC's role as a market *supervision* body in its own right is therefore close to non-existent.

b. Towards a supranational energy regulator?

383. *National regulatory authorities in the electricity and gas sectors* – The liberalization process in the electricity and gas sectors resulted in 1996, 2003 and 2009 liberalization Directives' packages.[1880] Similar to telecommunications' liberalization, the Electricity and Gas Directives mandated the establishment of national authorities capable of ensuring day-to-day enforcement.

The obligation to establish national regulatory authorities was directly inscribed into the 2003 liberalization Directives.[1881] The 2009 Electricity and Gas Directives continue to emphasize the role of NRAs with a view to ensure the supervision and enforcement of harmonized EU regulatory standards.[1882] Each Member State is obliged to designate a single regulatory authority at the national level, with the option of creating additional regional authorities and the establishment of specifc regulatory authorities for small systems on a geographically separate region.[1883] Not unlike NRAs in electronic communications, energy NRAs have to be legally distinct and functionally independent from any other public or private entity and should act independently from any market interest.[1884] Authorities cannot seek or take direct instructions from any government or other public or private entity when carrying out regulatory tasks. NRAs should equally exercise their powers impartially and transparently.[1885] With a view to carry out the particular market supervision tasks described within the energy

[1879] Articles 11 and 24 BEREC Regulation.

[1880] For a concise overview, see C. Jones, 'Introduction' in C. Jones (ed.), *EU Energy Law. Volume 1. The Internal Energy Market. The Third Liberalization Package* (Leuven, Claeys & Casteels, 2010), 3-8.

[1881] See Article 23 Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, [2003] O.J. L176/37 and Article 25 of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in gas and repealing Directive 98/30/EC, [2003] O.J. L176/57.

[1882] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, [2009] O.J. L211/53 (hereinafter referred to as 2009 Electricity Directive) and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, [2009] O.J. L211/94 (hereinafter referred to as 2009 Natural Gas Directive).

[1883] Article 35(1) 2009 Electricity Directive. See also Article 35(2), stating that the designation of a single authority shall be without prejudice to the designation of other regulatory authorities at regional level within Member States. Article 39(1) 2009 Natural Gas Directive. For general objectives, see Article 36 2009 Electricity Directive and Article 40 2009 Natural Gas Directive.

[1884] Article 35(4)(a) 2009 Electricity Directive; Article 39(4)(a) 2009 Natural Gas Directive.

[1885] Article 35(4), first sentence 2009 Electricity Directive; Article 39(4), first sentence 2009 Natural Gas Directive. See also Article 35(4)(b)(ii) and 39(4)(b)(ii), which oblige Member States to make sure that management and staff of the NRA do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks.

regulatory framework[1886], Member States have to provide for regulatory powers attached to NRAs. NRAs have to be able to issue binding decisions on electricity and natural gas undertakings, to carry out investigations into the functioning of electricy and gas markets and to decide upon and impose any necessary and proportionate measures to promote effective competition and the proper functioning of the market, to require information from undertakings and to impose effective, proportionate and dissuasive penalties on undertakings.[1887] NRAs enjoy additional supervision duties in relation to a transmission system operator.[1888] EU law particularly monitors NRAs to monitor congestion management of transmission networks and to have the authority to require transmission and distribution system operators to modify the terms and conditions including tariffs and methodologies to ensure that these are proportionate and applied in a non-discriminatory manner.[1889] The Recitals also state that NRAs should contribute to ensuring high standards of universal and public service in compliance with market opening, the protection of vulnerable customers and the full effectiveness of consumer protection measures.[1890]

384. *Supranationally structured national regulatory procedures* – Additional obligations specifically relate to the organization of NRAs as dispute settlement authorities. Any party having a complaint against a transmission or distribution system operator in relation to that operator's obligations under the Electricity or Natural Gas Directives may refer the complaint to the regulatory authority which, acting as dispute settlement authority, shall issue a decision within a period of two months following receipt of the complaint. That period may be extended by another two months where additional information is sought by the regulatory authority. That extended period may even further be extended with the agreement of the complainant. The regulatory authority's decision shall have binding effect unless and until overruled on appeal.[1891] In addition, Member States can provide for a right to complain against decisions on methodologies used to calculate or establish terms and conditions.[1892] In both instances, the existence of rights to appeal under national or supranational law cannot be prejudiced by the existence of such mechanisms.[1893]

NRA decisions shall be available to the public whilst preserving the confidentiality of commercially sensitive information. Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government.[1894] That provision only mentions the provision of *appellate review*. It does not *prima facie* mandate a system of judicial review.

At the same time however, the Directives refer to *judicial review* in relation to the obligation to ensure reasoned decision-making. According to that provision, decisions taken by NRAs should be fully reasoned and justified to allow for *judicial review*. EU law here presupposes the overall need for a *judicial review* mechanism as the only suitable appellate review mechanism.[1895] The Directives do not specifically provide for a right to *participative judicial*

[1886] Article 37(1) 2009 Electricity Directive; Article 41(1) 2009 Natural Gas Directive.
[1887] Article 37(4) 2009 Electricity Directive; Article 41(4) 2009 Natural Gas Directive.
[1888] Article 37(3) 2009 Electriciy Directive; Article 41(3) 2009 Natural Gas Directive.
[1889] Article 37(6)-(8) 2009 Electricity Directive; Article 41(6)-(8) 2009 Natural Gas Directive.
[1890] Recital 37 2009 Electricity Directive; Recital 33 2009 Natural Gas Directive only refers to public and not to universal service.
[1891] Article 37(11) 2009 Electricity Directive; Article 41(11) 2009 Natural Gas Directive.
[1892] Article 37(12) 2009 Electricity Directive; Article 41(12) 2009 Natural Gas Directive.
[1893] Article 37(15) 2009 Electricity Directive; Article 41(15) 2009 Natural Gas Directive.
[1894] Article 37(17) 2009 Electricity Directive; Article 41(17) 2009 Natural Gas Directive.
[1895] Article 37(16) 2009 Electricity Directive; Article 41(16) 2009 Natural Gas Directive.

review in the event judicial review has been organized. In the light of *Vebic* however, such obligation can also be inferred in this field.

Most importantly however, the Directives provide for cross-border cooperation among NRAs. The Directives explicitly mention that national regulatory authorities shall have the right to enter into cooperative arrangements with a view to enhance regulatory cooperation.[1896] The Commission is allowed to adopt guidelines determining the extent of such cooperation.[1897] Whilst that provision remains voluntary in nature and scope, the Directive also contains a set of minimum cooperative obligations with which NRAs have to comply. First, NRAs shall provide each other with any information necessary for the fulfilment of their tasks. In respect of the information exchanged, a receiving authority shall ensure the same level of confidentiality as that required of an originating authority.[1898] In addition, NRAs at least have to cooperate horizontally and within a particular region to foster the creation of operational arrangements, coordinate the development of network codes and coordinate the development of rules on the management of congestion.[1899]

385. *ERGEG* – The 2003 Directives were additionally accompanied by an institutionalized network of NRAs.[1900] The *European Regulators Group for Electricity and Gas (ERGEG)* served as an informal network established by Commission Decision.[1901] An independent advisory group composed of the heads of the national regulatory authorities[1902], ERGEG was to advise and assist the Commission in consolidating the internal energy market on any matters related to that market. It was to facilitate consultation, coordination and cooperation of national regulatory authorities and to contribute to a consistent application of the EU liberalization framework in all Member States.[1903] To that extent, it was to consult extensively with market participants, consumers and end-users in an open and transparent manner.[1904] ERGEG did not enjoy binding decision-making powers. It could only adopt soft law opinions, recommendations or guidelines.[1905] Opinions, recommendations or guidelines proposed by ERGEG did not constitute EU law and could not as such be enforced before the EU courts.

386. *ACER* – Contrary to electronic communications liberalization, the EU-wide coordination framework structured in ERGEG has subsequently been replaced by a full-fledged European Authority.[1906] Regulation 713/2009 formally established the *Agency for the Cooperation of Energy Regulators* (*ACER*) as a Union body with legal personality.[1907] Based on Article 114

[1896] Article 38(3) 2009 Electricity Directive; Article 42(3) 2009 Natural Gas Directive.
[1897] Article 38(5) 2009 Electricity Directive; Article 42(5) 2009 Natural Gas Directive.
[1898] Article 38(1) 2009 Electricity Directive; Article 42(1) 2009 Natural Gas Directive.
[1899] Article 38(2) 2009 Electricity Directive; Article 42(2) 2009 Natural Gas Directive.
[1900] Previous Directives were accompanied by the establishment of a European Electricity Regulation Forum (EERF) supported by the European Commission services and an intergovernmental Council of European Energy Regulators (CEER) comprising the national regulatory authorities of ten participating countries, see M. Zinzani, note 21, 106-117.
[1901] Commission Decision 2003/796/EC of 11 November 2003 on establishing the European Regulators Group for Electricity and Gas, [2003] O.J. L296/34 (hereinafter referred to as ERGEG Decision). See also M. Zinzani, note 21, 122.
[1902] Article 1(1 and Article 2) ERGEG Decision.
[1903] Article 1(2) ERGEG Decision.
[1904] Article 4 ERGEG Decision.
[1905] Even that mandate remained vaguely structured within Article 1(2) ERGEG Decision.
[1906] See Commission Decision 2011/280/EU of 16 May 2011 on repealing Decision 2003/796/EC on establishing the European Regulators Group for Electricity and Gas, [2011] O.J. L129/14
[1907] Article 2(1) Regulation 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, [2009] O.J. L211/1 (hereinafter referred to as ACER Regulation). See M. Zinzani, note 21, 133-134 for an overview of alternative institutional options considered.

TFEU, ACER is to assist the NRAs in exercising their tasks imposed by EU law and in coordinating their actions.[1908] In particular, '[t]he Agency shall provide a framework within which national regulatory authorities can cooperate. It shall promote cooperation between the national regulatory authorities and between regulatory authorities at the regional and Community level, and shall take due account of the outcome of such cooperation when formulating its opinions, recommendations and decisions. Where the Agency considers that binding rules on such cooperation are required, it shall make the appropriate recommendations to the Commission'.[1909]

ACER comprises and Administrative Board of nine Members, two appointed by both the Commission and the European Parliament and five by the Council for a once renewable four year term.[1910] It serves as the agency's management board, but also formally appoints members of the Board of Regulators.[1911] The Board is composed by one senior NRA representative per Member State and one non-voting Commission representative.[1912] The Board is responsible for all decision-making powers attributed to ACER. It acts by a two-thirds majority of its members present, each member having one vote.[1913] In adopting binding and non-binding agency decisions, Board members shall act independently and shall not seek or follow instructions from any government of a Member State, from the Commission or from another public or private entity.[1914] The obligation to act independently does not however diminish the members' roles as representatives of their NRA. NRAs are therefore entitled to provide instructions to their representatives convening in the Board of Regulators. The agency itself is presided over by a Director, appointed by the Administrative Board.[1915]

In line with the ESAs, ACER enjoys significant supporting or quasi-regulatory decision-making powers. These powers are accompanied by an obligation to engage upon wide market participants' consultations prior to taking decisions.[1916] According to the ACER Regulation, the agency shall issue opnions and recommendations addressed to transmission system operators, NRAs and to the European Parliament, the Council or the Commission. These ACER opinions and recommendations are essentially non-binding and serve as a prelude to potential future binding EU decisions in this regard.[1917] In particular, recommendations aim at sharing good practices among both NRAs and market players themselves.[1918] In addition, ACER is to monitor regional cooperation between transmission system operators.[1919] Since these system operators need to be compatible with each other in order to enable an internal market to come to being, EU law provides for the establishment of informal European Networks of Transmission Operators for Electricity and Gas (ENTSOs).[1920] ACER can issue

[1908] Article 1(2) ACER Regulation.
[1909] Article 7(3) ACER Regulation.
[1910] Article 12(1) ACER Regulation.
[1911] Article 13 ACER Regulation.
[1912] Article 14 ACER Regulation.
[1913] Article 14(3) ACER Regulation.
[1914] Article 14(5) ACER Regulation.
[1915] Article 16 ACER Regulation.
[1916] Article 10 ACER Regulation.
[1917] Article 4(a)-(c) ACER Regulation.
[1918] Article 5 ACER Regulation confirms the subordinate role of opinions and recommendations. See also Article 7(2) ACER Regulation and M. Zinzani, note 21, 141 for a schematic overview.
[1919] Articles 6(2) and 6(9) ACER Regulation.
[1920] See Regulation 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity, [2009] O.J. L211/15 and Regulation 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks, [2009] O.J. L211/36 (collectively referred to as ENTSO Regulations). See Recital 15: 'increased cooperation and coordination among transmission system operators is required to create network

opinions and recommendations to individual transmission operator systems, but also submit to the Commission non-binding framework guidelines structuring the functioning of ENTSOs.[1921] ACER is equally involved in drafting ENTSO network codes.[1922] The Commission can decide to grant binding force to these codes. In that instance, the network coodes are incorporated into binding EU law standards. The Commission can also decide not to incorporate these codes. In that case, operators would still need to comply with framework guidelines.[1923] In cases of failure to implement a particular code, ACER will provide the Commission with an opinion allowing the latter to take action.[1924]

ACER also enjoys an intensified role in monitoring NRA compliance with the EU energy regulation framework. First, it can provide opinions, based on matters of fact, at the request of a regulatory authority or of the Commission, on whether a decision taken by a regulatory authority complies with the Guidelines referred to in the Liberalization Directives, the ENTSO Regulations or with other relevant provisions of those Directives or Regulations.[1925] The Regulation does not prescribe a particular time limit for doing so. Such opinions are not binding. Where a national regulatory authority does not comply with the opinion of the Agency […] within four months from the day of receipt, the Agency shall inform the Commission and the Member State concerned accordingly.[1926] It cannot however request the initiation of infringement proceedings or of other concrete actions by the Member State concerned.[1927] Second, ACER may provide an opinion when an NRA encounters difficulties with the application of its guidelines in a specific case. In that instance, ACER will provide an opinion within three months of receiving the request, following consultation with the Commission.[1928] Third, the Electricity and Gas Directives provide for a specific and slightly adapted opinion procedure in relation to compliance with guidelines particularly referred to in those specific Directives. In this case, ACER will explicitly address an opinion to the regulatory authority which requested so or to the Commission upon its request within three months following receipt.[1929] In case an NRA does not comply with the opinion within four

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codes for providing and managing effective and transparent access to the transmission networks across borders, and to ensure coordinated and sufficiently forward looking planning and sound technical evolution of the transmission system in the Community, including the creation of interconnection capacities, with due regard to the environment. The network codes should be in line with framework guidelines which are non-binding in nature (framework guidelines) and which are developed by [ACER. ACER] should have a role in reviewing, based on matters of fact, draft network codes, including their compliance with the framework guidelines, and it should be enabled to recommend them for adoption by the Commission. The Agency should assess proposed amendments to the network codes and it should be enabled to recommend them for adoption by the Commission. Transmission system operators should operate their networks in accordance with those network codes'. ENTSOs established in accordance with these Regulations do not constitute formal EU bodies, but facilitating structures, see F. Ermacora, 'The Agency for the cooperation of Energy Regulators (ACER)' in C. Jones (ed.), note 1880, 266-267.

[1921] Article 4(e) ACER Regulation and Articles 6 ENTSO Regulations. Article 6 ACER Regulation also envisages an ACER opinion with regard to draft statutes, lists of members and draft rules of procedure the ENTSOs have to develop in accordance with Article 5 ENTSO Regulations.

[1922] See Article 6(3)(a) ACER Regulation and Articles 8(2) ENTSO Regulations and Article 6(4) ACER Regulation. Article 6 ENTSO Regulations provides an elaborate network code drafting procedure in which ACER plays a supporting role. At the same time however, the Commission could itself prepare a draft network code or could request ACER to do so in instances where the ENTSO concerned fails to prepare a code itself.

[1923] Article 9(1) ENTSO Regulations. F. Ermacora, note 1920, 276.

[1924] Article 6(5) ACER Regulation.

[1925] Article 7(4) ACER Regulation.

[1926] Article 7(5) ACER Regulation.

[1927] F. Ermacora, note 1920, 280.

[1928] Article 39 2009 Electricity Directive; Article 43 2009 Natural Gas Directive.

[1929] F. Ermacora, note 1920, 281.

months, the Agency is to inform the Commission, which can take appropriate action.[1930] Appropriate action in this respect amounts to deciding whether to examine the case further. In case the Commission effectively decides to do so, it shall issue a final decision. That final decision shall either not raise objections against the NRA's decision or require the regulatory authority concerned to withdraw its decision on the basis that guidelines have not been complied with. The Commission's supplementary supervision powers thus effectively enable these guidelines to obtain at least some binding force.[1931]

More innovatively, ACER also enjoys direct binding decision-making powers. Article 7 ACER Regulation confirms that the Agency shall adopt individual decisions on technical issues where those decisions are provided for in the EU energy regulatory framework.[1932] The ACER Regulation indeed provides for particular additional binding decision-making powers. First, ACER is competent to rule on those cross-border regulatory issues that fall within the competence of NRAs. ACER ruling power extends to disputes regarding the terms and conditions for access and operational security.[1933] Supranational binding powers are supplementary in this respect. ACER shall decide only if the competent NRAs have not been able to reach and agreement within a period of six months from the date the case was referred to them and to the extent that they jointly requested ACER intervention.[1934] ACER shall provide a decision within six months from the day of referral and may provide interim decisions to ensure that security of supply or operational security of infrastructure is protected.[1935] The category of decisions is open-ended.[1936] One particular competence in this regard lies in ACER's ability to fix or approve transmission charges on the users of infrastructure.[1937] Second, the agency may decide on exemptions of new infrastructures from the regulatory regime if and to the extent that national authorities cannot agree on the extent of such exemption.[1938]

387. *ACER internal appeal system* – The establishment of binding decision-making powers has been accompanied by the creation of an administrative appeal system. The ACER Regulation provides for the establishment of a Board of Appeal, composed of six members from among the currentor former senior staff of the NRAs, competition authorities or other national or Union institutions with relevant experience in the energy sector.[1939] Board of Appeal members shall be appointed by the Administrative Board, on a proposal from the Commission, for a renewable five year term.[1940] Members of the Board shall undertake to act independently and have to make a written declaration of commitments and interest indicating either the absence of any interest which may be considered prejudicial to their functioning.[1941] The Board additionally adopts its own rules of procedure.[1942] Any natural or legal person,

[1930] Article 39(3) 2009 Electricity Directive; Article 43(3) 2009 Natural Gas Directive.
[1931] It should nevertheless be remembered that Commission infringement proceedings will – in accordance with Article 258 TFEU – only be initiated against a Member State, see note 5 for references.
[1932] On the non-sensical scope of that provision, see F. Ermacora, note 1920, 283.
[1933] Article 8 ACER Regulation.
[1934] Article 8(1) ACER Regulation.
[1935] Article 8(3) ACER Regulation.
[1936] F. Ermacora, note 1920, 286.
[1937] F. Ermacora, note 1920, 285.
[1938] Article 9 ACER Regulation.
[1939] Article 18(1) ACER Regulation.
[1940] Article 18(2)-(3) ACER Regulation.
[1941] Article 18(3)-(4) ACER Regulation.
[1942] Article 19(6) ACER Regulations. These rules have to be published, see Decision BoA No1-2011 laying down the rules of organisation and procedure of the Board of Appeal of the Agency for the Cooperation of Energy Regulators, available at www.acernet.acer.europa.eu.

including national regulatory authorities, may appeal against a binding ACER decision[1943] which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person.[1944] Appeals shall be filed in writing within two months of notification or publication. An appeal does not have suspensory effect, unless the Board of Appeal explicitly orders the suspension of a contested decision.[1945] If the appeal is admissible, the Board of Appeal shall examine whether it is well-founded. It shall invite the parties as often as necessary and within specified time limits to file observations on notifications issued by itself or on communications from the other parties to the appeal proceedings. Parties to the appeal proceedings shall be entitled to make an oral presentation as well.[1946] Just like the ECHA Board of Appeal[1947], the ACER Board operates in accordance with the principle of administrative continuity. It may exercise any power which lies within the competence of the Agency, or it may remit the case to the competent body of the Agency, which shall be bound by the Board's decision.[1948] Board of Appeal decisions will be published on ACER's website.[1949] At the time of writing however, no decisions had been adopted by the Board.[1950] Board of Appeal decisions can be contested before the General Court or the Court of Justice in accordance with Articles 263 or 265 TFEU. In cases where no right of appeal lies before the Board, agency decisions can directly be reviewed by the Court of Justice. The Court will in that instance not be able to adopt a new decision. It can only annul the decision and remit the case to the Agency.[1951]

388. *Concluding remarks* – ACER's decision-making powers demonstrate that a network of national regulatory authorities can be incorporated into a supranational agency. Whilst the agency's binding decision-making powers are limited and supplementary, NRAs are effectively coordinated and compelled to cooperate with a view to ensure the consistent application of EU energy law. ACER's subsidiary intervention powers additionally allow for more intense control over and cooperation among NRAs within a supranationally structured framework.

3. Institutional heteronomy as a framework of understanding and a specific project for future developments

389. *Institutional heteronomy features* – Elements and principles of institutional heteronomy can be detected – albeit to a more limited extent or in a slightly modified format – in cooperation structures surrounding market liberalization. This section argues that the constitutional principles extracted from directly and indirectly mandated market supervision serve as building blocks structuring the operations of market liberalization supervision as well. A first subsection explains the extent to which institutional heteronomy elements can be identified in relation to both BEREC and ACER. The second subsection builds upon that summary analysis and argues that the constitutional principles of institutional heteronomy serve as institutional design benchmarks in developing future market supervision regimes. The nascent institutionalization initiatives in EU railway liberalization are briefly highlighted

[1943] The Regulation phrases it as follows: a decision referred to in Articles 7, 8 or 9.
[1944] Article 19(1) ACER Regulation.
[1945] Article 19(3) ACER Regulation.
[1946] Article 19(4) ACER Regulation.
[1947] See nr. 344 of this dissertation.
[1948] Article 19(5) ACER Regulation.
[1949] Article 19(7) ACER Regulation.
[1950] See http://acernet.acer.europa.eu/portal/page/portal/ACER_HOME/Public_Docs/Board_of_Appeal/. The Board only convened once, during which only provided for a first meeting and the determination of Board of Appeal Rules of Procedure.
[1951] Article 20 ACER Regulation.

as examples of that approach. Constitutional principles of institutional heteronomy thus serve to streamline and restrain the organizational shape of future supranationally structured market supervision innovations in this field.

a. Institutional heteronomy as an explanatory framework

390. *Constitutional techniques relied on* – Both BEREC and ACER have been established on the basis of Article 114 TFEU. Contrary to the ESA Regulations, the choice for Article 114 has not been the subject of elaborate justifications. In the case of BEREC, the lack of justification could be attributed to the limited decision-making nature of BEREC. BEREC's network like structure and complementary role as an information exchange body would most certainly fall within the confines of *Enisa* and would not therefore present constitutional legal basis problems. Just like *Enisa*, BEREC's creation reflects a minimum operational support mandate captured by Article 114 TFEU. The supranational level does not take binding decisions, but only enables the operational intertwinement and exchanges of information among national regulatory authorities. The ACER Regulation on the other hand demonstrates a preference for a more elaborate EU agency structure. That agency structure directly allows for the adoption of subsidiary binding individual decisions. Contrary to the ECHA, ACER has been established by a separate Regulation which supplements a regulatory framework developed in other instruments. Article 114 TFEU is therefore relied on as an independent constitutional mechanism to enable supranational operational support for national regulatory authorities, just like the ESAs. Whilst the Court did not formally sanction that framework, it is clear that the Union institutions consider it to remain within the constitutional structures of EU law. As such, ACER's Article 114 TFEU basis confirms the institutional delegation mandate read into that provision.

Whilst BEREC and ACER emphasize cooperation among NRAs, the cooperative incentives reflected in both frameworks have only marginally been structured through the prism of mutual cooperative rights. On the one hand, BEREC's emphasis on information exchange and the adoption of advices and recommendations do not entitle the supranational level to effectively intervene beyond direct Commission regulatory interventions. Whilst NRAs are indeed incorporated into BEREC and have as a result been entitled to participate in the development of EU electronic communications policy, they have not as such been included in a mutually cooperative enforcement framework. On the contrary, the lack of binding decision-making powers in BEREC establishes a mere formalized network that does not in itself enable heteronomous cooperation. ACER's structure on the other hand – and similar to the ESAs and the ECHA as discussed above – reflects the features of mutual cooperative rights. These mutual rights enable the supranational level – either the Commission or ACER – directly to intervene and to adopt binding decisions. At the same time, ACER's Board of Regulators' composition enables NRAs to effectively engage upon organized decision-making. The advisory role attributed to ACER additionally ensures that NRAs can effectively draft EU regulatory standards that can subsequently be adopted by the Commission. ACER's intervention options also allow for the resolution of actual or potential conflicts among NRAs.[1952] All these structures contribute to the emergence of a cooperatively structured heteronomous sphere present at the EU level.

The availability of independent judicial review serves as an institutional precondition for heteronomous enforcement in the operations of ACER. Attention to effective judicial review by an administrative Board of Appeal and the EU Courts incorporates a perceived need of judicially accountable administrative actions in EU law. That image promotes effective

[1952] See especially its powers under Article 8 ACER Regulation.

judicial review as a matter of national law as well, even though it does not directly mandate such review.[1953] In case of BEREC, the lack of binding legal decisions resulted in EU judicial protection not intervening in the matter. ACER's binding decisions are amenable to judicial review. Its opinions, guidelines and recommendations cannot however be directly contested as a matter of EU law. National courts nevertheless have a constitutional obligation to intervene in instances where non-binding network guidelines nevertheless produce effects on the position of particular market operators.[1954] In any instance, the establishment of review mechanisms in case of binding decisions demonstrates the importance of judicial review as a means to maintain supranational unity in an institutionally diverse context.

391. *Elements of institutional heteronomy* – It can be argued that ACER demonstrates all features of an institutionally heteronomous framework, whilst BEREC effectively incorporates particular elements of that framework.

Firstly, both systems function within a framework of supranational unity of policymaking. The liberalization of particular industries resulted in the reregulation of such industries at the supranational level and the ensuing reintroduction of competition within these sectors. As a result, both BEREC and ACER operate within the confines of a well-established supranational legislative framework.

Secondly, both systems reflect a taste for hierarchical quasi-duality. NRAs have in both instances been established as a matter of EU law and have been operating within an explicit supranational mandate. As a result, these institutional structures have become direct embodiments of EU regulatory mandates in national legal orders. EU law indeed imposed direct institutional, organizational and procedural obligations on such NRAs. Any organized network of NRAs supported by the Commission services would therefore enable the duality between national and supranational law to be mitigated even more.

Thirdly, the Commission acts as a supplementary market supervision body in both instances. In electronic communications however, the Commission's role remains more detached and confined to organizing infringement proceedings against *Member States*. With regard to energy, ACER effectively functions as a supplementary market supervision body, in conjunction with the Commission. The binding decision-making powers effectively attributed to ACER ensure that the latter structures, monitors and disciplines the NRAs.

Fourthly, both systems reflect cooperative incentives designed to allow for a more integrated market supervision approach. The ACER cooperative incentive framework is most developed, as it directly recognizes cooperative rights that structure and enable the resolution of conflicts among NRAs and between NRAs and ACER. Cooperative rights have particularly been structured as a supranational conflict resolution mechanism and in doing so effectively subordinate the operations and institutional organization of NRAs to a supranational scheme. A similar subordination can also be detected with regard to BEREC. In that structure however, a supranational framework for the resolution of actual or potential conflicts is lacking. Whilst conflicts cannot therefore be resolved in accordance to a binding decision of a supranational enforcement body, NRAs continue to operate within an institutional mandate and function within a networked EU-sanctioned structure.

Although the elements of institutional heteronomy do not therefore appear in their fullest form compared with other sectors, they can most certainly be detected in the legal frameworks

[1953] See nr. 119 of this dissertation.
[1954] See for that argument Article 19(1) TEU, Article 47 CFR and P. Van Cleynenbreugel, note 34, 13-31.

governing and structuring market liberalization supervision. The detection of these elements therefore serves to confirm that a constitutional framework governing institutionally heteronomous relationships underlies the institutional organization of both supranationally structured supervisory arrangements.

b. Institutional heteronomy as a constitutional design framework: railway liberalization as an example

392. *From elements to principles* – The identified elements of institutional heteronomy – albeit in a somewhat modified or attenuated format – can be considered as evidence of the constitutional principles governing institutional heteronomy playing a role in the institutional organization of market liberalization supervision. Consideration of these principles indeed showcases that they could once again serve as both an explanatory device and as a constructive design toolbox to develop market liberalization supervision into a supranational modus. This subsection specifically highlights these principles and the ways in which they can serve to explain recent and on-going institutional evolutions in the realm of railway liberalization.

Firstly, market liberalization supervision essentially incorporates the principle of second-resort supranationalism within the institutional framework of market liberalization supervision. The liberalization Directives mandate the establishment of independent NRAs and entrusted the Commission with enforcing these Directives across the Member States. Whilst the Directives did not directly foresee the establishment of a supranational supervision body, they did reflect a taste for second-resort intervention should the newly established NRAs refrain from functioning in accordance with the supranational legal framework. Only at a later stage were supranational authorities considered or established. These authorities were consequently not considered to replace the NRAs but to coordinate and streamline their functioning.

Secondly, pro-active commandeering is directly available throughout the regulatory framework. Member States have not only been mandated to establish NRAs. These NRAs also needed to comply with particular requirements such as independent functioning and transparent decision-making processes. As bodies entrusted with an EU mandate, NRAs have effectively been commandeered to organize their procedures and functioning in accordance with EU law. These commands not only appeared directly within the regulatory framework. The Court of Justice equally intervened to operationalize vague concepts such as independence[1955] or judicial review.[1956] In doing so, the Court established itself as a body capable of altering and structuring the institutional organization of national market supervisors.

Thirdly, these commands have been essentially structured in accordance with institutional obstacle pre-emption. The obligation to establish or modify the operations of national regulatory authorities essentially implied that incompatible institutional structures – e.g. market operators directly involved in network supervision – had to disappear as a matter of EU law. Only once such structures had disappeared could newly EU-mandated structures take centre stage.[1957] In that image, institutional obstacle pre-emption appeared as a necessary

[1955] See the judgments referred to in note 1832.
[1956] *Vebic* is a case in point in that regard, see nr. 94 of this dissertation.
[1957] The EU legislature considered itself competent to demand these institutional changes on the basis of Article 114 TFEU and the supranational operational support mandate read therein in all instances. The legal basis of Article 114 TFEU has not been contested in relation to determining these requirements.

precondition for the principles of second-resort supranationalism and economically justified commandeering to be effective.

Fourthly, the regulatory frameworks of electronic communications and energy liberalization directly focus on national institutional adaptations rather than on supranational competence development. The very essence of both regulatory frameworks lies in the adaptation of formerly national industries that remained closed to or detached from competition.[1958] With a view to bring competition into these fields, regulatory and operational functions had to be separated, national supervisory bodies had to be established and regulations concerning access, distribution and tariffs had to be redrafted. In doing so, former monopolists or state-owned undertakings were made to accept and accommodate for the presence of competitors. These adaptations were not presented as a side-effect of intensified substantive law harmonization (e.g. in financial regulation) or from direct adaptations to a long-functioning supranational enforcement framework (e.g. modernized EU competition law). Instead, national institutional adaptations and the sharing of competences to organize and enforce market regulation were essential components of the regulatory frameworks themselves.

Fifthly, the emergence of supranationally structured mutual cooperative rights appears rather limited compared with directly and indirectly mandated supervision structures in other sectors. That claim should nevertheless be nuanced in the light of the substantive specifics of market liberalization regulation. Contrary to a field such as financial regulation, in which economies of scale resulted in or at least promoted increased cross-border competition[1959], market liberalization essentially resulted in the opening up for competition of *national* or *nationalized* industries. The primary objective of such liberalization has been the introduction of competitive structures at the different national levels. To that extent, national regulatory authorities have been established, Directives have been adopted to be implemented by national legal orders and infringement proceedings against Member States have been initiated. Only once competition has effectively been introduced, non-Member State undertakings would be able to become active in newly liberalized sectors. A primary regulatory focus therefore lay on re-organizing national legal frameworks through EU regulation. Given the national nature of the industries involved, cooperation between different NRAs only took second stage. The more limited venture into designing cooperative rights structured by a supranational body does not however imply that such rights are not expected to gain momentum in the near future. As formerly national industries converge into an EU-regulated field, transnational economic interactions are also likely to increase, calling for transnational institutional cooperation. The establishment of BEREC and ACER showcases that these developments are indeed in progress.

393. *Constitutional principles as institutional benchmarks* – It follows from the foregoing that the constitutional principles structuring institutional heteronomy can directly be found in the market liberalization legal framework. The examples of market liberalization therefore allow to confirm that these constitutional principles could serve as institutional building-blocks for the establishment of supranationally structured market supervision arrangements.

The most recently 'liberalized' sector of railway transport provides a testing ground for these principles to serve as institutional design benchmarks.[1960] Following the adoption of three

[1958] See D. Geradin, note 1791, ix.
[1959] See G. Hertig, note 90, 349.
[1960] A similar argument could be made for the postal and air transportation sectors, although liberalization and the establishment of national regulatory authorities has progressed in both sectors, see for overviews, B. Van

subsequent railway packages[1961], national railway industries are now effectively facing the opening up of railway networks to national and foreign competitors.[1962] To that extent, the railway network and the operations on that network effectively had to be unbundled.[1963] With a view to enable competition to take place among network operators, a 2001 Directive mandated the establishment of national regulatory authorities ensuring competition in the railway field. [1964] Once again, these national authorities had to be independent from national railway undertakings and administrations.[1965] Given the premature stage of liberalization, no institutionalized EU network has been established, but it would not seem improbable that such a network will indeed effectively be institutionalized in the very near future.[1966] Enhanced attention to cross-border regulatory issues could likely result in the establishment of some sort of supranational authority in the somewhat more distant future. Similar supranational initiatives have in this field already been taken with regard to railway compatibility and railway safety. With a view to ensure the compatibility and technical convergence of different

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Houtte, 'Air Transport' in D. Geradin (ed.), note 1788, 67-97 and V. Visco Comandini, 'Postal Services', 135-172 in the same volume for basic and somewhat outdated but enlightening overviews.

[1961] See on railway transport prior to liberalization, C. Knill and D. Lehmkuhl, 'An Alternative Route of Legal Integration: the Community's Railways Policy', 2 *European Integration Online Papers* (1998), No. 3, http://eiop.or.at/eiop/texte/1998-003.htm. See also A. Meyer, 'Rail Transport' in D. Geradin (ed.), note 1788, 103-127; O. Stehmann and G. Zellhofer, 'Dominant Rail Undertakings under European Competition Policy', 10 *European Law Journal* (2004), 327-352; L. Quessette, 'L'Europe des rails, ou les influences de la construction européenne sur les chemins de fer en France', 42 *Cahiers de Droit Européen* (2007), 631-656. For an overview of regulatory measures adopted, see also http://ec.europa.eu/competition/liberalisation/legislation/legislation.html. A first package was adopted in 2001, a second in 2004 and a third in 2007, see http://ec.europa.eu/transport/modes/rail/packages/2007_en.htm.

[1962] See the Commission's programme in its 2001 White Paper on European Transport Policy for 2010: time to decide, COM(2001) 370 final, available at http://ec.europa.eu/transport/themes/strategies/2001_white_paper_en.htm. A fourth Railway Package is currently being prepared, see http://www.railsconference2012.eu/home.html in that regard.

[1963] See in particular Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, [2001] O.J. L75/29 (hereinafter referred to as 2001 Railway liberalization Directive).

[1964] See Article 30 2001 Railway liberalization Directive: Member States shall establish a regulatory body. This body, which can be the Ministry responsible for transport matters or any other body, shall be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant. The body shall function according to the principles outlined in this Article whereby appeal and regulatory functions may be attributed to separate bodies. See also Article 10(7) Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways, [2001] O.J. L75/1: Without prejudice to Community and national regulations concerning competition policy and the institutions with responsibility in that area, the regulatory body established pursuant to Article 30 of Directive 2001/14/EC, or any other body enjoying the same degree of independence shall monitor the competition in the rail services markets, including the rail freight transport market. That body shall be set up in accordance with the rules in Article 30(1) of the said Directive. Any applicant or interested party may lodge a complaint with this body if it feels that it has been treated unjustly, has been the subject of discrimination or has been injured in any other way. On the basis of the complaint and, where appropriate, on its own initiative, the regulatory body shall decide at the earliest opportunity on appropriate measures to correct undesirable developments in these markets. In order to ensure the necessary possibility of judicial control and the requisite cooperation between national regulatory bodies, Article 30(6) and Article 31 of the said Directive shall apply in this context.

[1965] See Article 30(1) 2001 Railway Liberalization Directive.

[1966] An Independent Regulators Group – Rail has been established on the initiative of fifteen Member States. At present, twenty-one Member States' regulators convene in the Group, which effectively operates outside the realm of EU law, see http://www.irg-rail.eu/about-irg-rail/. See also P. Larouche, note 1360, 30. The Group does not comprise all Member States' railway regulators.

national railway systems, a European Railway Agency (ERA) has been established.[1967] Whilst that Agency only enjoys advisory and coordinating powers, it effectively provides a supranational forum for railway network undertakings to convene and consider the development of EU-wide compatibility standards.[1968] The ERA does not however play a role in supervising and enforcing competition in the railway sector.

The constitutional principles of institutional heteronomy could serve as benchmarks outlining the extent and formats future institutional evolutions will take. Firstly, the principle of second resort intervention would allow for a formal EU network or supranational authority to be created. The network or authority would complement the Commission's competition law enforcement and the national authorities' day-to-day market supervision and enforcement frameworks. It could not however enable the European Commission as a full-fledged and primary market supervisor. A coopetitive reading of Article 103 TFEU would no longer allow for that regime to remain in place in the realm of EU competition law supervision. The resurrection of a similar system in EU railway supervision would not therefore be supported by the present constitutional framework as operationalized in competition and financial market supervision.

Secondly, the principle of proportionate pro-active commandeering would allow for the EU legislature to impose direct or indirect institutional and procedural requirements on national supervisory authorities. In doing so, the EU legislature may not only impose the establishment of national supervisory authorities, but could also determine particular independence, impartiality and effective sanctioning requirements. The Court could build upon these legislative choices and clarify the meaning of independence, impartiality and sanctioning requirements through its preliminary ruling procedure.

Thirdly, the prevalence of Court-sanctioned institutional obstacle pre-emption would serve as a necessary means to bring about national institutional transformations. Its emergence would require the Court to identify standards of adequate institutional organization applied at the supranational and national levels. These standards would then constitute a basis for judicially mandated national institutional adaptations. The emergence of such standards presupposes a supranational 'due process' framework within which national authorities' functioning will have to be integrated and structured. It also presupposes a willingness for the Court to impose a due process image on the operations at the supranational level. Those operations will in that understanding constitute a basis for institutional or procedural convergence across the national levels.

Fourthly and most fundamentally, an institutionally heteronomous supranationally structured market supervision regime requires a set of supranational 'cooperative' rights. These rights need to be structured as mutual supranational-national entitlements that serve to create

[1967] Regulation 881/2004 of the European Parliament and of the Council of 29 April 2004 establishing a European Railway Agency (Agency Regulation), [2004] O.J. L164/1. The ERA has not been established on the basis of Article 114 TFEU, but on the specific transport regulation provision in Article 91 TFEU. That provision allows for the establishment of common rules on transport in the Internal Market. Its scope could be argued to coincide with Article 114 TFEU.

[1968] S. Griller and A. Orator, note 30, 13 classify the ERA as a pre-decision making agency. In the realm of air transport, the European Aviation Safety Agency does enjoy binding decision-making powers, see Regulation 1592/2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency [2002] O.J. L240/1. In addition, Article 16 of Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (Railway Safety Directive), [2004] O.J. L220/16 mandates the establishment of independent national railway safety authorities.

regulatory spaces for both supranational bodies and national institutions to take shape. Supranationally determined 'conflict rights' would serve to determine what level of governance can be called upon to intervene in what circumstances. In the image of reflexive regulatory coopetition, these rights would particularly allow the EU level to intervene and withdraw a case from national authorities or provide binding guidelines on how the national level should proceed in dealing with the case at hand. Conflict rights should be complemented by control rights. These rights allow the supranational and national levels, as well as market operators, to control the market supervision operations engaged upon. Such control rights could also provide for appropriate action to be taken in instances where the supranational or national level does not comply with the obligations entrusted to it. Supranational control rights can also be structured 'horizontally'. EU Institutions can hold EU agencies to account and national authorities can be called upon to mutually control each other's operations within a network structure. A third category of 'cooperative rights' relates to institutional adaptation entitlements. These entitlements allow the EU level to intervene in the institutional organization of national supervisory bodies. In doing so, the EU level would be capable of structuring national institutional autonomy into an EU-compatible heteronomous mode. Institutional adaptation rights heavily rely on the Court of Justice to identify and promote their operationalization. The recognition of institutional adaptation entitlements could result in both national and supranational adaptations. Increased attention to due process and institutionalized judicial review guarantees at the national level might trigger due process innovations at the supranational level and vice versa. The identification of new fundamental procedural rights or the institutionalization of a segregated supranational or national decision-making body could as a result emerge, tailored to the specificities of a particular market sector.

Fifthly, the development of supranationally structured and integrated market supervision mechanisms presupposes a 'national institutional adaptation' focus. Within that focus, the development of supranational regulatory frameworks should not take place to the detriment of national institutional variety. It should rather embrace such variety and *include* national institutional frameworks within the supranationally structured harmonizing regime. The commandeering of national authorities into abiding by an EU-determined institutional framework and the adoption of a Court-sanctioned effectiveness approach to national institutional autonomy essentially allows for such focus to emerge. The creation of a network – or formalized network agency – in which national and supranational authorities convene and deliberate also directly enables such focus to determine further institutional advancements in the supranational structuring of market supervision arrangements.

The application of the abovementioned principles still grants significant policy room to the EU Institutions to design and determine the institutional outlook of liberalized EU railway law supervision. In doing so, the constitutional principles allow for a particular balance to be struck between supranational cooperation obligations and national 'institutional' competition among different regulatory bodies. As a result, the principles allow the Institutions – and most notably the Court – to design a more concrete and sector-specific balance between supranational intervention and national autonomy and between supranational cooperation and supranationally structured national competition. As such, the principles contribute to the emergence of a heteronomous sphere of institutional interaction and integrated administration structured at the EU level.

Chapter 3. Conclusion

394. *Concluding remarks* – This part sought further to argue that elements of institutional heteronomy can be identified across different market supervision sectors. It emphasized that constitutional principles of institutional heteronomy could serve as building blocks for future refinements to existing frameworks and new developments in additional sectors. In doing so, it sought to confirm that a singular set of constitutional principles can be relied on to justify and confine the establishment of supranationally structured market supervision frameworks.

Firstly, the part illustrated that institutional heteronomy serves to explain the institutionalization of both directly and indirectly mandated market supervision. Developments in product authorization supervision and consumer protection as well as in market liberalization supervision can be structured within a similar set of variables that allow to denote the operational frameworks as institutionally heteronomous. At the same time, it has also been hypothesized that the very same constitutional principles underlying institutionally heteronomous structures in both case studies in part II of the dissertation also structure and determine the organizational outlook of the sector arrangements discussed here. In that image, constitutional principles of institutional heteronomy serve as an explanatory, enabling and restraining framework for the development of current market supervision initiatives initiated at the EU level.

Secondly, the heteronomous constitutional principles previously identified can also be structured as institutional guidelines for future regulatory initiatives. The fields of comsumer protection supervision and railway liberalization exemplify the predictive roles these constitutional principles can play in that regard. The operational maxims extracted from these principles and the *reflexive regulatory coopetition* mandate incorporated in them could in that image serve as policy considerations that provide constitutional backing to the design and operation of new supranational authorities and supranationally structured institutional frameworks of market supervision.

Part V. General conclusions and prospects: institutionally heteronomous shared competences in EU market supervision

395. *Introductory overview* – In her 2009 dissertation, Maartje De Visser analyzed and generalized upon the phenomenon of 'network-based' governance in EU market supervision. Following an inquiry into the institutional operations of the ECN and of ERG, she concluded and prophecized that networked national authorities have been granted 'a stronger incentive to pursue European interests and reflect European concerns in [their] decision-making. Ultimately, the network's normative political eco-system could very well necessitate the recognition of a new dimension to [Article 4(3) TFEU], act as a catalyst for further procedural and institutional convergence, and allow for the development of a truly European law, with feedback and cross-fertilization between the [Union] and the national level'.[1969] This dissertation sought to build on those observations by outlining the EU's constitutional foundations of network-structured governance mechanisms in the functionally defined realm of market supervision. It essentially argued that the EU constitutional framework showcased an inherent flexibility to evolve towards these prophecies by relying on and reconfiguring established constitutional principles of European integration. EU constitutional law in that image enables and restrains *governance* mechanisms to be shaped and operated. EU constitutional law itself presents an essential element of EU governance, as it intertwines governance mechanisms within the EU legal framework itself.[1970]

Four years have passed since the abovementioned argument was felicitously developed. This dissertation sought to illustrate the institutional *evolutions* shaping an enhanced framework of national and supranational supervisory interaction adopted or developed since 2009. At the same time, it incorporated these institutional evolutions into a new EU constitutional *settlement* structure that serves as a predictive enabling and restraining device for emerging supranational market supervision arrangements. This part summarizes the dissertation's main findings and conclusions related to both evolution and settlement of supranationally structured market supervision. It also prospectively considers the extent to which the identified settlement affects the image of legitimate EU intervention into national legal orders and the effects such affectation produces for the understanding of legitimacy in an EU law context.

[1969] M. De Visser, note 23, 322-323.

[1970] On the relationship between law and governance as two sides of the same coin in EU law, see G. De Búrca and N. Walker, 'Reconceiving Law & New Governance', 13 *Columbia Journal of European Law* (2007), 519-537; N. Walker, 'EU Constitutionalism and New Governance' in G. De Búrca and J. Scott (eds.), *Law and New Governance in the EU and the US* (Oxford, Hart, 2006), 15-36. See also already A. Gatto, 'Governance in the European Union: a Legal Perspective', 12 *Columbia Journal of European Law* (2006), 487-514 and P. Van Cleynenbreugel, 'European Law in times of European Governance', *Jura Falconis* (2008-2009), 393-416.

Chapter 1. Evolution: towards elements of institutional heteronomy

396. *Heteronomous institutional context inquiry: constitutional logic* – The observational prophecies De Visser made in 2009 have since further been shaped and grounded in a more explicit constitutional framework. That framework not only recognized an inherent mutual rights-based dimension in Article 4(3) TFEU, it effectively imposed more institutional convergence through legislative *and judicial* organizational standard-setting initiatives and allowed for the inclusion of national law structures within the formal constitutional framework of EU law. In doing so, EU law has given shape to an executive federal system that I termed institutional heteronomy. National authorities operating in an institutionally heteronomous framework enjoy limited institutional autonomy. These authorities remain autonomous only to the extent that their autonomy is sanctioned and structured under EU law. EU law not only determines the supervisory and enforcement mandates attributed to such authorities, it also directly intervenes in the institutional organization of such authorities.

This dissertation sought to overcome the contradictory governance language guiding institutional evolutions in EU market supervision. It outlined that these structures and principles have thoroughly been transformed or enhanced over the past four years, either through legislative intervention or judicial elaborations. The dissertation argued that seemingly contrasting notions of 'decentralized' and 'more centralized' EU law enforcement tended to hide converging governance methodologies, principles and discourses. These converging methodologies, principles and discourses were argued to promote an institutionalized network model in which both supranational and national actors have particularly delineated roles to play. The dissertation sought to explore to what extent such converging dynamics guided institutional developments from a cross-sector point of view. The dissertation therefore incorporated a *constitutional logic*. It did not take the justifications for sector-specific institutional diversity on the basis of sector-specific necessitities for granted. It rather sought to attach such diversity to prima facie differently structured constitutional mandates. In doing so, the dissertation distinguished directly mandated supervision from indirectly mandated supervision. Whilst the former directly mandated the institutionalization of supranationally structured market supervision regimes by virtue of explicit and specific Treaty provisions, the latter relied on vague and open-ended functional Treaty provisions – such as Article 114 TFEU – to establish and maintain a market supervision structure. The distinction between both types of constitutional mandates allowed to refocus the scope of the dissertation into an examination of the constitutional structures and principles underlying different types of constitutional mandates. Despite being structured as both mandates, directly and indirectly mandated market supervision rely on the same EU constitutional metaprinciples – attributed competences, EU rule of law, Court of Justice judicial review – that determine the extent to which these mandates can be relied on to establish and limit the operations of supranational market supervision bodies.

397. *Functional-inductive case-study approach* – The constitutional logic identified provided a methodological basis for the categorization of different regimes of market supervision. It equally allowed for a conceptual inroad into investigating recently transformed institutional arrangements in EU market supervision. This dissertation opted for an inductive study of one example for each category and the institutional transformations taking place therein. It approached these case studies through four predetermined institutional proxy sub-questions that sought to identify the scope, nature, institutional organization and control mechanisms supporting supranational market supervision regimes. A vertical and transversal approach to the institutional organization of market supervision was said to underlie these institutional

proxies. From that perspective, the case studies highlighted the institutional equilibria established by EU law and the role of national and supranational supervisory bodies within these equilibria.

In the realm of directly mandated market supervision, the dissertation outlined and explored a system of shared enforcement powers in the realm of EU competition law. It identified a direct constitutional mandate to enforce competition law in the ECSC Treaty and projected its continued relevance in the EEC Treaty. The EEC Treaty explicitly granted the Commission enforcement powers, but did not exclude the Member States either. Article 103(2) TFEU mandated the Council to strike a balance between effective supervision and simplified administration in the organization and operations of EU market supervision. Regulation 17/62 struck that balance directly in favour of the Commission by invigorating a notification regime for potentially restrictive agreements. National authorities had a merely cooperative role to play within that regime. The 'long decade' between the early 1980s and the late 1990s witnessed several proposals to upgrade or modify the institutional framework of EU competition law enforcement. These modification proposals on the one hand focused on the internal functioning of the Commission – a political rule-making body called upon to act as a market supervisor in individual cases – and on the other on the subordinate roles of national judges and authorities within the framework of EU competition law enforcement. From an internal perspective, the combination of investigative, prosecutorial, adjudicative and regulatory policymaking functions in the College of Commissioners triggered 'due process' critiques and resulted in the judicial recognition of fundamental procedural rights, a more formal segregation between the prosecuting Directorate-General and the adjudicative College of Commissioners and the establishment of independent Hearing Officers. An even more radical proposal to establish an independent supranational Cartel Office had been developed, but never materialized. From an external perspective, non-binding notices on the roles of national courts and national authorities – complemented by supportive CJEU case law – resulted in the emergence of more attention to additional market supervision actors entrusted with an EU-wide mandate.

The external dimension was particularly addressed in the 1999 White Paper which sought to modernize the enforcement of EU competition law. Regulation 1/2003 partially translated the White Paper's proposals into the EU regulatory framework. The Regulation incorporates a new balance of effective supervision and simplified administration by mandating national authorities to apply EU competition law and by abolishing the mandatory notification system of Regulation 17/62. National authorities are obliged to cooperate and exchange information within the confines of a newly established European Competition Network. Deliberations in the network result in the allocation of cases to one or more competent authorities. Whilst allocation decisions are non-binding, the network's deliberative structures serves to ensure that allocation decisions are deliberated on prior to an investigation or adjudicative procedure being formally opened at either the national or supranational levels. The framework for cooperation and the exchange of information is mainly set up as an aid to Commission-focused EU competition law enforcement. The Commission remains a *primus super pares* in that understanding. Regulation 1/2003 confirms and enhances the Commission's investigation and inspection powers and clarifies its role in imposing fines on undertakings contravening EU competition law. National authorities' mandate within that Regulation mainly serves as an instrument to alleviate the Commission from routine or smaller competition law infringements. The Commission can nevertheless rely on Article 11(6) of the Regulation to withdraw a case from national authorities. National courts are equally obliged to apply EU competition law. The Commission cannot however withdraw a case from these courts. It can only serve as an *amicus curiae* in national law disputes. The Court of Justice remains at the

pinnacle of the Regulation 1/2003 regime. Through the preliminary ruling mechanism, it is able to ensure that national courts abide by EU competition law provisions. At the same time, it reviews – and potentially annuls – Commission decisions on the basis of Article 263 TFEU. The scope of review entertained by the Court varies between comprehensive review with regard to the establishment of facts and the law and limited review in relation to the margin of appreciation granted to the Commission. The *KME* and *Chalkor* judgments demonstrate that the comprehensiveness of such review depends on the way in which the grounds for the annulment have been framed. The judgments also indicated that the Court may be willing to tailor the comprehensiveness of its review to the grounds invoked in that regard. The ECtHR's *Menarini* judgment has been read as a confirmation that such review mechanism is compatible with the fundamental right to a fair trial and access to justice. Regulation 1/2003 additionally grants the Court unlimited jurisdiction in the review of fines and periodic penalty payments. In that case, the Court may adapt the fine imposed, rather than merely annulling it.

The internal dimension was left unaddressed by Regulation 1/2003 and its implementing Regulation 773/2004. The Commission maintains its role as a singularly structured market supervision body which actions are reviewable by the Court. A 2011 Commission President's Decision nevertheless established a significant movement towards a more institutionally segregated approach. The Decision strengthened the Hearing Officer's role as a gatekeeper of fundamental procedural rights in the investigative stage and at the hearing prior to the adoption of a Commission Decision. It allowed for the Hearing Officer to intervene early in the procedure with a view to hold the prosecuting Directorate-General for Competition to account and in order to ensure that the adjudicative College of Commissioners could take an informed and procedurally sound decisions. A set of non-binding Best Practices accompanied the Decision and confirmed the segegrated enforcement functions entrusted to different actors within the European Commission. The role of the Commission as a market supervision and enforcement body was not however questioned. Somewhat paradoxically, Member States' authorities have been subject to supranationally induced institutional adaptations to accommodate 'due process' requirements. Article 6 ECHR has been fundamental in organizing the institutional design of national market supervision authorities in accordance with a 'fundamental procedural rights'-proof template. The Court of Justice directly followed suit and imposed particular conditions of adequate institutional organization on the Member States. The *Vebic* judgment has been an example in that regard. *Vebic* can be read as promoting three national institutional varieties in accordance with which national authorities have to be structured. These varieties present a Commission-like unitary agency model, separated prosecution and (administrative or judicial) adjudicative bodies or segregated administative bodies. In all instances, the first instance adjudicative body – or the segregated or separated prosecutorial department – should be able to participate in ensuing judicial review proceedings. In that reading, the judgment operationalizes Article 35 Regulation 1/2003, which grants extensive national institutional autonomy to Member States in the organization of national market supervision. The Court's emphasis on the need for effective EU competition law enforcement highlights that Member States' autonomy is necessary curtailed by demands of EU law. Whilst the Court does not impose the Commission model as the only viable institutional framework for competition law supervision, Member States are at least invited to take that model into account and to adapt their institutional organization with a view to guarantee fundamental procedural rights. The Court in that image considers the institutional organization of national competition authorities a matter of EU law. The Court thus serves as a body enabling institutional convergence among diverging national arrangements.

The dissertation subsequently expounded on the emergence of integrated financial market supervision structures as an example of indirectly mandated market supervision. The emergence of supranational financial market regulation occurred against the background of proceeding Common and Internal Market enhancement initiatives and the free movement guarantees they incorporated. Financial regulation was considered a species of the free movement of services and capital.Whilst the EEC Treaty projected the establishment of a Common Market and the ensuing regulatory implementation of the free movement provisions, regulatory and political backlog resulted in only limited initiatives taken in this regard. A first Banking Directive and a Listing Directive constituted the most important examples in that regard. The limited regulatory focus in EEC financial regulation attested to a more general inability to establish the Common Market through positive integration. The 1985 White Paper on the Completion of the Internal Market sought to adopt a new approach grounded in the inclusivity of national legal orders in bringing about market integration. The White Paper particularly centred attention on the free movement of goods, but equally included a nucleus for further financial regulatory integration on the basis of a newly proposed 'Internal Market' harmonization provision to be included in the Treaty framework. As a result, a second Banking Directive and different Securities markets' Directives have been adopted. Most innovatively however, the White Paper and its constitutional translation into the 1986 Single European Act projected a new organizational approach to market supervision. In that approach, national supervisory authorities would be called upon to supervise entities that had been established in their national legal order, even in cases where these entities provided cross-border services or branched out in other Member States. The Host Member State authorities did however remain involved and could exercise supplementary or supporting supervisory powers. The European Commission in that system acted as a supranational supervisor, but was only called upon to police *Member States'* infringements of supranational law through the Treaty infringement procedure. Home Country supervision was supplemented by an obligation mutually to recognize the stringency and adequateness of other Member States' regulatory systems and the freedom attributed to market operators to relocate to a different Member State and accompanying supervisory system. The Home Country supervision template continued to serve as a benchmark guiding further institutionalization of market supervision at the supranational level.

The 1998 Financial Services Action Plan proposed an ambitious regulatory refinement programme. That programme was aimed at enhancing the supranational financial services framework and resulted in the proposal of a *de facto* single EU rulebook related to financial services. The broad substantive regulatory mandate read into Article 114 TFEU provided a constitutional justification for the adoption of upgraded and more intense regulatory standards. The extension of supranational legislative activity also re-opened debates on the desirability of a more developed supranational supervisory mechanism. The 'Lamfalussy' Report proposed a four-layered regulatory approach, in which the EU level was to be responsible for the adoption of both principled level one legislation and detailed technical level two implementing standards. The Commission retained its Member States' infringement policing role at level four. Level three comprised a new stage. It included national supervisory authorities into a network-based model of regulatory cooperation with a view to achieve convergence. National supervisory authorities were to convene in EU-wide networks of national supervisors (CESR, CEBS, CEIOPS). These networks were established by Commission Decision, but incorporated as national legal persons. They did not enjoy powers to adopt EU-wide decisions and served as informal convergence-promoting bodies. Although they did not constitute supranational supervisors, they served to complement the home country supervision mechanism by providing for an obligatory deliberation framework in which different national supervisory authorities were invited to design tools for supervisory

and regulatory convergence. The global financial crisis resulted in the model of informal and bottom-up convergence in the shadows of EU law being profoundly questioned. Responding to the crisis, the *De Larosière* report proposed the organizational overhaul of the level three network system and their replacement by formal EU-recognized market supervisory bodies. These supervisory bodies were to be included in a macro-supervision framework steered by the Member States and the European Central Bank. The post-crisis regulatory framework outlined in Regulations 1092-1095/2010 confirmed the *De Larosière* recommendations and adopted a new European System of Financial Supervision. That system incorporates a macro-prudential European Systemic Risk Board and micro-supervisory European Supervisory Authorities. These authorities do not replace, but complement national supervisory bodies and the home country supervision principle. They provide the necessary EU institutional bridge between the supranational rulemaking and national implementing levels.

The establishment of the ESAs has equally been justified on the basis of Article 114 TFEU. Three ESAs have as such been established: the European Banking Authority, the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority. The three ESAs succeed to the now dissolved level three networks. ESAs have EU legal personality and serve as decision-making agencies complementing national supervisory authorities and the European Commission. They comprise a Board of Supervisors, in which the heads (and their alternates) of national supervisory authorities convene and adopt decisions, a Management Board, a Chairperson and an Executive Director. In addition, the ESAs have established internal committees in which national supervisory representatives convene with a view to adopt converging enforcement strategies. The founding Regulations attribute preparatory, supporting and binding regulatory powers to the ESAs. First, the ESAs play a preparatory role in the adoption of binding regulatory and implementing technical standards. These standards are formally adopted by Commission Regulations or Decisions on a proposal from the responsible ESA. The European Commission has little leeway in adopting or modifying a proposal agreed on by the ESA concerned. Only to the extent that the ESA does not respond to a request to prepare a draft proposal will the Commission retain regulatory discretion. Regulatory tehnical standards result from a delegation in a legislative instrument concerned. Such delegations can be revoked in accordance with the ESA framework and Article 290 TFEU. Implementing technical standards are adopted in accordance with Article 291 TFEU and the adapted Comitology procedure. Second, the ESAs continue the convergence roles attributed to the level three networks. They are responsible for the assembling of information, for conducting peer reviews over national authorities and for promoting supervisory convergence and the adoption of a single rulebook in EU financial services law. The ESAs also play a supporting role in the the operations of the ESRB and in the prevention of systemic crises. The three ESAs convene in a Joint Committee, which can adopt common positions. Most particularly however, the ESAs can adopt non-binding guidelines and recommendations. National supervisory authorities have to indicate whether or not they intend to comply with these guidelines or recommendations. Notices of intended non-compliance can be published or may trigger binding ESA actions. Third, the ESA Regulations provide for supplementary binding decision-making powers. In cases of breaches of Union law or emergency situations, the ESAs can address binding individual decisions to national supervisory authorities or financial market participants. Prior to the adoption of such binding decisions however, elaborate procedures involving the European Commission have to be followed. In cases of disagreement over the allocation of supervisory powers grounded in EU law, the ESAs are called upon to reconcile national authorities or to adopt a binding decision if no reconciliation can be attained. In doing so, the ESAs can address binding allocation decisions to national supervisory authorities. These powers are supplementary and meant to be exercised only in exceptional circumstances. At present, these powers have not

yet been tested in practice. In addition, the ESA Regulations provide for consumer financial protection powers in accordance with which the ESAs can temporarily restrain or prohibit financial activities from taking place. Consumer protection powers have to be explicitly developed in specific substantive provisions. ESAs have been granted such powers in the realm of short selling, alternative investment fund managers and central counterparties to name but a few examples. The EU legislature even went beyond these binding powers and granted ESMA binding powers to authorize credit rating agencies and trade repositories. ESMA can supervise these entities and impose fines or periodic penalties on them. In doing so, ESMA procedures occur in an institutionally segregated fashion: an investigative officer will be responsible for conducting the investigation, whilst the Board of Supervisors will adopt a formal decision imposing a fine or periodic penalty payment.

The inclusion of the ESAs into the EU constitutional framework is most directly visible in the importance attached to judicial review of ESA Decisions. First, as EU bodies with legal personality, the ESAs can be held liable by the Court of Justice for damages inflicted on natural or legal persons. Second, the ESA Regulations established a joint Board of Appeal composed of legal experts. The Board is called upon to review decisions adopted by the ESAs. In cases where a Decision proves to be unlawful, the Board will have to remit the matter to the competent ESA. The latter will have to re-adopt its Decision. Board of Appeal decisions can subsequently be reviewed by the Court of Justice. In instances where the ESA Regulations do not provide for Board of Appeal intervention, the Court can directly review contested ESA Decisions. The present framework of Board of Appeal and judicial review is far from complete and reflects numerous gaps and inconsistencies. Many of these gaps will have to be clarified through judicial practice. At present however, the Board has not been called upon to take a decision. The ESA Regulations' importance attached to judicial review also affects the institutional outlook and the need for judicial review at the national levels. Whilst the Regulations do not concern national supervisory authorities, these authorities operate within the confines of Article 6 ECHR and Article 47 of the Charter. These provisions have been read to incorporate similar guarantees in relation to judicial review of national supervisory decisions. The Member States have indeed adapted their institutional functioning and judicial review provisions to the requirements posited by supranational provisions. In practice, these supranational 'due process' provisions still allow for various institutional formats to take shape across the Member States. Overall however, they serve as devices to converge both supranational and national actors towards a common 'due process' governance sphere.

398. *Constitutional transformations approach* – The descriptive analysis of supranationally structured market supervision schemes constituted the basis for a sector-transcending EU 'constitutional' transformations approach. It was submitted that EU law – and most notably the EU Treaty framework structuring market supervision mandates – serves as a benchmark for the development of supranationally structured market supervision mechanisms. From that point of view, the dissertation sought to identify how constitutionally structured mandates of market supervision diverge or converge in their practical operationalization. Three benchmarks had been identified to facilitate that assessment. First, the establishment of supranationally structured market supervision arrangements relies on a particular or more general *Treaty legal basis*. The ways in which that legal basis has been understood and the limits attached to it allow to discern the scope and format of institutional market supervision arrangements. Second, supranational law structures the *institutional interactions* between supranational and national authorities. It does so by attributing powers to supranational authorities or by delegating specific powers to national authorities. As a result, a level playing field emerges in which both the supranational and the national levels are *entitled* to specific

functions. In order to be able effectively to fulfil these functions, supranational law may require institutional adaptations at both levels. The *institutional interactions* benchmark sought to identify the extent and appearance of such requirements. Third, the obligation to provide for *complete judicial review* as a matter of EU constitutional law – confirmed in Article 19 TEU – served as a constitutional benchmark as well. The need for complete judicial review on the one hand included national courts into the operations of supranationally structured market supervision. National courts are in that image called upon to review national supervisory decisions in accordance with EU law requirements. From that point of view, the Court of Justice could be called upon to intervene in the institutional organization of national judicial review structures in order to guarantee the effective application of EU law. EU law can equally intervene in the organization of supranational supervisory structures. The Court's judicial protection mandate in Article 263 TFEU not only allows it to review the actions taken by supranational supervisory bodies, but also to annul EU rules that establish supranational supervisory structures. As such, the Court – and the interpretation it grants to the EU 'rule of law' – allow for the EU constitutional framework to shape and restrain the organization of supranational market supervision.

The constitutionally directly mandated field of EU competition law is structured in accordance with Articles 3(1)(b) and 103-105 TFEU. The former provision establishes that the determination of rules on competition necessary for the Internal Market shall be an exclusive EU competence. The latter provisions confirm and nuance that position. On the one hand, the Treaty framework entrusts the Commission with EU competition law supervision. On the other, it mandates the Council to strike a balance between effective supervision and simplified administration and refers to national authorities as supporting supervisory mechanisms. From that perspective, a combined reading of these legal bases allows for the establishment of a network based regime in which the Commission's supervisory role is complemented by national authorities applying EU competition law. A national operational support reading of Article 103 can indeed be said to underlie Regulation 1/2003. The same bases also justify the involvement of national courts in this endeavour. Two additional legal bases serve as a constitutional justification for the establishment of the system currently in force. First, despite references in Article 101(3) to agreements which should be 'declared' inapplicable, nothing in the wording of the exception regime impedes national authorities and courts from being called upon to engage upon such analysis. Second, Article 47 of the Charter of Fundamental Rights and the extensive interpretation granted to it allow for the inclusion of national authorities and courts into an EU-wide supervisory system.

EU law relied on mutually structured cooperative entitlements into supranational conflict, control and institutional adaptation rights to structure EU and national interactions in the realm of competition law supervision. These rights allow either national or supranational bodies to claim particular positions in determining the allocation of and supervisory review over decision-making powers. First, supranational conflict rights predominantly allow the Commission to withdraw a case from national authorities. National (judicial) authorities can also review Commission investigative measures and can have their position heard in the European Competition Network and Advisory Committee meetings. A similar EU-structured rights based regime does not operate in the horizontal cooperation between national competition authorities. Second, control rights serve to hold responsible actors to account. EU law mainly grants these rights to market operators. The role of the Council, European Parliament and national supervisory authorities is remarkably limited in that respect. The attribution of fundamental procedural rights to market operators and the availability of supranational judicial protection against infringements of such rights enables control over supervisory decision-making procedures. The Court's preliminary reference procedure fulfils

a similar role in introducing these fundamental procedural control rights into national legal orders. Third, the Court of Justice framed national institutional adaptation rights. These 'rights' allow the EU level to mandate organizational adaptations to national supervisory regimes. These adaptations are justified by the need to adequately guarantee fundamental procedural rights and by the need for an effective EU-controlled supervisory regime to take shape. At present, the Court's *Vebic* judgment could be read to mandate national organizational or procedural adaptations grounded in EU fundamental rights. The organizational templates within which national competition authorities can operate are as a result limited to formats EU law considers to be acceptable institutional organization mechanisms.

The narrative of national procedural autonomy and the limits identified by EU law serves as an additional constitutional tool to include national authorities and courts into a supranationally structured competition law supervision system. *Vebic* provided an inroad into defining and outlining a judicial commandeering approach that underlies the Court's actions in reviewing national market supervision frameworks. The commandeering approach justifies and enables the Court to define standards of adequate national procedure. These standards directly affect the ways in which national supervisory authorities operate. They could also indirectly serve as benchmarks for national institutional transformations. The approach effectively recognizes the subordination of national procedural frameworks to the necessities of EU law and the Court's fundamental role in striking a balance between supranational intervention and national procedural autonomy. In that understanding, national procedural frameworks operate under the threat of direct Court intervention. The fundamental right to effective judicial protection reflected in Article 47 of the Charter serves as the relevant supranational constitutional basis in that regard.

Contrary to the mandated field of EU competition law supervision, the establishment of supranational financial supervision mechanisms has entirely been based on the vague mandate read into Article 114 TFEU. That provision – read in conjunction with Article 291 TFEU and Article 47 Charter – has been interpreted to justify the establishment, the institutionalization of supranational cooperative rights and the development of a procedurally heteronomous framework. Doing so required a reading of Article 114 TFEU that had only limitedly been explicated in the Court's case law. The Court extensively interpreted the scope of Article 114 TFEU as enabling the adoption of a wide range of measures for the approximation of national law in the service of establishing and maintaining an Internal Market. That reading promoted a supranational operational support mandate. Such mandate enables the establishment of supranational agencies with binding decision-making powers. It equally allows to circumvent limits traditionally read into the *Meroni* case law on the institutional balance between the EU institutions. A supranational operational support mandate comprises a delegation from the national to the EU level. As such, an EU agency composed of national authorities' representatives can be said to provide an intermediate structure that would not be available should the Commission be made responsible for market supervision. That reading of Article 114 TFEU reflects a taste for inclusive constitutionalism. It understands national authorities as extensions of EU law that could as a result be subject to harmonization or complementary supervision at the supranational level.

The ESA Regulations provide for detailed supranational conflict and control rights. First, the ESA Regulations create and define a set of actual or potential conflict rights that are subsequently to be resolved in a hierarchical or heterarchical way. The adoption of binding ESA decisions is preceded by elaborate procedures in which national authorities can bring conflicting points of view to the table. The same goes for guidelines and recommendations

and for procedures resulting in the adoption of draft technical standards.. Most fundamentally, national authorities serve as constituent decision-makers in the ESA Board of Supervisors, allowing for a horizontal mechanism of conflict resolution. Voting procedures in that understanding ensure that different positions are being taken into account. Second, the ESA regimes structure an elaborate framework of control rights, through which both EU institutions and national supervisory authorities can hold the ESAs to account. These control rights are scattered throughout the regulatory framework and refute the provision that only the Council and European Parliament ensure the ESAs' accountability. The European Commission, the European Central Bank, the European Ombudsman, national authorities and market operators/stakeholders each contribute to the control over the ESAs' operations. Third, the ESA framework projects a preference for the institutional adaptation of national supervisory frameworks. Although the Regulations do not directly mandate such adaptations and the Court did not impose them in its case law, the information feeding role attributed to the ESAs and the division between macro- and micro-supervision at the EU level at least promotes such adaptations. Following on the recommendation in the *De Larosière* report that a national *Twin Peaks* regime would better fit the structures of the ESFS, multiple legal orders have made such adaptations. The question whether or not the EU would be entitled to such or similar adaptations has not however been tested before the Court.

Article 47 CFR potentially allows the Court of Justice to intervene in national procedural settings. These procedural settings include judicial review against national financial supervisory authorities. Throughout these actions, the institutional organization of national supervisory authorities could additionally be adapted in the light of EU law demands. It was argued that the ESA framework provides a basis for such procedurally heteronomous evolutions to develop. The Court additionally reflected a taste for substantive law heteronomy in its *Alpine Investments* judgment and in the inclusion of national authorities into a supranationally structured framework. Contrary to competition law enforcement, precedents like *Vebic* are lacking.

399. *Elements of institutional heteronomy as benchmarks of institutional functioning* – The constitutional transformations approach allowed to identify and classify different *elements* that structured supranational supervisory operations within a framework of institutional heteronomy. Institutional heteronomy refers to a situation in which national institutional arrangements are directly included as parts of a supranationally structured market supervision regime. The organizational features of these arrangements are no longer a matter of autonomous national law, but have been explicitly integrated into an EU law framework. The constitutional inclusion of supranationally structured supervision mechanisms – and their reliance on a Treaty legal basis, supranational cooperative rights and complete EU judicial review – allows to determine how constitutional law facilitates and structures particular kinds of governance mechanisms.

The elements identified indeed serve to explain how and why supranationally structured market supervision incorporates national authorities within its framework. Four elements have been identified in that respect. First, the presence of a *unity of policymaking* structure at the EU level facilitates the inclusion of national authorities and the ensuing diminution of national institutional autonomy. Since EU law regulates the substantive conditions of market regulation, national institutional frameworks can more readily be nudged towards compliance with effective EU law enforcement requirements. Second, EU law provides for *cooperative incentives* that entice national supervisory authorities to participate in an EU enforcement regime. These enticements grant particular incentives to national authorities to act as EU enforcement bodies. Cooperative enticements can vary between an obligation to apply EU law

and the promotion of exchanges of information or supranationally steered institutional cooperation mechanisms. The cooperative enticements thus provided effectively allow national authorities to cooperate, the proceedings of which may also result in institutional convergence among these authorities. Third, EU law provides for complementary and systemic supervision. A supranational body is called upon to scrutinize the operations of national supervisory authorities. Whilst such supervision generally relates to the correct application of EU substantive standards, the effective application of such standards may require institutional adaptations at the national level. EU supervisory bodies are in that regard responsible for the adequate functioning of the supranationally structured system. To the extent that national supervisory authorities do not properly manage to ensure the aims of EU law, EU law might have to intervene and require national institutional adaptations. Fourth, national authorities have to operate in a system of *hierarchical quasi-duality* with a view to facilitate national institutional adaptations in the service of EU law. On the one hand, national authorities remain bodies established in accordance with national law and staffed by national officials. On the other, national bodies operate in a direct hierarchical relationship to EU law and to EU complementary supervision structures. EU constitutional law effectively allowed for such hierarchical relationship to emerge and to be sustained.

Despite institutional differences and nuances related to the use of different legal bases, the abovementioned elements of institutional heteronomy can be identified in both market supervision regimes. EU competition law supervision operates against the unitary background of *de iure* EU exclusive competences outlined in Article 3(1)(b) TFEU. Article 114 TFEU allowed for a *de facto* unitary supranational legal framework to emerge. Within that framework the scope for Member States to adopt deviating legislative or regulatory standards has significantly been diminished. Both systems incorporate cooperative incentives through the 'rights'-based structures of specific networks: the ECN and the ESFS. The European Commission or the ESAs serve as complementary systemic supervision bodies in that regard and operate from a primus super pares position within the network structure. In doing so, EU law establishes a hierarchical quasi-duality to emerge in both sectors.

EU constitutional law essentially structures both institutionally heteronomous regimes. In both sectors, a Treaty legal basis establishes an operational support regime structured by supranational cooperative conflict, control and adaptation rights. The Court of Justice has additionally intervened – or its intervention has been facilitated or envisaged – to establish a procedurally heteronomous context in which supranational and national institutional adaptations can more easily be justified as a matter of EU constitutional law.

In addition to both case studies, the dissertation also summarily outlined the institutional operations of two indirectly mandated and one directly mandated control group sectors in its fourth part. The supervision of chemical products authorizations, the enforcement of EU consumer protection law and the supervision of market liberalization in the electronic communications and energy sectors have briefly been outlined. These control group sectors remarkably navigate between a Commission-based networked supranational market supervision model and an agency-structured network complementing both the Commission and national supervisory authorities. On a more abstract level however, they also operate in accordance with the *elements* of institutional heteronomy outlined above. Depending on the system at hand, different elements of institutional heteronomy have more or less been developed. In all instances however, a hierarchical quasi-dual model of institutional intertwinement is taking shape, effectively including national authorities into an EU regulatory and supervisory model. In particular, EU law is directly called upon to facilitate and operationalize such quasi-dual model.

Chapter 2. Settlement: constitutionally regulated market supervision as reflexive regulatory coopetition

400. *From elements to principles of institutional heteronomy* – The elements of institutional heteronomy allow to identify converging tendencies in the institutional organization of directly and indirectly mandated market supervision mechanisms. Despite being structured in accordance with different constitutional mandates, the constitutional proxies of legal bases, supranational coordination rights and judicial review have allowed for institutionally heteronomous market supervision governance mechanisms to emerge. This dissertation argued that the converging tendencies underlying the institutional organization of market supervision in both directly and indirectly mandated supervision structures can be attributed to similarly structured constitutional meta-principles underlying the EU Treaty framework. These meta-principles appear throughout particular Treaty provisions and seek to shape the EU constitutional framework as a tool of governance. In doing so, they comprise structural principles that govern regulatory interactions between the supranational and national levels and the ways in which supranational and national law intertwine.

It was submitted that both constitutional mandates governing the organization of market supervision mechanisms operate in accordance with principles structuring the exercise of shared competences recognized in EU law. Despite EU competition law being considered an exclusive competence, Article 103(2) TFEU effectively promoted and enabled the sharing of enforcement powers between the supranational and national levels. It was therefore posited that the underlying principles determining the extent of sharedness of competences could also apply to that supervisory field. Following an overview of the principles governing shared competences, the dissertation extracted five meta-principles: a conferral focus principle, two conferral scope principles (subsidiarity and proportionality), a principle of sincere cooperation and a principle of functional national institutional autonomy underlying the system of governance inaugurated by the EU Treaty framework.

The analysis then proceeded to identify the shaping of these principles in theoretical frameworks of European integration, with a view to translate them into workable standards of EU-national interaction in the realm of EU market supervision governance. An overview of economics and federalism literature confirmed that these principles effectively underlie the Treaty framework. Theories of economic and fiscal federalism focused on the substantive of subsidiarity and the underlying reasons for the attribution of regulatory powers to a supranational governance level. They justify federal regulatory powers with a view to enable and maintain a market for regulatory competition among defederated entities. That market is to promote a race among these entities towards an efficient and welfare-enhancing regulatory framework. This dissertation identified two presumed 'markets' underlying economic federalism theories. First, regulatory intervention served as a means to bring about a market in which operators could most effectively contribute to the most efficient allocation of goods and services. Regulatory intervention addresses information problems and similar negative externalities. The establishment of such market sphere across the Member States can be posited as an end of European integration. Second however, theories of federal regulation equally support the establishment of a market among public entities *as a means* to effectuate the Internal Market. The second market – a market among regulatory bodies – is believed to bring about the first market in a less intrusive and more effective way. Theories of regulatory competition precisely serve to regulate the second market as a necessary means to bring about an efficient market operators' market.

Following this conceptual distinction between two markets, the dissertation focused on the theoretical underpinnings identified in relation to the second – public regulators' – market. In doing so, it outlined theories related to regulatory races, (reflexive) harmonization, functional alternatives and regulatory coopetition as explanatory and normative frameworks for the emergence of such markets. In the image of all these theories, the federal or supranational level should at least intervene to enable and maintain a regulatory market. It should also address negative externalities impeding the effective operations of that market. The theories do however differ on the the extent to which such externalities are indeed present and the regulatory tools required for their remediation. In doing so, different theories placed different accents on either regulatory cooperation and competition. Detached from more concrete federalism structures, each theory would serve as a viable efficiency benchmark to give shape to supervisory governance mechanisms.

The dissertation therefore proceeded to connect these explanatory theories to the legal-theoretical frameworks of *federalism* underlying EU law. It identified different approaches to federalism and sought to connect these with the abovementioned theories of economic federalism. It subsequently sided with the claim that the EU constitutional framework embraces a *cooperative federalism* logic, which gives shape to a *regulatory coopetition* framework in which supranational cooperation techniques constitute a necessary precondition for competitive regulatory interaction. Regulatory coopetition as an underlying framework for cooperative EU federalism in that image constitutes the theoretical background against which a reconfiguration of constitutional principles governing shared competences could be proposed.

401. *Reconfigured principles as operational maxims* – The dissertation subsequently proceeded to shape the identified structural meta-principles in the light of a regulatory coopetition-enhancing cooperative federalism interpretation. Doing so resulted in the identification of a national institutional adaptations' focus, a principle of second-resort supranationalism, a principle of pro-active interventionist commandeering, a constitutional technique of institutional obstacle pre-emption giving shape to effectiveness and a principle of mutual cooperative conflict, control and adaptation rights. These newly identified focuses, principles and techniques give shape to otherwise open-textured constitutional principles governing shared competences. In doing so, they serve to justify the emergence of institutionally heteronomous governance regimes. From that point of view, the principles identified could be structured as explanatory constitutional devices giving shape to the emergence of institutionally heteronomous market supervision mechanisms. Principles and elements of institutional heteronomy operate in a framework of *mutual dependency*.

The mutual dependency identified allowed to move from descriptive analysis to normative theorization. The dissertation built upon the mutual dependency of principles and elements to conceptualize an institutionally heteronomous framework into prescriptive *operational maxims.* These maxims would guide the institutional organization of market supervision arrangements in EU law. On the one hand, operational maxims would justify the appearance of elements of institutional heteronomy in the sectors scrutinized in the disseration. On the other, they could also serve as institutional design guidelines serving as constitutionally sanctioned standards which should be taken into account when designing supranationally structured market supervision regimes.

The extraction of operational maxims from identified principles and elements of institutional heteronomy encapsulates a particular approach to law and economics. It understands EU constitutional law as a tool for governance. Constitutional principles are in that understanding

malleable in accordance with a particular economic theory that best reflects the policy-making preferences underlying the operations structured within a constitutive framework. The operational maxims demonstrate how a regulatory coopetition-focused reading of the EU's Treaty principles governing shared competences shapes the law and the ways in which it is operationalized in particular supervisory regimes. In that understanding, a legal analysis serves to outline the extent to which regulatory coopetition considerations have been taken into account. From that perspective, he regulatory coopetition image provides an *antithesis* to the understanding of dual and separated enforcement positions underlying EU market supervision. In that understanding, national authorities are responsible for the day-to-day implementation and enforcement of EU-determined policy standards. Whilst such understanding is not entirely inaccurate, the constitutional principles of institutional heteronomy demonstrate that it requires some nuance. Heteronomous principles and operational maxims structure supranational and national authorities into a singular enforcement structure by virtue of cooperative rights and other constitutional intervention techniques. In doing so, the dual structure of EU law enforcement is replaced by an integrated supervision image governing the supervision of EU law across the Member States. A regulatory coopetition reading in that understanding triggers a new *synthesis* grounded in refined and reconfigured constitutional principles.

402. *Reflexive regulatory coopetition as restraining framework* – The identification of operational maxims provided a basis for a framework of *institutional settlement* providing an institutional equilibrium underlying the institutional organization of supranationally structured market supervision. The notion of institutional settlement refers to the allocation and division of decisionmaking powers to institutions best suited to decide on particular questions. The equilibrium attained in that regard outlines the ways in which different institutions or organizations cooperate and interact with a view to bring about the most effective and constitutionally sound decision-making process. This dissertation undertook to identify the institutional settlement underlying the division of supervisory competences and the institutional frameworks enabling such division in EU law. It relied on the operational maxims to outline a framework of institutional design and institutional implementation powers divided among the EU legislature, EU administrative agencies, EU Courts, national legal orders, national administrative authorities, national judges and market operators. The settlement thus appearing demonstrated that EU constitutional principles – and derived operational maxims – create a level playing field in which supranational and national as well as private market operators are effectively intertwined.

The intertwinement of different institutional actors on the basis of reconfigured constitutional principles of institutional heteronomy has subsequently further been theorized upon. It was held that the institutional settlement identified could be relied on to project a framework of *reflexive regulatory coopetition* as a way forward for EU integration through law. In the image of *reflexive regulatory coopetition*, supranational law should contribute to an institutional race to the top among diverging national organizational frameworks. Such race to the top should not however be a means towards a singular EU-wide model of market supervision governance, but should rather enable the constant re-invention and re-consideration of national and supranational institutional arrangements. In doing so, a regime of reflexive convergence would arise. Reflexive convergence aims to promote continuous institutional shifts for the benefit of more efficient operationalization of EU norms. Institutional shifts in the long run still converge towards a singular framework, but that framework should continuously grant room for continuous institutional experimentation. EU constitutional law should enable and facilitate such continuous experimentation. The principles governing institutional heteronomy allow for such experimental context to arise and

to remain in place. The establishment of second-resort supranational bodies, supported by institutional obstacle pre-emption techniques and the adoption of a set of adequate institutional organization principles could effectively contribute to an experimental context.

The reflexive nature of an envisaged regulatory coopetition framework restrains the focus of EU intervention in the institutional organization of market supervision arrangements. It limits the establishment of EU-wide supervisory bodies and defers the institutional organization of market supervision bodies to national legal orders. At the same time, it allows for the inclusion of these diversified bodies into supranationally structured regulatory networks. Such inclusion should not constitute an intermediate stage towards a full-fledged supranational supervisory authority, but should rather enable national diversity as a constitutional principle of European integration. The dissertation nevertheless pointed towards difficulties or nuances in the institutional operationalization of these principles in both directly and indirectly mandated market supervision initiatives. First, a specific Treaty mandate could always provide for the creation of a full-fledged supranational supervision mechanism, as Articles 104 and 127(6) demonstrate. The intertwinement of these supranational mechanisms with a regulatory coopetition framework read into more general Treaty bases such as Articles 103(2) and 114 TFEU results in institutional misalignments. The interactions between the Banking Union and the ESA framework serve as an example in that regard. Second, the institutional delegation mandate identified in Article 114 TFEU does not in itself provide meaningful regulatory coopetition boundaries to EU institutional action. Such boundaries have to be read explicitly into that provision by the EU legislature and the EU Courts. Nothing would however seem to impede a different reading being adopted to the extent that the felt necessities of EU integration would justify such different reading. The EU's one way road therefore relies on a precarious legal basis and should at least be nuanced.

The restraining focus of a *reflexive regulatory coopetition* framework also demonstrates that refined constitutional principles do not presuppose the incorporation of pure economic theories into law as an absolute aim. Law – and constitutional law in particular – rather serves to modify and apply such theoretical insights to the practical necessities of maintaining an effective and politically viable legal system. Legal principles and economic insight can be said to co-evolve in that image. In that understanding, the operational maxims only provide guidelines that can in practice be frustrated by political compromise. Only if and to the extent that the Court of Justice is willing or able to police regulatory coopetition standards as constitutional principles of European integration will the integrity of a theoretical framework be maintained in practice. As long as the Court is not adopting that approach, the operational maxims will serve as mere policy guidelines. At present, the Court only indirectly addressed and enforced the principles and maxims identified.

403. *Reflexive regulatory coopetition as enabling instrument of constitutional design* – Despite its limits, the proposed *reflexive regulatory coopetition* approach could be relied on to predict and delineate institutional initiatives across different market supervision sectors. This dissertation applied the reflexive coopetition framework as an outlook for potential institutional innovations in EU consumer protection cooperation and EU railway supervision. In both instances, it sought to predict how the principles of institutional heteronomy and the reflexive regulatory coopetition image they incorporated could be transformed into practical institutional policy improvements. A transformation of the Consumer Protection Coordination network into a supranational coordinating structure would first of all require the coordination and convergence among diversified national authorities and bodies. At the same time, these bodies would need to retain their essentially experimentalist role. The establishment of a European Railway Supervisory Agency to the image of either BEREC or ACER would not be

impossible within the current constitutional framework. The principles governing institutional heteronomy would nevertheless grant significant room for different institutional varieties to take shape within these principles. Both instances showcase that the principles of institutional heteronomy – and the operational maxims derived therefrom – could serve as guiding policy beacons for the development and design of new or upgraded supranationally structured market supervision arrangements.

404. *No normative preference for institutional heteronomy* – Despite the guiding function attributed to institutional heteronomy principles, it should be clear that the reflexive regulatory coopetition structure underlying EU is not presented as the only desirable way forward for the institutionalization of supranationally structured market supervision in EU law. This dissertation rather argued that EU constitutional law is relied on to justify, enable and restrain supervisory governance arrangements structured along a reflexive regulatory coopetition framework. Reliance on EU constitutional law to bring about these arrangements does not however ensure that such arrangements should be considered the best or only desirable frameworks of reference. It has been argued in the context of EU regulatory agencies that 'it is not at all demonstrated that national administration is induced to modify its practice in relation to the behaviour and mobility of the regulatees. Nor is it demonstrated that the polycentric structure of the regulatory system opens the way to a race to the top'.[1971] Whilst such results may not indeed be attained in practice, it could be argued that EU constitutional law prefers them to be attained. EU law structures supranational and national supervisors in order to bring about an institutional framework of market supervision grounded in reflexive regulatory coopetition. This dissertation identified the constitutional techniques according to which such framework is believed to flourish in the EU. It did not however explicitly advocate a normative preference for such model to emerge as the best way forward for European integration.

[1971] E. Chiti, note 1507, 1412.

Chapter 3. Prospects: towards an enhanced balance between efficiency and justice in EU market supervision

405. *Towards a new image of legitimate EU-structured intervention* – Whilst the EU Treaty framework formally projects a regime of multi-level governance on the basis of conflict resolution principles (first generation principles) of primacy/supremacy and direct effect, it additionally incorporated second generation principles of subsidiarity, proportionality, sincere cooperation and institutional autonomy limited by the concept of EU law pre-emption. These principles complement the conflict resolution values underlying primacy and direct effect, but at the same time serve as benchmarks for more intense cooperation between governance levels. In my doctoral dissertation, I argued that these second generation principles provide a basis for the conceptualisation of so-called *third generation principles* underlying the EU constitutional framework. The latter principles – not directly referred to in the EU's formal constitutional framework, the Treaties – comprise *operational maxims* that structure EU-Member State interactions and serve to design and sustain a relationship based on cooperation rather than conflict or mutual exclusion of regulatory powers. In doing so, third generation principles shape and render more concrete vague organisational principles such as *subsidiarity, due process* or *sincere cooperation* and transform these principles into the backbones of a particular *multi-layered quasi-federalism* system underlying European integration.

The reconfigured constitutional principles of institutional heteronomy not only outline the allocation of institutional competences among the supranational and national levels. They also invigorate novel tools for EU intervention in national legal orders through economically justified commandeering and institutional obstacle pre-emption. In doing so, the present markers of what legitimate EU intervention in such national orders amounts to are challenged. Discussions on legitimate EU intervention entails have so far largely focused on balancing *efficiency* and *justice*.[1972] In order to maintain an operational and effective regime grounded in law, both elements should be present. Principles governing the institutional architecture of an enforcement system traditionally only concerned a secondary issue that related both to efficiency and justice requirements.

406. *Legitimacy as balancing efficiency and justice* – Efficiency refers to the emergence or maintenance of a system that most effectively contributes to the realisation of substantive (economic or political) goals. Law is perceived as legitimate if and to the extent that it contributes to these goals. In that image, law's legitimacy is directly focused on the *output* generated by that law. Concerns about democratic, transparent or equitable processes underlying the adoption of such norms are downplayed in favour of efficiency elements. This kind of *output legitimacy* has long dominated EU discourse and has served as a justificatory tool to do away with so-called democratic deficit critiques that progressively accompanied wider EU integration initiatives.[1973]

[1972] See for an application of that distinction in the realm of EU competition law, W. Wils, note 76, v; See also J. Flattery, note 282, 53; M. Trebilcock and E. Iacobucci, note 550, 458.

[1973] Connecting output with *utility*, see M. Haller, 'Is the European Union Legitimate? To what extent?', 60 *International Social Science Journal* (2009), 223. See also F. Scharpf, *Governing in Europe. Effective and Democratic?* (Oxford, Oxford University Press, 1999), 256 pp.; See also, G. Majone, 'Europe's Democratic Deficit', 4 *European Law Journal* (1998), 5-28. Scharpf and Majone contrast the Union's useful output with a faulting input system – the so-called democratic deficit. See for an additional conceptualization, V. Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Output, Input and Throughput', KFG Working Paper Series, No. 21, November 2010, *Kolleg-Forschergruppe* (KFG) "The Transformative Power of Europe"

In order to be perceived legitimate, the nature and scope of the output generated by a system of laws should in that image be clear at the outset. Vague and open-ended market integration standards as such hardly qualify as a direct guarantor for legitimate EU intervention in national legal orders. In different subfields of EU law, more specific efficiency/output standards have been developed. EU competition law provides an example, as its goals have shifted over time. Efficient EU competition law was perceived as promoting market integration[1974] and competitor protection.[1975] In the 1990s, increased attention for *consumer* protection translated into a specific combination of market integration and consumer welfare.[1976] Increased attention to 'consumer welfare' equally underlies the 'more economic approach' in EU competition discourse.[1977] The latter perspective is at present considered to legitimize supranational intervention through competition *law*.[1978] From an output perspective, EU competition law rules and a supporting enforcement system would be legitimate once concrete national and EU decisions support the idea of consumer welfare and incorporate that idea in the application of legal rules and principles. The legitimacy of competition law enforcement as a result depends on the substantive output of competition law enforcement agencies. In the realm of the Internal Market for financial services, supranational intervention was legitimized through a need for the opening of national markets for non-Member State undertakings in order to bring about economies of scale and to develop more beneficial competitive practices for consumers. At the same time, consumers had to be protected against these new market operators operating in the Internal Market. In order to guarantee consumer trust and minimize transaction costs for consumers in that regard, common (minimum) protection standards had to be adopted.[1979] Growing economies of scale in return necessitated a common approach to enforcing supranational standards. The establishment of supranationally structured market authorities could therefore be legitimized.[1980] As such, the legitimacy of EU financial regulation equally presupposes more efficient and barrier-free rules and enforcement frameworks for financial market operators (both providers and consumers).[1981]

Output legitimacy standards do not in themselves however establish why, how and to what extent supranational intervention should be warranted. It has for instance been argued that mere attention to efficiency and output cannot alone justify an enforcement system capable of imposing particularly severe sanctions on individuals.[1982] These individuals also demand a 'just' environment in which their claims on whether or not practices threaten substantive goals, could be heard and discussed. As a result, the output of a legitimate enforcement

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Freie Universität Berlin, available at http://userpage.fu-berlin.de/kfgeu/kfgwp/wpseries/WorkingPaperKFG_21.pdf.

[1974] See R. D. Kelemen, note 278, 153; D. Gerber, note 125, 343.

[1975] J. Joshua and C. Harding, note 281, 117-118 pinpoint the early competitor protection dynamic in the earliest cartel decisions.

[1976] See P. Akman, 'Consumer Welfare and Article 82 EC: Practice and Rhetoric', 32 *World Competition* (2009) 71-90; B. Jedličková, 'One among many or one above all? The role of consumers and their welfare in competition law', 33 *European Competition Law Review* (2012), 568-575. For a different opinion, see R. Nazzini, *The Foundations of European Union Competition Law. The Objective and Principles of Article 102* (Oxford, Oxford University Press, 2012), 400 pp.

[1977] G. Monti, 'Article 81 EC and Public Policy', 39 *Common Market Law Review* (2002), 1057-1099.

[1978] See recently P. Ibanez Colomo, note 79, 542, in which the justification for the law is supposed to lie in its use for bringing about these economic goals.

[1979] See the justifications in the White Paper on the Completion of the Internal Market, note 621.

[1980] See the justifications in Recitals 1-8 ESA Regulations.

[1981] On consumer financial protection in EU law, see Article 9 ESA Regulations, which serves partly as a justification for the ESAs' existence.

[1982] On the need for a more justice-oriented public enforcement scheme as a corollary to ever increasing sanctioning practices, see R. Nazzini, note 412, 6.

system requires a complementary input set of 'justice' or 'due process' standards.[1983] These input standards governed the *pre-adoption*, *decision-making* and *post-adoption litigation* stages of EU law application. At the pre-adoption stage, input legitimacy standards seek to address democratic participation, transparency and consultation requirements.[1984] At the decision-making stage (both general and individual[1985]), input standards aim to guarantee an informed decision following consultation with and hearing of parties concerned.[1986] At the post-adoption litigation stage, input standards foresee the availability of independent and impartial judicial review, during which a meaningful debate on the legality merits of a particular decision can be conducted in an adversarial context.[1987] These input standards complement output/efficiency by guaranteeing a *procedural justice* framework through which a perception of *fairness* is attached to such efficient outcomes.[1988]

Attention to balancing efficiency and justice also presents a framework of understanding for the institutional adaptations summarized above.[1989] As a general perception, supranational and national institutional transformations mainly reflect a shifting balance between efficiency and justice struck at a particular time in a particular policy context. In this classical perception, the modified institutional architecture of EU market supervision is not considered an independent proxy of legitimate EU law. It provides a mere facilitating mechanism in order to guarantee a legitimately balanced input/output structure, but no direct proxy to assess the legitimacy of a particular intervening legal framework.

407. *Beyond efficiency and justice* – The case studies explored in this dissertation demonstrated that EU law intervention in national legal orders is no longer solely confined to balancing efficiency and justice justifications. EU law's perception of legitimacy includes the reconfiguration of national institutional arrangements to a supranationally designed ideal. That institutional ideal lies in an organizational framework through which efficient outcomes and justice-enhancing input mechanisms can coalesce within a specific EU-tailored framework. As EU and national frameworks function within an integrated constitutional setting, national authorities have to legitimize their operations, actions and omissions in the light of EU law. The organizational requirements imposed by EU law – either by its legislature or its judiciary – in that image serve as precursors for legitimate EU intervention in the input and output realm.

[1983] The distinction between output as efficiency and input as justice is not entirely aligned to recent legitimacy studies that distinguish input, *process* and output within a wide variety of legitimacy discourses, see C. Lord and P. Magnette, 'E Pluribus Unum? Creative Disagreement about Legitimacy in the EU', 32 *Journal of Common Market Studies* (2004) 183-202; the three-layered legitimacy framework even entered the realm of judicial decision-making, as it supported Advocate General Sharpston's Opinion in Joined Cases C-128/09, C-129/09, C-130/09, C-131/09, C-134/09 and C-135/09, *Boxus*, *nyr*, judgment of 18 October 2011, para 84. For the purposes of this dissertation, the notion of process forms part of the concept of input, complementing the necessity of effective competition law enforcement (output).

[1984] On democratic enhancements in the European Union as a remedy for this so-called deficit, see V. Schmidt, note 1973, 11, focusing on the contrast between output and input.

[1985] On the relevance of that distinction in EU administrative law, see P. Craig, note 350, 298-303.

[1986] See J. Flattery, note 282, 76. The ESMA supervision regime is built on similar procedural guarantees, see Article 23e CRA Regulation.

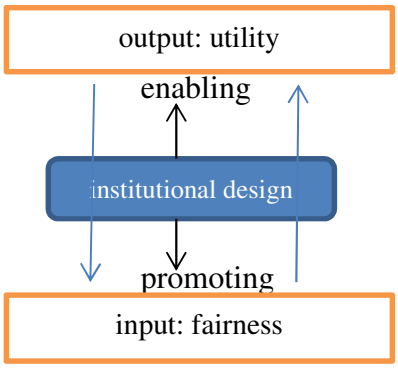
[1987] See P. Craig, note 350, 294-297.

[1988] On fairness and procedural justice in EU law, see in general E. Barbier de la Serre, 'Procedural Justice in European Community Case-law concerning the Rights of the Defense: Essentialist and Instrumental Trends', 12 *European Public Law* (2006), 225-250. See also F. de Witte, note 61, 700, attributing EU intervention to moulding policy choices. EU's legitimacy would then arrive from steering national decision-making to incorporate interests of those excluded in national decision-making processes.

[1989] For a summary overview of the input-output legitimacy debate, see D. Keyaerts, *Better regulation en de EU-rechter: een overbrugbare kloof* (Bruges, Die Keure, 2012), 25-32.

In particular, the Court's or EU legislature's identification and imposition of principles of adequate national institutional organization is influential in that regard. That Court in that instance directly considers and evaluates the institutional architecture of national competition law enforcement structures. It also confirms an essential 'engineering' role that is reflected into institutional architecture as an additional tool to ensure legitimacy. By identifying particular principles of institutional organisation, the Court and EU legislature are able to require national and supranational innovations to adhere to a set of principles that in themselves promote justice and enable an efficient competition law enforcement regime. Principles of institutional organisation are not however merely static elements reflecting the current balance of efficiency and justice considerations. As flexible and judicially refined standards of good institutional practice, they allow for the institutional architectural framework to be engineered towards desirable policy goals just like efficiency and justice concerns do. In order to be perceived legitimate, particular principles of institutional organisation have been engineered into the architectural system of law.

The following scheme incorporates these three legitimacy perspectives in a supranationally structured institutional setting:



408. *Institutional engineering and EU legitimacy* – According to the image projected by the institutions in the organization of market supervision, the legitimacy of EU law intervention in national legal orders should no longer exclusively be assessed solely from the vantage points of efficiency and justice, it should also reflect an inherent set of institutional engineering principles that shape and reshape the institutional architecture as an end in itself. Engineered institutional architecture thus complements both output and input and becomes a self-standing value framework in order to justify and legitimise particular choices made in the realm of EU market supervision. Supranationally structured institutional engineering is thus considered to contribute to both efficiency and justice. At the same time, engineering in itself presents a dynamic process that facilitates the interaction between efficiency and justice. It joins both aims around a particular 'engineered' institutional structure that is deemed to be legitimate in and of itself on the basis of particular principles of institutional organization. In that image, legitimate EU law intervention into national legal orders is not only premised on efficiency and justice concerns, but also on the extent to which it brings about institutional preconditions legitimizing particular input and output conditions. These institutional organization principles thus serve as precursors for legitimate – balanced efficient and just – EU intervention.

This image enriches and complicates the framework of EU legitimacy. On the one hand, perceptions of EU law' legitimacy present a two-way road. The intervention of EU law in national legal orders should not only be balance efficiency and justice, it should equally operate in a national organizational framework capable of institutionally accommodating these demands. To that extent, national legal orders serve as enablers for EU law to be

perceived legitimate. On the other, the understanding of legitimate EU intervention through the prism of national institutional adaptations essentially frustrates Member States' roles as safeguards of legitimate EU intervention. It should indeed be remembered that EU law – either the legislature or the judiciary – itself places institutional adaptation burdens on these national legal orders. In order for EU law to be both efficient and just, national legal frameworks need to be adapted in accordance with an institutional image imposed upon national legal orders by the very same EU legal structures that are in need for national law legitimation.

409. *Institutional design powers as legitimating intervention techniques* – The scope of legitimate EU intervention into national law is directed by supranationally determined 'institutional organization' principles. In that image, EU constitutional law itself determines the boundaries of legitimate EU intervention in national legal orders. As the abovementioned graph demonstrates, EU institutional requirements serve as an inroad for efficient and justice-enhancing EU law into national legal orders. The institutional preconditions provide tools in accordance with which national institutional adaptations have to occur in order to be perceived as legitimate from an EU perspective. Legitimacy no longer presents a nationally imposed limit on EU intervention. It reflects a mutual framework of understanding and interaction governed by a set of principles determined at the supranational level. In that image, national legal orders are effectively integrated into a supranationally structured framework.

This institutional convergence understanding of legitimacy justifies the emergence and operationalization of a constitutional framework of *reflexive regulatory coopetition*. Reflexive regulatory coopetition presupposes an EU framework that justifies national institutional adaptations. At the same time, national structures retain their autonomy to the extent that competition on the institutional merits of national diversity remains more beneficial for EU institutional integration. The efficiency and justice standards in that regard provide barriers to the intrusion of EU law in the national legal orders. These barriers to intrusion are nevertheless structured within an institutional or organizational framework laid out at the supranational level.[1990] In that understanding, assessments of legitimate EU intervention would be required to take that framework as a starting point. The development of EU institutional organization principles thus reflects a balance between cooperation and competition. That balance additionally serves as a means to balance efficiency and justice resulting from EU intervention in the institutional organization of Member States' supervisory authorities and arrangements. In doing so, the identification and delimitation of institutional organization principles serves as a precondition to determine the scope of legitimate EU intervention striking an appropriate balance between efficiency and justice.

410. *Concluding remarks* – In the image projected in this section, legitimate EU intervention lies in the development of legislative or judicial supranational principles that seek to include national supervisory authorities into a supranationally structured market supervision regime. In order to be perceived legitimate, EU intervention in this field should not only concern market regulation, but equally incorporate the adoption of coopetitive principles allowing for supranationally structured supervision frameworks to emerge. This dissertation argued that converging constitutional principles underlying institutionally heteronomous evolutions serve as means to justify EU institutional interventions into national organizational market supervision structures. The image of reflexive regulatory coopetition adds to that perspective by explicitly impeding EU law from completely usurping national institutional autonomy. In

[1990] See for a similar understanding, C. Scott, note 523, 61-62.

order to be perceived legitimate, EU law should essentially include national authorities into its supranational operations and structures.

The identification of preliminary institutional organization principles that determine the legitimate outlook of EU intervention emphasizes the intertwinement that has taken place between the EU and the national levels. As a matter of EU law, national legal orders serve as extensions to EU law principles. Such 'extension' focus consistently appeared throughout EU 'governance' scholarship that sought to identify the processes and structures remedying deficiencies in EU 'hard law' principles and concepts.[1991] Softer network structures have indeed more readily included national actors into an EU governance mandate. This dissertation fundamentally maintained that such governance initiatives do not only take place in the shadows of EU law, but are essentially structured by and operated through EU constitutional principles.

EU constitutional law in that image does not present a set of norms and principles that are difficult to square with more informal EU governance. It rather projects *a tool of EU governance in its own right*, seeking to legitimize, structure and restrain EU intervention into national legal orders. EU governance mechanisms – such as networks – therefore serve as inherent parts of the EU constitutional order. EU constitutional law essentially serves to legitimize, enable and restrain the development of heteronomous governance mechanisms that seek to include national authorities into an ever closer Union among the peoples – and States – of Europe.[1992]

[1991] See for references, note 1970.

[1992] Referring to one of the preambles of the TEU, which reads that the High Contracting Parties to the Treaty are resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity.

Bibliography

Legislation

European Union primary legislation

Treaty establishing the European Coal and Steel Community of 18 April 1951, 261 *United Nations Treaty Series* 140.

Treaty establishing the European Economic Community of 25 March 1957, 298 *United Nations Treaty System* 11.

Treaty on the European Union, [2008] O.J. C115/13.

Treaty on the Functioning of the European Union, [2008] O.J. C115/47.

Charter of Fundamental Rights of the European Union, [2010] O.J. C 83/02.

Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank, [2010] O.J. C83/230.

Protocol No. 26 on Services of General Interest, [2010] O.J. C83/308.

Protocol No 27 on the Internal Market and Competition, [2010] O.J. C83/309.

Treaty establishing The European Stability Mechanism, 2 February 2012, available at http://www.esm.europa.eu/pdf/esm_treaty_en.pdf.

European Union secondary legislation (including Commission guidelines, declarations and proposals)

Council Regulation 17 implementing Articles 85 and 86 of the Treaty, [1962] O.J. L 13/204 (English Special Edition, Chapter 1959-1962, 87).

Regulation 99/63 of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17, [1963] O.J. L127/2268 (English Special Edition Series I Chapter 1963-1964, 47).

Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, [1984] O.J. L250/17.

Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, [1985] O.J. L210/85.

Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, [1985] O.J. L372/31.

Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, [1987] O.J. L42/48.

Council Regulation (EEC) No. 4064/89 of December 21, 1989 on the control of concentrations between undertakings, [1990] O.J. L257/13.

Council Directive 89/107/EEC on the approximation of the laws of the Member States concerning food additives authorized for use in foodstuffs intended for human consumption, [1989] L40/27.

Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, [1989] O.J. L 386/1.

Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, [1990] O.J. L158/59.

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, [1993] O.J. L95/29.

Council Regulation 2309/93 of 22 July 1993 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Agency for the Evaluation of Medicinal Products, [1993] O.J. L214/1.

Commission Notice on the cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, [1993] O.J. C39/6.

Council Regulation 40/94 of 20 December 1993 on the Community trade mark, [1994] O.J. L11/1.

Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, [1994] O.J. L280/83.

Commission Decision 94/810/ECSC-EC of 12 December 1994 on the terms of reference of Hearing Officers in competition procedures before the Commission, [1994] O.J. L 330/67.

Council Regulation 2100/94 of 27 July 1994 on Community Plant Variety Rights, [1994] O.J. L227/1.

Regulation 258/97 of the European Parliament and Council of 27 January 1997 concerning novel foods and novel food ingredients, [1997] O.J. L43/1.

Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concernign misleading advertising so as to include comparative advertising, [1997] O.J. L290/18.

Commission notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 and 86 of the EC Treaty, [1997] O.J. C313/3.

Commission Regulation 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty, [1998] O.J. L 354/18.

Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, [1998] O.J. L166/51.

Commission guidelines concerning the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, [1998] O.J. C9/3.

Directive 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, [1999] O.J. L171/12.

Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, [2000] O.J. L126/1, as recast by Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions, [2006] O.J. L177/1 and by Directive 2006/49/EC of 14 June 2006 on the capital adequacy of investment firms and credit institutions, [2006] O.J. L177/201.

Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways, [2001] O.J. L75/1.

Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, [2001] O.J. L75/29.

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), [2000] O.J. L178/1.

Directive 2001/82/EC of 6 November 2001 on the Community code relating to veterinary medicinal products, [2001] O.J. L311/1.

Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, [2001] O.J. L311/67.

Commission Decision 2001/462/EC-ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, [2001] O.J. L162/21.

Commission Decision 2001/527/EC of 6 June 2001 establishing the Committee of European Securities Regulators, [2001] O.J. L191/43.

Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), [2002] O.J. L108/7.

Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), [2002] O.J. L108/21.

Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ("Framework Directive"), [2002] O.J. L108/33.

Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), [2002] O.J. L108/51.

Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, [2002] O.J. L271/16.

Regulation 178/2002 of the European Parliament and Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food SafetyAuthorityand laying down procedures in matters of food safety, [2002] O.J. L31/1.

Council Regulation 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments, [2002] O.J. L53/1.

Commission Decision 2002/627/EC of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services, [2002] O.J. L200/38.

Regulation 1592/2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency [2002] O.J. L240/1.

Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] O.J. L1/1.

Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, [2003] O.J. L31/18 and Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [2004] O.J. L304/12.

Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, [2003] O.J. L156/17.

Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, [2003] O.J. L176/37.

Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in gas and repealing Directive 98/30/EC, [2003] O.J. L176/57.

Regulation 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed, [2003] O.J. L268/1.

Regulation (EC) 1831/2003 of the European Parliament and of the Council of 22 September 2003 on additives for use in animal nutrition, [2003] O.J. L268/29.

Commission Decision 2003/796/EC of 11 November 2003 on establishing the European Regulators Group for Electricity and Gas, [2003] O.J. L296/34.

Commission Decision 2003/796/EC of 11 November 2003 on establishing the European Regulators Group for Electricity and Gas, [2003] O.J. L296/34

Commission Decision 2004/5/EC of 5 November 2003 establishing the Committee of European Banking Supervisors, [2004] O.J. L3/28.

Commission Decision 2004/6/EC of 5 November 2003 establishing the Committee of European Insurance and Occupational Pensions Supervisors, [2004] O.J. L3/30.

Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (Railway Safety Directive), [2004] O.J. L220/16.

Council Regulation 139/2004 on the control of concentrations between undertakings, [2004] O.J. L24/1.

Regulation 726/2004 of the European Parliament and the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, [2004] O.J. L136/1.

Commission Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, [2004] O.J. L123/18.

Regulation 881/2004 of the European Parliament and of the Council of 29 April 2004 establishing a European Railway Agency (Agency Regulation), [2004] O.J. L164/1.

Regulation (EC) 460/2004 of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency, [2004] O.J. L77/1.

Regulation (EC) 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), [2004] O.J. L364/1.

Commission Notice on cooperation within the Network of Competition Authorities, [2004] O.J. C101/43.

Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, [2004] O.J. C101/54.

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive), [2005] O.J. L149/22.

Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, [2005] O.J. L326/13.

Commission Notice on Case Referral in respect of concentrations, [2005] O.J. C56/2.

Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, [2006] O.J. L376/21.

Regulation 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, [2006] O.J. L93/12

Regulation (EC) 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, [2007] O.J. L136/3.

Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2) (a) of Regulation No 1/2003, [2006] O.J. C210/2.

Commission Notice on Immunity from fines and reduction of fines in cartel cases, [2006] O.J. C298/17.

Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, [2008] O.J. L133/66.

Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (Text with EEA relevance), [2009], O.J. L33/10.

Commission Regulation (EC) 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, [2008] O.J. L171/3.

Commission Regulation 771/2008 of 1 August 2008 laying down the rules of organisation and procedure of the Board of Appeal of the European Chemicals Agency, [2008] O.J. L206/5.

Declaration No. 17 concerning Primacy, [2008] O.J. C115/344.

Declaration 39 on Article 290 of the Treaty on the Functioning of the European Union states, [2008] O.J. C 115/350.

Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, [2009] O.J. L110/30.

Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, [2009] O.J. L211/53.

Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, [2009] O.J. L211/94.

Commission Decision 2009/77/EC of 23 January 2009 establishing the Committee of European Securities Regulators, [2009] O.J. L25/18.

Commission Decision 2009/78/EC of 23 January 2009 establishing the Committee of European Banking Supervisors, [2009] O.J. L25/23.

Commission Decision 2009/79/EC of 23 January 2009 establishing the Committee of European Insurance and Occupational Pensions Supervisors, [2009] O.J. L25/28.

Council Regulation 207/2009 of 26 February 2009 on the Community Trade Mark, [2009] O.J. L78/1.

Regulation 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, [2009] O.J. L211/1.

Regulation 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity, [2009] O.J. L211/15.

Regulation 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks, [2009] O.J. L211/36.

Regulation 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, [2009] O.J. L302/1.

Regulation 1211/2009 of the European Parliament and the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, [2009] O.J. L337/1.

Council Regulation 407/2010 of 11 May 2010 establishing a European Financial Stabilisation Mechanism, [2010] O.J. L118/1.

Council Decision 2010/320/EU of 10 May 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, [2010] O.J. L145/6.

Directive 2010/78/EU of the European Parliament and the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority), [2010] O.J. L331/120.

Regulation 439/2010 of 19 May 2010 establishing a European Asylum Support Office, [2010] O.J. L132/11.

Regulation 1092/2010 of 24 November 2010 of the European Parliament and Council on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, [2010] O.J. L331/1.

Regulation 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision 716/2009/EC and repealing Commission Decision 2009/78/EC, [2010] O.J. L331/12.

Regulation 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) amending Decision 716/2009/EC and repealing Commission Decision 2009/79/EC, [2010] O.J. L331/48.

Regulation 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 716/2009/EC and repealing Commission Decision 2009/77/EC, [2010] O.J. L331/84.

Council Regulation 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board, [2010] O.J. L331/162.

Directive 2011/83 of the European Parliament and of the Council on consumer rights, [2011] O.J. L304/64.

Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, [2011] O.J. L174/1.

Regulation 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, [2011] O.J. L55/13.

Regulation 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation 1060/2009 on credit rating agencies, [2011] O.J. L145/30.

Regulation 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, [2011] O.J. L306/1.

Regulation 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, [2011] O.J. L306/8.

Regulation 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, [2011] O.J. L306/12.

Regulation 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, [2011] O.J. L306/25.

Regulation 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, [2011] O.J. L306/33.

Council Directive 2011/85 of 8 November 2011 on requirements for budgetary frameworks of the Member States, [2011] O.J. L306/41

Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the Hearing Officer in certain competition proceedings, [2011] O.J. L275/29.

Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, [2011] O.J. C308/6.

Regulation 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, [2012] O.J. L86/1.

Commission Delegated Regulation (EU) 446/2012 of 21 March 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to regulatory technical standards on the content and format of ratings data periodic reporting to be submitted to the European Securities and Markets Authority by credit rating agencies, [2012] O.J. L140/2.

Commission Delegated Regulation (EU) 447/2012 of 21 March 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies by laying down regulatory technical standards for the assessment of compliance of credit rating methodologies, [2012] O.J. L140/14.

Commission Delegated Regulation (EU) 448/2012 of 21 March 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to regulatory technical standards for the presentation of the information that credit rating agencies shall make available in a central repository established by the European Securities and Markets Authority, [2012] O.J. L140/17.

Commission Delegated Regulation (EU) 449/2012 of 21 March 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to regulatory technical standards on information for registration and certification of credit rating agencies, [2012] O.J. L140/32.

Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, available at http://ec.europa.eu/internal_market/finances/committees/index_en.htm.

Proposal for a Regulation of the European Parliament and the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards its interaction with Council Regulation (EU) No…/… conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, available at http://ec.europa.eu/internal_market/finances/committees/index_en.htm.

National legislation

Belgium

Wet 22 February 1998 tot vaststelling van het organiek statuut van de Nationale Bank van België, *Belgian Official Journal* 28 March 1998, 9377.

Wet tot bescherming van de economische mededinging, coordinated on 15 September 2006, *Belgian Official Journal* 29 September 2006, 50613.

Wet 2 July 2010 tot wijziging van de wet van 2 augustus 2002 betreffende het toezicht op de financiële sector en de financiële diensten en van de wet van 22 februari 1998 tot vaststelling van het organiek statuut van de Nationale Bank van België, en houdende diverse bepalingen, *Belgian Official Journal* 28 September 2010, 59140.

Koninklijk Besluit 3 March 2011 betreffende de evolutie van de toezichtsarchitectuur voor de financiële sector, *Belgian Official Journal* 9 March 2011, 15623.

Projet de Loi of 27 December 2012 portant insertion du Livre IV "Protection de la concurrence" et du Livre V "La concurrence et les évolutions de prix" dans le Code de droit économique et portant insertion des définitions propres au livre IV et au livre V et des dispositions d'application de la loi propres au livre IV et au livre V, dans les livres I et XV du Code de droit économique, available at http://www.dekamer.be/FLWB/PDF/53/2592/53K2592001.pdf.

France

Commercial Code (consolidated version), www.legifrance.gouv.fr.

Code monétaire et financier (consolidated version), www.legifrance.gouv.fr.

Loi du 1er Juillet 1901 relative au contrat d'association (coordinated version), www.legifrance.gouv.fr.

Loi No. 2003-706 du 1 août 2003 de sécurité financière, *Journal Officiel de la République Française,* 2 août 2003, 13232.

Ordonnance n° 2010-76 du 21 janvier 2010 portant fusion des autorités d'agrément et de contrôle de la banque et de l'assurance, *Journal Officiel de la République Française* du 22 Janvier 2010, 1392.

Germany

Gesetz über Ordnungswidrigkeiten (OWiG) of 19 February 1987, *Bundesgesetzblatt* (1987), I. 602.

Gesetz über die Deutsche Bundesbank of 22 October 1992, *Bundesgesetzblatt* (1992) I. 1782.

Gesetz gegen Wettbewerbsbeschränkungen of 15 July 2005 (amended by Art. 1 of the Act of 20 April 2009), *Bundesgesetzblatt* (2005) I. 2114.

Gesetz über die integrierte Finanzdienstleistungsaufsicht of 22 April 2002, *Bundesgesetzblatt* (2002) I. 1310.

The Netherlands

Wet van 4 juni 1992, houdende algemene regels van bestuursrecht (AWB), consolidated version available at www.wetten.overheid.nl.

Wet van 22 mei 1997, houdende nieuwe regels omtrent de economische mededinging (Dutch Competition Act), consolidated version available at www.wetten.overheid.nl.

Wet van 26 Maart 1998, houdende nieuwe bepalingen inzake De Nederlandsche Bank N.V. in verband met het Verdrag tot oprichting van de Europese Gemeenschap*, Staatscourant* (1998), 200.

Wet van 28 september 2006, houdende regels met betrekking tot de financiële markten en het toezicht daarop (WFT), *Staatscourant* (2006), 507.

United Kingdom

Competition Act 1998, 1998 c. 41, http://www.legislation.gov.uk/ukpga/1998/41/contents.

Financial Services and Markets Act 2000, 2000 c. 8, http://www.legislation.gov.uk/ukpga/2000/8/

Enterprise Act 2002, 2002 c. 40, http://www.legislation.gov.uk/ukpga/2002/40/contents

Ireland

2002 Irish Competition Act, Irish Statute Book 2002 (No 14).

Sweden

Swedish Konkurrenslag (2008:579).

Case law

Court of Justice of the European Union

Case 9/56, *Meroni* v *High Authority,* [1958] ECR 133.

Case 13/61, *De Geus v Bosch,* [1962] ECR 45.

Case 26/62, *Van Gend & Loos*, [1963] ECR 3.

Case 6/64, *Costa Enel*, [1964] ECR 585.

Joined Cases 56/64 and 58/64, *Consten and Grundig*, [1966] ECR 299.

Case 14/68, *Walt Wilhelm*, [1969] ECR 1.

Case 10/69, *Portelange*, [1969] ECR 309.

Case 11/70, *Internationale Handelsgesellschaft mbH*, [1970] ECR 1125.

Case 22/70, *Commission v Council* (*AETR*), [1971] ECR 263.

Case 48/72, *Brasserie De Haecht,* [1973] ECR 77.

Case 127/73, *BRT v Sabam*, [1974] ECR 51.

Case 2/74, *Reyners,* [1974] ECR 631

Case 8/74, *Dassonville,* [1974] ECR 837.

Case 17/74, *Transocean Marine Paint v Commission,* [1974] ECR 1063.

Case 33/74, *Van Binsbergen,* [1974] ECR 1299.

Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein,* [1979] ECR 649.

Opinion 1/75, [1975] ECR 1355.

Opinion 1/76, [1977] ECR 741

Joined Cases 3/76, 4/76 and 6/76, *Kramer,* [1967] ECR 1279.

Case 33/76, *Rewe-Zentralfinanz and Rewe-Zentral*, [1976] ECR 1989.

Case 41/76, *Donckerwolcke*, [1976] ECR 1921.

Case 45/76, *Comet*, [1976] ECR 2043.

Case 85/76, *Hofmann La Roche v. Commission*, [1979] ECR 461.

Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*., 1978 ECR 629.

Case 59/77, *De Bloos v Bouyer,* [1977] ECR 2359.

Opinion 1/78, [1979] ECR 2871.

Case 218/78 P, *van Landewyck SARL v Commission*, [1980] ECR 3125.

Joined Cases 253/78 and 1/79 to 3/79, *Procureur de la République v Giry and Guerlain,* [1980] ECR 2327.

Case 99/79, *Lancôme,* [1980] ECR 2511.

Case 102/79, *Commission v. Belgium*, [1980] ECR 1487.

Case 149/79, *Commission v. Belgium*, [1980] ECR 3903.

Case 155/79, *AM&S Europe Limited* v *Commission,* [1982] ECR 1575.

Case 804/79, *Commission v United Kingdom,* [1981] ECR 1045.

Case 98/80, *Giuseppe Romano v. Rijksinstituut voor Ziekte- en Invaliditeitsverzekering,* [1981] ECR 1241.

Joined Cases 100-103/80, *Musique de Diffusion Française v Commission,* [1983] ECR 1825.

Case 60/81, *IBM v Commission,* [1981] ECR 2639.

Case 229/83, *Leclerc*, [1985] ECR 1.

Case 294/83, *Parti écologiste "Les Verts" v. European Parliament*, [1986] ECR 1339.

Case 34/86, *Council v European Parliament,* [1986] ECR 2155.

Joined Cases 97/86, 193/86, 99/86 and 215/86, *Asteris and others and Hellenic Republic v Commission*, [1988] ECR 2181.

Case 374/87, *Orkem v Commission*, [1989] ECR 3283.

Case C-2/88, *Zwartveld*, [1990] ECR I-3365.

Case 27/88, *Solvay v Commission,* [1989] ECR 3355.

Case C-202/88, *France v Commission*, [1991] ECR I-1223.

Case C-188/89, *Foster*, [1990] ECR I-3313.

Case C-234/89, *Delimitis*, [1991] ECR I-935.

Case C-260/89, *ERT*, [1991] ECR I-2925.

Case C-300/89, *Commission v Council (Titanium Dioxide),* [1991] ECR I-2867.

Joined Cases T-68/89, T-77/89 and T-78/89, *SIV v Commission*, [1992] ECR II-1407.

Case C-208/90, *Emmott,* [1991] ECR I-4269.

Case T-24/90, *Automec v Commission (Automec II)*, [1992] ECR II-2223.

Opinion 1/91, [1991] ECR I-6079.

Opinion 2/91, [1993] ECR I-1061.

Case C-67/91, *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada,* [1992] ECR I-4785.

Joined Cases C-267/91 and C-268/91, *Keck and Mithouard,* [1993] ECR I-6907.

Case C-314/91, *Beate Weber v European Parliament*, [1993] ECR I-1093.

Case C-128/92, *Banks*, [1994] ECR I-1209.

Case C-350/92, *Spain v Council,* [1995] ECR I-1985.

Case C-359/92, *Germany* v. *Council,* [1994] ECR I-3681.

Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame (Factortame IV)*, [1996] ECR I-1029.

Case C-312/93, *Peterbroeck*, ECR [1995], I-4599.

Case C-384/93, *Alpine Investments BV*, [1995] ECR I-1141.

Joined cases C-430/93 and C-431/93, *Van Schijndel*, [1995] ECR I-4705.

Case C-473/93, *Commission v. Luxemburg,* [1996] ECR I-3255.

Opinion 1/94, [1994] ECR I-5267.

Case C-25/94, *Commission v Council*, [1996] ECR I-1469.

Case C-90/94, *Haahr Petroleum,* [1997] ECR I-4085.

Case C-233/94, *Germany v European Parliament and Council*, [1997] ECR I-2405.

Case C-188/95, *Fantask and Others,* [1997] ECR I-6783.

Case C-341/95, *Bettati,* [1998] ECR I-4355.

Case C-231/96, *Edis,* [1998] ECR I-4951.

Case C-7/97, *Bronner,* [1998] ECR I-7791.

Joined Cases C-240/98 – 244/98, *Océano Grupo Editorial SA v Roció Murciano Quintero (C-240/98) and Salvat Editores SA v José M. Sánchez Alcón Prades (C-241/98), José Luis Copano Badillo (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98)*, [2000] ECR I-4941.

Case C-285/98, *Tanja Kreil v Bundesrepublik Deutschland*, [2000] ECR I-105.

Case C-352/98 P, *Bergaderm*, [2000] ECR I-5291.

Case C-376/98, *Germany v Parliament and Council,* [2000] ECR I-8419.

Case C-377/98, *Kingdom of the Netherlands v Parliament and Council*, [2001] ECR I-7079.

Case T-163/98, *Procter & Gamble* v *OHIM (BABY-DRY),* [1999] ECR II-2383.

CFI, T-13/99, *Pfizer Animal Health SA v.* Council, [2002] ECR II-3305.

Case T-70/99, *Alpharma Inc v. Council,* [2002] ECR II-3495.

Case T-112/99, *M6 v Commission*, [2001] ECR II-1557.

Case T-326/99, *Olivieri*, [2003] ECR II-6053.

Case C-11/00, *Commission v European Central Bank*, [2003] ECR I-7147.

Case C-50/00 P, *Unión de Pequeños Agricultores* v *Council,* [2002] ECR I-6677.

Case C-137/00, *Milk Marque and National Farmers' Union,* [2003] ECR I-7975.

Case C-275/00, *First NV and Franex NV*, [2002] ECR I-10943.

Case C-453/00, *Kühne & Heitz*, [2004] ECR I-837.

Joined Cases T-74/00, T-76/00, T-83-85/00, T-132/00, T-137/00 and T-141/00, *Artegodan* v Commission, [2002] ECR II-4945.

Case C-491/01, *R v. Secretary of State ex parte BAT and Imperial Tobacco*, [2002] ECR I-11543.

Case T-334/01, *MFE Marienfelde GmbH v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, [2004] ECR II-2787.

Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and Others* v *Commission,* [2005] ECR I-5425.

Case C-222/02, *Peter Paul, Cornelia Sonnen-Lütte and Christel Mörkens v Bundesrepublik Deutschland*, [2004] ECR I-9425.

Case C-258/02 P, *Bactria Industriehygiene-Service Verwaltungs GmbH v* Commission, [2003]ECR I-15105.

Case C-304/02, *Commission* v. *France*, [2005] ECR I-6263.

Case C-434/02, *Arnold André*, [2004] ECR I-11829.

Joined Cases T-109/02, 118/02, 122/02, 125/02, 126/02, 128/02, 129/02, 132/02 and 136/02, *Bollorè and others v Commission*, [2007] ECR II- 947.

Case C-12/03, *Commission v Tetra Laval*, [2005] ECR I-987.

Case C-53/03, *Syfait,* [2005] ECR I-4609.

Case C-210/03, *Swedish Match*, [2004] ECR I-11893.

Case C-347/03, *Regione autonoma Friuli-Venezia Giulia*, [2005] ECR I-3785.

Case C-380/03, *Federal Republic of Germany v European Parliament and Council of the European Union*, [2006] ECR 11573.

Case C-436/03, *European Parliament v Council,* [2006] ECR I-3733.

Case C-540/03, *European Parliament v Council,* [2006] ECR I-5769.

Case T-54/03, *Lafarge v Commission,* [2008] ECR II-120.

Case T-133/03, *Schering-Plough* v *Commission and EMEA* (not published in ECR).

Case C-66/04, *United Kingdom v Parliament and Council*, [2005] ECR I-10553

Case C-154/04 and 155/04, 12 July 2005, *Alliance for Natural Health*, [2005] ECR I-6451.

Case C-217/04, *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union,* [2006] ECR I-3771.

Joined Cases C-295/04 to C-298/04, *Manfredi and Others,* [2006] ECR I-6619.

Case T-16/04, *Arcelor Mittal v European Parliament and Council* , [2010] ECR II-21.

Case T-339/04, *France Télécom v Commission*, [2007] ECR II-521.

Case T-340/04, *France Télécom v. Commission*, [2007] ECR II-573.

Case C-110/05, *Commission v Italy,* [2008] ECR I-519.

Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA, formerly Lucchini Siderurgica SpA*., [2007] ECR I-6199.

Case C-168/05, *Elisa María Mostaza Claro v Centro Móvil Milenium SL*, [2006] ECR I-10421.

Joined Cases C-222/05 to C-225/05, *van der Weerd and others,* [2007] ECR I-4233.

Case C-341/05, *Laval un Partneri Ltd*., [2007] ECR 1-11767.

Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, [2008] ECR I-6351.

Case C-426/05, *Tele2 Telecommunication GmbH, formerly Tele2 UTA Telecommunication GmbH v. Telekom-Control-Kommission,* [2008] ECR I-685.

Case C-429/05, *Max Rampion and Marie-Jeanne Godard, née Rampion v Franfinance SA and K par K SAS*, [2007] ECR I-8017.

Case C-432/05, *Unibet,* [2007] ECR I-2271.

Joined Cases C-439/05 P and C-454/05 P, *Land Oberösterreich v Commission,* [2007] ECR I-7141.

Case T-21/05, C*halkor AE Epexergasias Metallon v Commission of the European Communities*, [2010] ECR II-1895.

Case C-120/06, *FIAMM*, [2008] ECR I-6513.

Case C-266/06 P, *Evonik Degussa* v *Commission and Council*, [2008] ECR I-81.

Case C-301/06, *Ireland v. Parliament and Council*, [2009] ECR I-593.

Case C-445/06, *Danske Slagterier*, [2009] ECR I-2119.

Case C-561/06, *Archer Midland Daniels Co v Commission,* [2009] ECR I-1843.

Case T-411/06, *Sogelma*, [2008] ECR II-2771.

Case C-155/07, *European Parliament v Council,* [2008] ECR I-8103.

Case C-166/07, *European Parliament v Council* [2009] ECR I-7135.

Joined Cases C-261/07 and C-299/07, *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV,* [2009] ECR I-2949.

Case C-370/07, *Commission v Council*, [2009] ECR I-8917.

Case C-424/07, *Commission v Germany*, [2009] ECR I-11431.

Case C-429/07, *X. BV,*[2009] ECR I-4833.

Case C-441/07 P, *European Commission v Alrosa Company Ltd.,* [2010] ECR I-5949.

Case C-518/07, *Commission v Germany*, [2010] ECR I-1885.

Case C-550/07, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, [2010] ECR I-8301.

Case C-8/08, *T-Mobile*, [2009] ECR I-4529.

Case C-40/08, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, [2009] ECR I-9579.

Case C-58/08, *Vodafone Ltd.*, [2010] ECR I-4999.

Case C-137/08, *VB Pénzügyi Lízing Zrt. v Ferenc Schneider*, [2010] ECR I-10847.

Case C-147/08, *Jürgen Römer v Freie und Hansestadt Hamburg*, [2011] ECR I-3591.

Case C-243/08, *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi,* [2009] ECR I-4713.

Case C-304/08*, Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH*, [2010] ECR I-217.

Case C-389/08, *Base NV and others v. Ministerraad*, [2010] ECR I-9073.

Case C-439/08, *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW*, [2010] ECR I-12471.

Case C-484/08, *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc),* [2010] ECR I-4785.

Case C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG v "Österreich"-Zeitungsverlag GmbH*, [2010] ECR I-10909.

Case C-90/09 P, *General Quimica and others v Commission*, [2011] ECR I-1.

Joined Cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v Land Hessen*, [2010] ECR I-11063.

Case C-240/09, *Lesoochranárske zoskupenie*, [2011] ECR I-1255.

Case C-272/09 P, *KME Germany v Commission*, [2011] ECR I-0000.

Case C-359/09 P, *ThyssenKrupp Nirosta GmbH v Commission*, [2011] ECR I-269.

Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, [2011] ECR I-5161.

Case C-375/09, *Prezes Urzedu Ochrony Konkurencji i Konsumentów* v. *Tele2 Polska sp. z o.o.* (now: *Netia SA*), [2011] ECR I-3055.

Case C-403/09 PPU, *Detiček*, [2009] ECR I-12193.

Case T-122/09, *Zhejiang Xinshiji Foods and Hubei Xinshiji Foods v Council*, [2011] ECR II-22.

Case T-360/09, *E.ON Ruhrgas AG, E.ON AG v European Commission*, [2012] ECR I-0000.

Case C-17/10, *Toshiba*, [2012] ECR I-0000.

Joined Cases C-42/10, C-45/10 and C-57/10, *Vlaamse Dierenartsenvereniging VZW*, [2011] ECR I-2975.

C-69/10, *Samba Diouf*, [2011] ECR, I-0000.

Case C-76/10, *Pohotovosť s.r.o. v Iveta Korčkovská,* [2010] ECR I-11557.

Case C-288/10, *Wamo BVBA v JBC NV and Modemakers Fashion NV*, [2011] ECR I-0000.

Case C-355/10, *European Parliament v Council*, [2012] ECR I-0000.

Case C-386/10 P, *Chalkor AE Epexergasias Metallon v Commission*, [2011] ECR I-0000.

Case C-389/10 P, *KME Germany, KME France SAS and KME Italy SpA v Commission,* [2011] ECR I-0000.

Case C-400/10 PPU, *McB.,* [2010] ECR I-8965.

Joined Cases C-411/10 and C-493/10, *N.S.*, [2011] ECR I-0000.

Case C-453/10, *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.*, [2012] ECR I-0000.

Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, [2012] ECR I-0000.

Case C-617/10, *Fransson*, [2013] ECR I-0000.

Case C-618/10, *Banco Español de Crédito SA v Joaquín Calderón Camino*, judgment of 14 June 2012, [2012] ECR I-0000.

Case T-1/10, *Polyelectrolyte Producers Group GEIE (PPG) and SNF SAS v European Chemicals Agency*, [2011] ECR II-0000.

Case T-71/10, *Xeda International SA and Pace International LLC v Commission*, [2012] ECR I-0000.

Case T-268/10, *Polyelectrolyte Producers Group GEIE (PPG) and SNF SAS v European Chemicals Agency*, [2011] ECR II-0000.

Case T-343/10, *Etimine SA and AB Etiproducts Oy v European Chemicals Agency,* [2011] ECR II-0000.

Case T-346/10, *Borax Europe Ltd v European Chemicals Agency*, [2011] ECR II-0000.

Case T-18/10, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council,* [2011] ECR II-0000.

Cases T-93/10-T-96/10, *Bilbaína de Alquitranes, SA, Cindu Chemicals BV, Deza a.s., Industrial Química del Nalón, SA, Koppers Denmark A/S, Koppers UK Ltd, Rütgers Germany GmbH, Rütgers Belgium NV and Rütgers Poland Sp. Z o.o. v European Chemicals Agency*, [2013] ECR I-0000.

Case T-262/10, *Microban International Ltd and Microban (Europe) Ltd v European Commission*, [2011] ECR II-0000.

Case C-126/11, *INNO NV v Unie van Zelfstandige Ondernemers VZW (UNIZO) and Others*, [2011] ECR I-0000.

Case C-256/11, *Dereci*, [2011] ECR I-0000.

Case C-399/11, *Melloni*, [2013] ECR I-0000

Case C-536/11, *Donau Chemie*, [2013] ECR I-0000.

Case C-583/11 P, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, [2013] ECR I-0000.

Cases C-625/11 P and C-626/11 P, Appeal brought on 6 December 2011 by Polyelectrolyte Producers Group, SNF SAS against the order of the General Court (Seventh Chamber, Extended Composition) delivered on 21 September 2011 in Case T-268/10: Polyelectrolyte Producers Group, SNF SAS v European Chemicals Agency (ECHA), [2012] O.J. C25/45.

Case T-245/11, *ClientEarth and International Chemical Secretariat v European Chemicals Agency* , Action brought on 6 May 2011 — ClientEarth and International Chemical Secretariat v ECHA, [2012] O.J. C194/20.

Case T-381/11, *Eurofer ASBL v Commission*, [2012] ECR II-0000.

Case C-270/12, Action brought on 1 June 2012 – United Kingdom v Council and European Parliament, [2012] O.J. C273/3.

Case C-370/12, *Pringle*, [2012] ECR I-0000.

Case T-23/12, *Mutuelle des Architects Français assurances v. European Insurance and Occupational Pensions Authority*, Action brought on 17 January 2012, [2012] O.J. C98/22.

Case T-177/12, *Spraylat v European Chemicals Agency,* Action brought on 20 April 2012 — Spraylat v ECHA, [2012] O.J. C174/26.

European Chemicals Agency Board of Appeal decisions

Case A-001-2009, *Specialty Chemicals Coordination Center sa/nv*, decision of 30 October 2009.

Case A-001-2011, *Feralco Deutschland GmbH*, decision of 31 March 2011.

Case A-002-2011, *Feralco (UK) Ltd.*, decision of 31 March 2011.

Case A003-2011, *BASF SE*, decision of 27 May 2011.

Case A-004-2011, *Kronochem GmbH*, decision of 7 October 2011.

Case A-001-2010, *N.V. Elektriciteits – Produktiemaatschappij Zuid-Nederland EPZ*, decision of 10 October 2011.

Case A006-2011, *5N PV GmbH*, decision of 30 November 2011.

Case A002-2012, *BASF SE*, decision of 21 June 2012.

European Court of Human Rights

Cases 5100/71; 5101/71; 5102/71; 5354/72 and 5370/72, *Engel v The Netherlands,* judgment of 8 June 1976.

Cases 7299/75 and 7496/76, *Albert and Le Compte v Belgium*, judgment of 10 February 1983.

Case 8544/79*, Öztürk v Germany*, judgment of 21 February 1984.

Case 12547/86, *Bendenoun v France*, judgment of 24 February 1994.

Case 34619/97*, Janosevic v* Sweden judgment of 23 July 2002.

Case 45036/98, *Bosphorus v Ireland*, judgment of 30 June 2005.

Case 73053/01, *Jussila v Finland*, judgment of 23 November 2006.

Case 5242/04, *Dubus v France*, judgment of 11 June 2009.

Cases 32181/04 and 35122/05*, Sigma Radio Television Ltd. v Cyprus*, judgment of 21 July 2011.

Case 30183/06, *Vernes v France*, judgment of 20 January 2011.

Case 21539/07*, Steininger v Austria*, judgment of 17 April 2012.

Case 43509/08, *Menarini Diagnotics S.R.L. v Italy*, judgment of 27 September 2011.

Miscellaneous

U.S. Supreme Court, *Testa v Katt*, 330 U.S. 386 (1947).

U.S. Supreme Court, *South Dakota v Dole*, 483 U.S. 209 (1987).

U.S. Supreme Court, *Printz v United States*, 521 U.S. 898 (1997).

U.S. Supreme Court, *New York v United States* 505 U.S. 144 (1992).

U.S. Supreme Court, *National Federation Of Independent Business et al. v. Sebelius*, 567 U.S. __ (2012).

Paris Cour d'Appel, SCP Fisselier Chiloux Boulay, judgment of 27 January 2011, available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=138 (last consulted 12 May 2013).

EFTA Court, Case E-15/10, *Posten Norge AS v EFTA Surveillance* Authority, judgment of 18 April 2012, not yet published, available at www.eftacourt.int.

References

Accetto, M. and Zleptnig, S., 'The Principle of Effectiveness: Rethinking its Role in Community Law', 11 *European Public Law* (2003), 375-403.

Adamski, D., 'National power games and structural failures in the European macroeconomic governance', 49 *Common Market Law Review* (2012), 1319-1364.

Adler, M., 'State Sovereignty and the Anti-Commandeering Cases', *The Annals of the American Academy of Political Science* (2001), 158-172.

Adriaanse, P., 'Public and Private Enforcement of EU State Aid Law. Legal issues of dual vigilance by the Commission and national courts' in H. Blanke and S. Mangiameli (eds.) *The European Union after Lisbon - Constitutional basis, economic order and external action* (Heidelberg, Springer 2011), 443-470.

Ahdieh, R., 'Dialectical Regulation', 38 *Connecticut Law Review* (2006), 863- 927.

Ahuja, R., 'Constitutional in Name: the Bureau of Consumer Financial Protection and the Obama Administration's Treatment of the Nondelegation Principle and the Appointments Clause', 14 *University of Pennsylvania Journal of Constitutional Law* (2011), 271-300.

Aitken, J. and Jones, A., 'Reforming a World Class Competition Regime: The Government's Proposal for the Creation of a Single Competition and Markets Authority', *Competition Law Journal* (2011), 97-110.

Akman, P., 'Consumer Welfare and Article 82 EC: Practice and Rhetoric', 32 *World Competition* (2009), 71-90.

Albers, M. and Jourdan, J., 'The Role of Hearing Officers in EU Competition Proceedings: a Historical and Practical Perspective', 2 *Journal of European Competition Law & Practice* (2011), 185-200.

Alesina, A. and Wacziarg, R., 'Is Europe going too far?', 51 *Carnegie –Rochester Conference Series on Public Policy* (1999), 1-42.

Alexander, W., 'The Domestic Courts and Article 85 of the Rome Treaty', 1 *Common Market Law Review* (1963), 431-455.

Alford, R., 'Subsidiarity and Competition: Decentralized enforcement of EU Competition Laws', 27 *Cornell International Law Journal* (1994), 271-302.

Alston, P. and Weiler, J.H.H., 'An "Ever Closer Union" in Need of a Human Rights Policy', 9 *European Journal of International Law* (1998), 658-723.

Ameye, E., 'The interplay between human rights and competition law in the EU', 25 *European Competition Law Review* (2004), 332-341.

Amorese, M., 'The Primacy of the European Commission in the European Competition Network as a Safeguard against national competition policies and the rejection of the '*primus inter pares'* doctrine, 18 *Columbia Journal of European Law* (2011), 177-196.

Amtenbrink, F. and De Haan, J., 'Regulating Credit Ratings in the European Union: A Critical First Assessment of Regulation 1060/2009 on Credit Rating Agencies', 46 *Common Market Law Review* (2009), 1915-1949.

Anagnostaras, G., 'Preliminary problems and jurisdiction uncertainties: the admissibility of questions referred by bodies performing quasi-judicial functions', 30 *European Law Review* (2005), 878-890.

Andenas, M. and Avgerinos, Y. (eds.), *Financial Markets in Europe: Towards a Single Regulator?* (London, Kluwer Law International, 2003), 544 pp.

Andenas, M. and Baasch Andersen, C. (eds.), *Theory and Practice of Harmonisation* (Cheltenham, Edward Elgar, 2011), 640 pp.

Anderson, D. and Cuff, R., 'Cartels in the EU: Procedural Fairness for Defendants and Claimants' in B. Hawk (ed.), *International Antitrust Law & Policy. Annual Proceedings of the Fordham Competition Law Institute* (Huntington, Juris, 2011), 197-235.

Andersson, J., 'The Regulatory Technique of EU Securities Law – A Few Remarks', *European Business Law Review* (2002), 313-322.

Andreangeli, A., 'The Protection of Legal Professional Privilege in EU Law and the Impact of the Rules on the Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: one step forward, two steps back?', 2 *Competition Law Review* (2005), 31-54.

Andreangeli, A., *EU Competition Enforcement and Human Rights*, (Cheltenham, Edward Elgar, 2008), 296 pp.

Andreangeli, A., 'From Complainant to 'Private Attorney General': The Modernisation of EU Competition Enforcement and Private Anti-Trust Actions Before National Courts' in M. Dougan and S. Currie (eds.), *50 years of the European Treaties. Looking back and thinking forward* (Oxford, Hart, 2009), 229-254.

Andriychuk, O., 'Rediscovering the Spirit of Competition: on the Normative Value of the Competitive Process', 6 *European Competition Journal* (2010), 575-610.

Andriychuk, O., 'The Dialectics of Competition Law: Sketching the Ordo-Austrian Approach to Antitrust', 35 *World Competition* (2012), 355-384.

Appeldoorn, J., 'Are the Proposed Changes Compatible with Article 81(3) EC?', 22 *European Competition Law Review* (2001), 400-403.

Araujo, M., 'The Respect of Fundamental Rights within the European Network of Competition Authorities' in B. Hawk (ed.), *International Antitrust Law & Policy. Annual Proceedings of the Fordham Competition Law Institute* (Huntington, Juris, 2011), 511-531.

Arcuri, A. and Dari-Mattiacci, G., 'Centralization versus Decentralization as a Risk-Return Trade-Off', 53 *Journal of Law and Economics* (2010), 359-378.

Arena, A., 'The Doctrine of Union Preemption in the EU Single Market: Between *Sein* and *Sollen*', *Jean Monnet Working Paper 3/10, http://centers.law.nyu.edu/jeanmonnet/papers/10/100301.pdf* , 91 pp.

Asimow, M., and Dunlop, L., 'The Many Faces of Administrative Adjudication in the European Union', 61 *Administrative Law Review* (2009), 131-171.

Aslam, I. and Ramsden, M., 'EC Dawn Raids: A Human Rights Violation?', 5 *Competition Law Review* (2008), 61-87.

Avbelj, M., 'Theory of European Union', 36 *European Law Review* (2011), 818-836.

Avgerinos, Y., 'Essential and Non-essential Measures: Delegation of Powers in EU Securities Regulation', 8 *European Law Journal* (2002), 269-289.

Avgerinos, Y., 'EU Financial Market Supervision Revisited: The European Securities Regulator', *Jean Monnet Working Paper 7/03*, http://www.jeanmonnetprogram.org/papers/03/030701.html, 68 pp.

Awrey, D., 'Complexity, Innovation and the Regulation of Modern Financial Markets', forthcoming in *Harvard Business Law Review* (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1916649 as Oxford Legal Studies Research Paper 49/2011.

Azoulai, L., 'The Force and Forms of European Legal Integration', *EUI Department of Law Working Paper* 2011/6, 13 pp.

Azoulai, L., Boucon, L. and Millet, F.-X. (eds.), 'Deconstructing EU Federalism through Competences', *EUI Department of Law Working Paper* 2012/06, 114 pp.

Azoulai, L., 'The "Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?', 4 *European Journal of Legal Studies* (2011), 192-219.

Bailey, D., 'Standard of Proof in EC Merger Proceedings: A Common Law Perspective', 40 *Common Market Law Review* (2003), 845-888.

Bailey, D., 'Scope of Judicial Review under Article 81 EC', 41 *Common Market Law Review* (2004), 1327-1360.

Baquero Cruz, J., *Between Competition and Free Movement. The Economic Constitutional Law of the European Community*, (Oxford, Hart, 2002), 176 pp.

Baquero Cruz, J., 'Beyond Competition: Services of General interest and European Community law' in G. De Búrca (ed.), *EU Law and the Welfare State: In search of solidarity* (Oxford, Oxford University Press, 2005), 169-212.

Baradaran, M., 'Reconsidering the Separation of Banking and Commerce', 80 *George Washington Law Review* (2012), 385-441.

Barber, N., 'The Limited Modesty of Subsidiarity', 11 *European Law Journal* (2005), 308-325.

Barbier de la Serre, E., 'Procedural Justice in European Community Case-law concerning the Rights of the Defense: Essentialist and Instrumental Trends', 12 *European Public Law* (2006), 225-250.

Barents, R., 'The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation', 30 *Common Market Law Review* (1993), 85-109.

Barents, R., 'Constitutional Horse Trading: Some Comments on the Protocol on the Internal Market and Competition' in M. Bulterman *et al.* (eds.), *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot* (Kluwer, Alphen a/d Rijn 2009), 123-132.

Barents, R., 'The precedence of EU law from the perspective of Constitutional Pluralism', 5 *European Constitutional Law Review* (2009), 421-446.

Barnard, C. and Deakin, S., 'Market Access and Regulatory Competition' in C. Barnard and J. Scott (eds.), *The Law of the Single European Market: unpacking the premises* (Oxford, Hart, 2002), 197-224.

Barnard, C., *The Substantive Law of the EU: the Four Freedoms* (Oxford, Oxford University Press, 3nd Edition, 2010), 752 pp.

Barr, M., 'The Financial Crisis and the Path of Reform', 29 *Yale Journal on Regulation* (2012), 91-119.

Barth, J., Caprio, G. and Levine, R., *Guardians of Finance. Making Regulators Work for Us* (Cambridge, MIT Press, 2012), 280 pp.

Barzun, C., 'The Forgotten Foundations of Hart and Sacks', *University of Virginia School of Law Research Paper*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1959406, 49 pp.

Bast, J., 'New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law', 49 *Common Market Law Review* (2012), 885-928.

Bartosch, A., 'Von der Freistellung zur Legalausnahme: Der Vorschlag der EG-Kommission für eine "neue Verordnung 17"', 12 *Europaïsche Zeitschrift für Wirtschaftsrecht* (2001), 101-107.

Baudrier, A., 'The EU Regulatory Framework for Electronic Communications: Relevance and Efficiency Three Years Later', *Communications & Strategies* (2006), 129-130.

Bavasso, A., 'Electronic Communications: A New Paradigm for European Regulation?', 41 *Common Market Law Review* (2004), 87-118.

Bebchuk, L., 'Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law', 105 *Harvard Law Review* (1992), 1435-1510.

Bebchuk, L. and Ferrell, A., 'Federal intervention to enhance shareholder choice', 87 *Virginia Law Review* (2001), 993-1006.

Bebr, G., *Rule of Law within the European Communities* (Brussels, Institut d'études européennes, 1965), 34 pp.

Bechtold, R., 'Modernisierung des EG-Wettbewerbsrechts: Der Verordnungs-Entwurf der Kommission zur Umsetzung des Weißbuchs', *Betriebs-Berater* (2000), 2425-2431.

Bednar, J., Ferejohn, J. and Garrett, G., 'The Politics of European Federalism', 16 *International Review of Law and Economics* (1996), 279-294.

Begg, I., 'Regulation and Supervision of Financial Intermediaries in the EU: the aftermath of the financial crisis', 47 *Journal of Common Market Studies* (2009), 1107-1128.

Bekkedal, T., 'Article 106 TFEU is Dead. Long Live Article 106 TFEU' in E. Szyszczak, J. Davies, M. Andenas and T. Bekkedal (eds.), *Developments in Services of General Interest* (The Hague, T.M.C. Asser Press, 2011), 61-102.

Bellamy, C., 'Modernisation of EU Competition Law. Impact of the proposed reform on national competition law and practice. Some points for discussion' in J. Stuyck and H. Gilliams (eds.), *Modernisation of European Competition Law. The Commission's proposal for a new regulation implementing Articles 81 and 82 EC* (Antwerp, Intersentia, 2002), 87-92.

Berger, N. and Mergelina, M.A., 'Un nouveau système de régulation communautaire des marches de valeurs mobilières dans l'Union Européenne', *Revue du Marché Commun de l'Union Européenne* (2001), 529-534.

Berghe, P. and Dawes, A., '"Little Pig, little pig, let me come in": an evaluation of the European Commission's power of inspection in competition cases', 30 *European Competition Law Review* (2009), 407-423.

Bermann, G., 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', 94 *Columbia Law Review* (1994), 331-456.

Bermann, G., 'Competences of the Union' in T. Tridimas and P. Nebbia (eds.), *European Union Law for the Twenty-First Century. Rethinking the New Legal Order Volume I Constitutional and Public Law External Relations* (Oxford, Hart, 2004), 65-74.

Bernard, N., 'The Future of European Economic Law in the light of the Principle of Subsidiarity', 33 *Common Market Law Review* (1996), 633-666.

Bernard, N., *Multilevel Governance in the European Union*, (The Hague, Kluwer, 2002), 274 pp.

Besselink, L., 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union', 35 *Common Market Law Review* (1998), 629-680.

Bieber, R., 'On the Mutual Completion of Overlapping Legal Systems', 13 *European Law Review* (1988), 147-158.

Biernat, E., 'The *locus standi* of private applicants under article 230 (4) EC and the principle of judicial protection in the European Community', *Jean Monnet Working Paper 12/03,* 66 pp.

Bignami, F., 'Creating European Rights: National Values and Supranational Interests', 11 *Columbia Journal of European Law* (2004), 258-292.

Bingham, T., *The Rule of Law*, (London, Penguin, 2011), 224 pp.

Biondi, A., Eeckhout, P. and Ripley, S. (ed.), *EU Law After Lisbon* (Oxford, Oxford University Press, 2012), 472 pp.

Black, J., 'Constitutionalising Self-Regulation', 59 *Modern Law Review* (1996), 24-56.

Black, W., 'The Imperium Strikes Back: the need to teach socioeconomics to law students', 31 *San Diego Law Review* (2004), 231-256.

Blomgren Bingham, L., 'The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance', *Wisconsin Law Review* (2010), 297-356.

Bobek, M., 'Why there is no principle of "procedural autonomy" of the Member States' in H. W. Micklitz and B. De Witte (eds.), *The Court of Justice and the Autonomy of the Member States* (Antwerp, Intersentia, 2012), 305-323.

Boeles, P., Den Heijer, M. Lodder, G. and Wouters, K., *European Migration Law* (Antwerp, Intersentia, 2009), 467 pp.

Borger, V., 'The ESM and the European Court's Predicament in *Pringle*', 14 *German Law Journal* (2013), 113-139.

Börzel, T., 'From Competitive Regionalism to Cooperative Federalism: The Europeanization of the Spanish State of the Autonomies', 30 *Publius: The Journal of Federalism* (2000), 17-42.

Börzel, T., 'Pace-setting, Foot-dragging and Fence-sitting: Member State responses to Europeanization', 40 *Journal of Common Market Studies* (2002), 193-214.

Böse, M., 'Annotation of Case C-45/08, Spector Photo Group NV, Chris Van Raemdonck v. Commissie voor het Bank-, Financie- en Assurantiewezen, Judgement of the European Court of Justice of 23 December 2009, nyr', 48 *Common Market Law Review* (2011), 189-201.

Bos, P. V., 'Towards a clear distribution of competence between EC and national competition authorities', 16 *European Competition Law Review* (1995), 410-416.

Bourgeois, J., 'EC Competition law and Member States' Courts' in B. Hawk (ed.), *Antitrust in a Global Economy. Annual Proceedings of the Fordham Corporate Law Institute 1993* (The Hague, Kluwer Law International, 1994), 475-495.

Bourgeois, J., 'Enforcement of EC Competition Law by National Authorities: Square Pegs in Round Holes?' in L. Gormley (ed.), *Current and Future Perspectives on EC Competition Law* (The Hague, Kluwer Law International, 1997), 89-100.

Bovens, M., 'Analysing and Assessing Accountability. A Conceptual Framework', 13 *European Law Journal* (2007), 447-468.

Bovens, M., Curtin, D. and 't Hart, P., 'The EU's Accountability Deficit: Reality or Myth?' in M. Bovens, D. Curtin and P. 't Hart (eds.), *The Real World of EU Accountability. What Deficit?* (Oxford, Oxford University Press, 2010), 1-8.

Bradley, K., 'Powers and Procedures in the EU Constitution: Legal Bases and the Court' in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 2nd Edition, 2011), 85-110.

Brammer, S., 'Concurrent jurisdiction under Regulation 1/2003 and the Issue of Case Allocation', 42 *Common Market Law Review* (2005), 1383-1424.

Brammer, S., *Co-operation between national competition agencies in the enforcement of EC competition law* (Oxford, Hart 2009), 561 pp.

Brammer, S., 'Comment on Case C-375/09, *Prezes Urzedu Ochrony Konkurencji i Konsumentów* v. *Tele2 Polska sp. z o.o.* (now: *Netia SA*), Judgment of the Court of Justice (Grand Chamber) of 3May 2011, nyr', 49 *Common Market Law Review* (2012), 1163-1178.

Breatnach, S., 'Sweetening the Carrot: the role of leniency programmes in the fight aganst cartels', 34 *European Competition Law Review* (2013), 12-16.

Brenncke, M., 'Annotation of Case C-58/08, *Vodafone Ltd and Others* v *Secretary of State for Business, Enterprise and Regulatory Reform*, Judgment of the Court of Justice (Grand Chamber) of 8 June 2010', 47 *Common Market Law Review* (2010), 1793-1814.

Breton, A., 'Towards a Theory of Competitive Federalism', 3 *European Journal of Political Economy* (1987), 263-328.

Breyer, S., *Regulation and its Reform* (Cambridge, Harvard University Press 1982), 486 pp.

Breyer, S., *Active Liberty: Interpreting our Democratic Constitution* (Knopf, 2005), 176 pp.

Bridge, J., 'Procedural aspects of the Enforcement of EC Law through the Legal Systems of the Member States', 9 *European Law Review* (1984), 28-42.

Bronckers, M. and Van Gerven, Y., 'Legal Remedies under the EC's new Chemicals Legislation REACH: testing a new model of European governance', 46 *Common Market Law Review* (2009), 1823-1871.

Bronckers, M. and Vallery, A. ,'Fair and effective competition policy in the EU: which role for Authorities and which role for the courts after *Menarini*?', 8 *European Competition Journal* (2012), 283-299.

Bruzzone, G., and Boccaccio, M., 'Taking Care of Modernization after the Start-Up: A View from a Member State', 31 *World Competition* (2008), 89-111.

Buendia Sierra, J.L., *Exclusive Rights and State Monopolies under EC Law. Article 86 (formerly Article 90) of the EC Treaty* (Oxford, Oxford University Press, 2000), 498 pp.

Búry, T., 'Financial Crisis – Is Short Selling to Blame?', 12 *Common Law Review* (2012), 33-36.

Busuioc, M., 'Accountability, Control and Independence: The Case of European Agencies', 15 *European Law Journal* (2005), 599-615.

Busuioc, M., 'Rule-Making by the European Financial Supervisory Authorities: Walking a Tight Rope', 19 *European Law Journal* (2013), 111-125.

Caffagi, F. (ed.), *The Institutional Framework of European Private Law* (Oxford, Oxford University Press, 2006), 352 pp.

Calabresi, G., *The Cost of Accidents. A Legal and Economic Analysis* (New Haven, Yale University Press, 1970), 350 pp.

Calabresi, G. and Douglas Melamed, A., 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral', 85 *Harvard Law Review* (1972), 1089-1128

Canova, T., 'Financial Market Failure as a Crisis in the Rule of Law: From Market Fundamentalism to a New Keynesian Regulatory Model', 3 *Harvard Law & Policy Review* (2009), 370-396.

Capobianco, A., 'The essential facility doctrine: similarities and differences between the American and European approach', 26 *European Law Review* (2001), 548-564.

Cappelletti, M. Seccombe, M. and Weiler, J. H.H. (eds.), *Integration through Law. Europe and the American Federal Experience Volume 1 Methods, Tools and Institutions, Book 2 Political Organs, Integration Techniques and Judicial Process* (Berlin, de Gruyter, 1985), 355 pp.

Carbonara, E., Luppi, B. and Parisi, F., 'Self-Defeating Subsidiarity', 5 *Review of Law and Economics* (2009), 741-783.

Caro de Sousa, P., 'Negative and Positive Integration in EU Economic Law: Between Strategic Denial and Cognitive Dissonance?', 13 *German Law Journal* (2012), 979-1011.

Carter, C. and Scott, A., 'Legitimacy and Governance Beyond the European Nation State: Conceptualising Governance in the European Union', 4 *European Law Journal* (1998), 429-445.

Cary, W., 'Federalism and Corporate Law: Reflections Upon Delaware', 83 *The Yale Law Journal* (1974), 663-705.

Cass, D., 'The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community', 29 *Common Market Law Review* (1992), 1107-1136.

Cauffman, C., 'The impact of voidness for infringement of Article 101 TFEU on related contracts', 8 *European Competition Journal* (2012), 95-122.

Cengiz, F., 'Management of Networks between the Competition Authorities in the EC and the US: different polities, different designs', 3 *European Competition Journal* (2007), 413-436.

Cengiz, F., 'Multi-level governance in competition policy: the European Competition Network', 35 *European Law Review* (2010), 665.

Cengiz, F., 'Judicial Review and the Rule of Law in the EU Competition Law Regime after Alrosa', 7 *European Competition Journal* (2011), 127-153.

Chalmers, D., Davies, G. and Monti, G., *European Union Law: Texts and Materials* (Cambridge, Cambridge University Press 2010), 1150 pp.

Chalmers, D., 'The European Redistributive State and a European Law of Struggle', 18 *European Law Journal* (2012), 667-693.

Chamon, M., 'EU Agencies: Does the Meroni Doctrine make sense?', 17 *Maastricht Journal of European and Comparative Law* (2010), 281-317.

Chamon, M., 'EU agencies between Meroni and Romano or the Devil and the Deep Blue Sea', 48 *Common Market Law Review* (2011), 1055-1075.

Chamon, M., 'How the concept of essential elements of a legislative act continues to elude the Court. *Parliament* v. *Council'*, 50 *Common Market Law Review* (2013), 849-860.

Chirico, F. and Larouche, P., 'Conceptual Divergence, Functionalism and the Economics of Convergence' in S. Prechal and B. Van Roermund (eds.), *The Coherence of EU Law. The Search for Unity in Divergent Concepts* (Oxford, Oxford University Press, 2008), 463-493.

Chiti, E., 'The Emergence of a Community Administration: The Case of European Agencies', 37 *Common Market Law Review* (2000), 309-343.

Chiti, E., 'Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies', 10 *European Law Journal* (2004), 402-438.

Chiti, E., 'The relationship between National Administrative Law and European Administrative Law in Administrative Procedures' in J. Ziller (ed.), 'What's New in European Administrative Law?'*, EUI Law Department Working Paper* 2005/10*,* 7-10.

Chiti, E., 'An important part of the EU's institutional machinery: features, problems and perspectives of European agencies', 46 *Common Market Law Review* (2009), 1395-1442.

Chiti, E., 'European Agencies' Rulemaking Powers, Procedures and Assessment', 19 *European Law Journal* (2013), 93-110.

Chiti, E. and Teixeira, P.G., 'The constitutional implications of the European responses to the financial and public debt crisis', 50 *Common Market Law Review* (2013), 683-708.

Chiu, I., *Regulatory Convergence in EU Securities Regulation* (London, Kluwer, 2008), 323 pp.

Choi, S. and Guzman, A., 'Choice and Federal Intervention in Corporate Law', 87 *Virginia Law Review* (2001), 961-992.

Chowdury, N. and Wessel, R., 'Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?', 18 *European Law Journal* (2012), 335-357.

Christiansen, T. and Dobbels, M., 'Non-Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts', 19 *European Law Journal* (2013), 42-56.

Coase, R., 'The Problem of Social Cost', 3 *Journal of Law and Economics* (1960), 1-44.

Coen, D. and Thatcher, M., 'Network Governance and Multi-Level Delegation: European Networks of Regulatory Agencies', 28 *Journal of Public Policy* (2008), 49-71.

Coffee, J., 'The Future of Corporate Federalism: State Competition and the New Trend toward de facto Federal Minimum Standards', 8 *Cardozo Law Review* (1987), 759-778.

Collins, H., 'The Unfair Commercial Practices Directive', 1 *European Review of Contract Law* (2005), 417-441.

Collins, H., *The European Civil Code: the way forward* (Cambridge, Cambridge University Press, 2008), 288 pp.

Colombo, R.J., 'Towards a Nexus of Virtue', 69 *Washington & Lee Law Review* (2012), 3-84.

Conway, G., 'Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ', 11 *German Law Journal* (2010), 967-1005.

Cooter, R. and Drexl, J., 'The Logic of Power in the Emerging European Constitution: Game Theory and the Division of Powers', 14 *International Review of Law and Economics* (1994), 307-326.

Cooter, R. and Ulen, T., *Law and Economics* (Reading, Addison-Wesley, sixth edition, 2012), 576 pp.

Constantinesco, V., 'Who's afraid of subsidiarity?', 11 *Yearbook of European Law* (1991), 33-55.

Corthaut, T. and Vanneste, F., 'Waves between Strasbourg and Luxembourg: the Right of Access to a Court to Contest the Validity of Legislative and Administrative Measures', *Yearbook of European Law* (2006), 475-514.

Corthaut, T., 'Institutional pragmatism or constitutional mayhem?', 48 *Common Market Law Review* (2011), 1271-1296.

Corthaut, T., *EU Ordre Public* (The Hague, Kluwer Law International, 2012), 512 pp.

Cousy, H., *Problemen van produktenaansprakelijkheid* (Brussels, Bruylant, 1978), 441 pp.

Craig, P., 'Competence: clarity, conferral, containment and consideration', 29 *European Law Review* (2004), 323-344.

Craig, P., *EU Administrative* Law, (Oxford, Oxford University Press, 2006), 888 pp.

Craig, P., 'Legal Control of Regulatory Bodies: Principle, Policy and Teleology' in P. Birkinshaw and M. Varney (eds.), *The European Union Legal Order after Lisbon* (The Hague, Kluwer, 2010), 93-116.

Craig, P., 'Shared Administration and Networks: Global and EU Perspectives' in G. Anthony, B. Auby, J. Morison and T. Zwart (eds.), *Values in Global Administrative Law* (Oxford, Hart, 2010), 81-116.

Craig, P., *The Lisbon Treaty. Law, Politics, and Treaty Reform* (Oxford, Oxford University Press 2010), 512 pp.

Craig, P., 'Delegated acts, implementing acts and the new Comitology Regulation', 36 *European Law Review* (2011), 671-687.

Craig, P., *EU Administrative Law* (Oxford, Oxford University Press, 2nd Edition 2012), 777 pp.

Craig, P., 'Subsidiarity: A Political and Legal Analysis', 50 *Journal of Common Market Studies* (2012), 72-87.

Crane, D., *The Institutional Structure of Antitrust Enforcement* (Oxford, Oxford University Press 2011), 268 pp.

Craufurd Smith, R., 'Remedies for Breaches of EU Law in National Courts: Legal Variation and Selection' in P Craig and G. De Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 1999), 287-320.

Cseres, K., *Competition law and Consumer Protection* (Alphen a/d Rijn, Kluwer, 2005), 468 pp.

Curtin, D., 'The constitutional structure of the Union: A Europe of Bits and Pieces', 30 *Common Market Law Review* (1993), 17-69.

Curtin, D. and Nollkaemper, A., 'Conceptualizing Accountability in International and European Law', *Netherlands Yearbook of International Law* (2005), 3-20.

Curtin, D., 'Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability', in D. Geradin and N. Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Cheltenham, Edward Elgar, 2005), 88–119.

Curtin, D., 'Holding (Quasi-) Autonomous EU Administrative Actors to Public Account', 13 *European Law Journal* (2007), 523-541.

Curtin, D., *Executive Power of the European Union. Law, practices and the living constitution* (Oxford, Oxford University Press 2009), 374 pp.

Curtin, D., Hofmann, H. and Mendes, J., 'Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda', 19 *European Law Journal* (2013), 1-21.

Cowan, D., and Nazerali, J., 'Modernising the enforcement of E.U. competition rules - can the Commission claim to be preaching to the converted?', 20 *European Competition Law Review* (1999), 442-445.

Daniel Cross, E., 'Pre-Emption of Member State Law in the European Economic Community. A Framework for Analysis, 29 *Common Market Law Review* (1992), 447- 472.

Dashwood, A., 'States in the European Union', 32 *European Law Review* (1998), 201-216.

Davidoff, S. and Zaring, D., 'Regulation by Deal: the Government's Response to the Financial Crisis', 61 *Administrative Law Review* (2009), 463-541.

Davies, G., 'Can selling arrangements be harmonised?', 30 *European Law Review* (2003), 371-385.

Davies, G., 'Subsidiarity: The wrong idea, in the wrong place, at the wrong time', 43 *Common Market Law Review* (2006), 63-84.

Dawson, M., 'From Informal to Formal Networks. The Case of Economic Governance', presentation delivered at the November 2011 Utrecht Ius Commune Conference, http://www.rechten.unimaas.nl/iuscommune/activities/2011/2011-11-24/workshop5b_Dawson.pdf.

Deakin, S., 'Two Types of Regulatory Competition: Competitive Federalism versus Reflexive Harmonisation. A Law and Economics Perspective on *Centros*' in 2 *Cambridge Yearbook of European Legal Studies* (1999), 231-260.

Deakin, S., 'Legal Diversity and Regulatory Competition: Which Model for Europe?', 12 *European Law Journal* (2006), 440-454.

De Baere, G., *Constitutional principles of EU external relations* (Oxford, Oxford University Press 2008), 330 pp.

De Baere, G., 'N.S. v. Secretary of State for the Home Department', 106 *American Journal of International Law* (2012), 616-624.

De Búrca, G., 'The Principle of Proportionality and its Application in EU Law', 13 *Yearbook of European Law* (1993), 105-150.

De Búrca, G., 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor', 36 *Journal of Common Market Studies* (1998), 217-235.

De Búrca, G., 'The Institutional Development of the EU: A Constitutional Analysis' in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 1999), 55-81.

De Búrca, G., 'Proportionality and Subsidiarity as General Principles of Law' in U. Bernitz and J. Nergelius (eds.), *General Principles of European Community Law* (The Hague, Kluwer 2000), 93-112.

De Búrca, G. and Walker, N., 'Reconceiving Law & New Governance', 13 *Columbia Journal of European Law* (2007), 519-537.

De Búrca, G., '*Europe's* raison-d'être', 18 *Maastricht Journal of European and Comparative Law* (2011), 418-420

De Búrca, G., 'The Road not Taken: The European Union as a Global Human Rights Actor', 105 *American Journal of International Law* (2011), 649-693.

de Cecco, F., 'Room to Move? Minimum Harmonization and Fundamental Rights', 43 *Common Market Law Review* (2006), 9-30.

de Cecco, F., *State Aid and the European Economic Constitution* (Oxford, Hart, 2012), 210 pp.

Den Hertog, J., 'General Theories of Regulation' in B. Bouckaert en G. De Geest (eds.), *Encyclopaedia of Law and Economics, Volume III, The Regulation of Contracts*, Cheltenham, Edward Elgar, 2000, 223-270.

Dekeyser, K. and Jaspers, M., 'A New Era of ECN Cooperation. Achievements and Challenges with a Special Focus on Work in the Leniency Field', 30 *World Competition* (2007), 3-24.

De Leeuw, M. E., 'The European Ombudsman's Role as a Developer of Norms of Good Administration', 19 *European Public Law* (2011), 349–368.

De Lucia, L., 'Conflict and Cooperation within European Composite Administration (Between Philia and Eris), 5 *Review of European Administrative Law* (2012), 43-77.

Demaret, P., 'A Short Walk in the Realm of Subsidiarity' in R. Buxbaum, G. Hertig, A. Hirsch and K. Hopt (eds.), *European Economic and Business Law. Legal and Economic Analyses on Integration and Harmonization* (New York, de Gruyter, 1996), 12-31.

Deringer, A., 'The Distribution of Power in the Enforcement of the Rules of Competition under the Rome Treaty', 1 *Common Market Law Review* (1963), 30-40.

Deringer, A., 'Stellungnahme zum Weissbuch der Europaïschen Kommission über die Modernisierung der Vorschriften zur Anwendung der Art. 85 und 86 EG-Vertrag (Art. 81 und 82 EG)', 11 *Europaïsche Zeitschrift für Wirtschaftsrecht* (2000), 5-11.

De Sadeleer, N., 'The New Architecture of the European Economic Governance: A Leviathan or a Flat-Footed Colossus?', 19 *Maastricht Journal of European and Comparative Law* (2012), 354-382.

De Smijter, E., and Kjolbe, L., 'The Enforcement System under Regulation 1/2003' in J. Faull and A. Nikpay (eds.), *The EC Law of Competition* (Oxford, Oxford University Press, 2007), 87-180.

De Visscher, C. and Maiscocq, O., 'The Lamfalussy Procedure and the EC Institutional Balance: From Comitology Procedures to Policy Levels', http://www.eu-newgov.org/database/DELIV/D07D07b_Lamfalussy_Process_and_the_EC_Institutional_Balance.pdf, 27pp.

De Visscher, P., 'La Communauté européenne du charbon et de l'acier et les états membres' in *Actes officiels du congress international d'études sur la communauté européenne du charbon et de l'acier. Volume II* (Milan, Giuffré, 1957), 85 pp.

De Visser, M., *Network-Based Governance in EC Law. The Example of EC Competition and EC Telecommunications Law* (Nijmegen, Wolf Legal Publishers, 2008), 576 pp.

Devroe, W., 'Privatizations and Community Law: Neutrality versus Policy', 34 *Common Market Law Review* (1997), 267-306.

Devroe, W., '"Universele dienstverlening" als nieuwe manier van denken?', 48 *SEW – Tijdschrift voor Europees en Economisch Recht* (2000), 82-95.

Devroe, W., 'De Europese commissie en nationale mededingingsautoriteiten als amicus curiae. Huidig en komend recht' in P. Van Orshoven and M. Storme (eds.), *Amice curiae, quo vadis? Het openbaar ministerie in privaatrechtelijke, administratieve en sociale zaken* (Antwerp, Kluwer, 2002), 211-233.

Devroe, W. and Van Cleynenbreugel, P, 'Observations on economic governance and the search for a European economic constitution' in D. Schiek, U. Liebert and H. Schneider (eds.), *Economic and social constitutionalism after the Treaty of Lisbon* (Cambridge, Cambridge University Press 2011), 95-120.

De Witte, B., 'Retour à "Costa" - La primauté du droit communautaire à la lumière du droit international', *Revue trimestrielle de droit européen* (1984), 425-454.

De Witte, B., 'Institutional Principles: A Special Category of General Principles of EC Law' in U. Bernitz and J. Nergelius (eds.), *General Principles of European Community Law* (The Hague, Kluwer 2000), 143-159.

De Witte, B., 'The Role of Institutional Principles in the Judicial Development of the European Union Legal Order' in F. Snyder (ed.), *The Europeanisation of Law* (Oxford, Hart, 2000), 83-100.

De Witte, B., 'The Legal Status of the Charter: Vital Question or Non-Issue?', 7 *Maastricht Journal of European and Comparative Law* (2001), 81-89.

De Witte, B. and De Búrca, G., 'The Delimitation of Powers between the EU and its Member States' in in A. Arnull and D. Wincott (eds), *Accountability and Legitimacy in the European Union*, (Oxford, Oxford University Press, 2002), 201-222.

De Witte, B., 'Executive Accountability under the European Constitution and the Lisbon Treaty: *Nihil Novi sub Sole*?', in L. Verhey, P. Kiiver and S. Loeffen (eds.), *Political Accountability and European Integration* (Groningen, Europa Law Publishing, 2009), 137-151.

De Witte, B. and Beukers, T., 'Annotation of Case C-370/12, *Thomas Pringle* v. *Government of Ireland, Ireland, The Attorney General*, Judgment of the Court of Justice (Full Court) of 27 November 2012', 50 *Common Market Law Review* (2013), 805-848

De Witte, F., 'Transnational Solidarity and the Mediation of Conflicts of Justice in Europe', 18 *European Law Journal* (2012), 694-710.

Di Fabio, U., 'Some Remarks on the Allocation of Competences between the European Union and its Member States', 39 *Common Market Law Review* (2002), 1289-1301.

Di Frederico, G., 'EU Competition Law and the Principle of *Ne Bis in Idem*', 34 *World Competition* (2011), 241-260.

Di Giorgio, G. and Di Noia, C., 'Financial market regulation and supervision: how many peaks for the Euro area?', 28 *Brooklyn Journal of International Law* (2002-2003), 463-494.

Dorf, M. and Sabel, C., 'A constitution of democratic experimentalism', 98 *Columbia Law Review* (1998), 267-473

Dougan, M., 'Minimum Harmonisation and the Internal Market', 37 *Common Market Law Review* (2000), 853-885.

Dougan, M., 'When Worlds Collide! Competing Visions of the Relationship Between Direct Effect and Supremacy', 44 *Common Market Law Review* (2007), 931-963.

Dougan, M., 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts' in P. Craig and G. De Búrca (ed.), *The Evolution of EU Law* (Oxford, Oxford University Press, 2nd Edition, 2011), 407-438.

Douglas-Scott, S., 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing EU Human Rights *Acquis*', 43 *Common Market Law Review* (2006), 629-665.

Douglas-Scott, S., 'The European Union and Human Rights after the Treaty of Lisbon', 11 *Human Rights Law Review* (2011), 645-682.

Drahos, M., *Convergence of competition laws and policies in the European Community: Germany, Austria and the Netherlands*, (The Hague, Kluwer, 2001), 512 pp.

Driessen, J., 'Delegated legislation after the Treaty of Lisbon: An Analysis of Article 290 TFEU', 35 *European Law Review* (2010), 837-848.

Duijkersloot, J., 'Do Courts engage in lawmaking in relation to the supervision of the insurance industry? Reflections on supervision in the Netherlands and Germany' in F. Stroink and E. Van der Linden (eds.), *Judicial Lawmaking and Administrative Law* (Antwerp, Intersentia, 2005), 225-234.

Duxbury, N., 'Faith in Reason: The Process Tradition in American Jurisprudence', 15 *Cardozo Law Review* (1993), 601-704.

Easterbrook, F., 'Federalism and European Business Law' in R. Buxbaum, G. Hertig, A. Hirsch and K. Hopt (eds.), *European Economic and Business Law. Legal and Economic Analyses on Integration and Harmonization* (New York, de Gruyter, 1996), 1-11.

Eberlein, B. and Newman, A.L., 'Escaping the International Governance Dilemma? Incorporated Transgovernmental Networks in the European Union', 21 *Governance* (2008), 25-52.

Eeckhout, P., 'The EU Charter of Fundamental Rights and the Federal Question', 39 *Common Market Law Review* (2002), 945-994.

Egger, A., 'EU-Fundamental Rights in the National Legal Order: The Obligations of Member States Revisited', 25 *Yearbook of European Law* (2006), 515-553.

Ehlermann, C. D., 'The Contribution of EC Competition Policy to the Single Market', 29 *Common Market Law Review* (1992), 257-282.

Ehlermann, C.D., 'Reflections on a European Cartel Office', 32 *Common Market Law Review* (1995), 471-486.

Ehlermann, C. D., 'The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution', 37 *Common Market Law Review* (2000), 537-590.

Ehlermann, C. D. and Marquis, M. (eds.), *European Competition Law Annual 2008. Antitrust Settlements under EC Competition Law* (Oxford, Hart, 2010), 723 pp.

Eijlander, P. and van Gestel, R., (eds.), *Domeinconflicten tussen Europees en nationaal toezicht* (Den Haag, Boom Juridische Uitgevers 2006), 220 pp.

Eliantonio, M., *Europeanization of administrative justice? The influence of the ECJ's case law in Italy, Germany and England* (Groningen, Europa Law Publishing 2008), 416 pp.

Elliott, M., 'Tribunal Justice and Proportionate Dispute Resolution', 71 *Cambridge Law Journal* (2012), 297-324.

Ely, J.H., *Democracy and Distrust. A theory of judicial review* (Cambridge, Harvard University Press 1980), 268 pp.

Emiliou, N., 'Subsidiarity: an effective barrier against the "enterprises of ambition"?', 17 *European Law Review* (1992), 383-407.

Enchelmaier, S., 'Always at your service (within limits): the ECJ's case law on article 56 TFEU (2006-11)', 36 *European Law Review* (2011), 615-650.

Eskridge, W. and Peller, G., 'The New Public Law Movement: Moderation as Postmodern Cultural Form', 89 *Michigan Law Review* (1991), 707-791.

Estella, A., *The EU Principle of Subsidiarity and its Critique* (Oxford, Hart, 2002), 210 pp.

Esty, D. and Geradin, D., 'Regulatory Co-Opetition', 3 *Journal of International Economic Law* (2000), 235-255.

Everson, M. and Joerges, C., 'Reconfiguring the Politics-Law Relationship in the Integration Project through Conflict-Laws Constitutionalism', 18 *European Law Journal* (2012), 644-666.

Fabbrini, F., 'The European Multilevel System for the Protection of Fundamental Rights: A 'Neo-Federalist' Perspective', *Jean Monnet Working Paper 15/10*, 60 pp.

Fahey, E., 'Does the Emperor have Financial Crisis Clothes? Reflections on the Legal Basis of the European Banking Authority', 74 *Modern Law Review* (2011), 581-595.

Fallon, R., 'Reflections on the Hart and Wechsler Paradigm', 47 *Vanderbilt Law Review* (1994), 953-987.

Farber, D., 'Federal Preemption of State Law: The Current State of Play', *UC Berkeley Public Law Research Paper No. 1740043,* available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1740043&rec=1&srcabs=1778363, 38 pp.

Fernández Ordóñez, M., 'Enforcement by national authorities of European Community and Member States' Antitrust Law' in B. Hawk (ed.), *Antitrust in a Global Economy. Annual*

Proceedings of the Fordham Corporate Law Institute 1993 (The Hague, Kluwer, 1994), 629-637.

Ferran, E., *Building an EU Securities Market* (Cambridge, Cambridge University Press, 2004), 328 pp.

Ferran, E. and Alexander, K., 'Can soft law bodies be effective? The special case of the European Systemic Risk Board', 35 *European Law Review* (2010) 751-776.

Fischel, D., 'The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporate Law', 76 *Northwestern University Law Review* (1981-1982), 913-945.

Fischer, E., 'The European Union in the Age of Accountability', *Oxford Journal of Legal Studies* (2004), 495-515.

Fischer-Appelt, D., 'Does the EU need a single European securities regulator?' in H. Hofmann and A. Türk (eds.), *EU Administrative Governance* (Cheltenham, Edward Elgar, 2006), 244-285.

Fischer-Appelt, D., 'The European Securities and Markets Authority: the beginnings of a powerful European Securities Authority?', *Law and Financial Markets Review* (2011), 21-32.

Flattery, J., 'Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing', 7 *Competition Law Review* (2010), 53-81.

Forrester, I., 'Complement or Overlap? Jurisdiction of National and Community Bodies in Competition Matters after SABAM', 11 *Common Market Law Review* (1974), 171-182.

Forrester, I., 'The Modernisation of EC antitrust policy: Compatibility, Efficiency, Legal Security' in C.-D. Ehlermann and I. Atanasiu (eds.), *European competition law annual 2000: The Modernization of EC Antitrust Policy* (Oxford, Hart, 2001), 75-122.

Forrester, I., 'Due process in EC competition cases: a distinguished institution with flawed procedures', 34 *European Law Review* (2009), 817-843.

Forrester, I., 'A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review' in C.D. Ehlermann and M. Marquis (eds.), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Oxford, Hart, 2011), 407-452.

Forrester, I., 'A challenge for Europe's judges: the review of fines in competition cases', 36 *European Law Review* (2011), 185-207.

Forwood, N., 'Effective Enforcement and Legal Protection – Friends or Enemies?' in C.D. Ehlermann and I. Atanasiu (ed.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Oxford, Hart, 2007), 661-664.

Freeman, J., 'Collaborative Governance in the Administrative State', 45 *UCLA Law Review* (1997-1998), 1-98.

Freeman, J., 'The Private Role in Public Governance', 75 *New York University Law Review* (2000), 543-675.

Freeman, J. and Rossi, J., 'Agency Coordination in Shared Regulatory Space', 125 *Harvard Law Review* (2012), 1145-1151.

Freeman, P., 'The Competition and Markets Authority: can the whole be greater than the sum of its parts?', 1 *Journal of Antitrust Enforcement* (2013), 4-23

Freeman, R., 'Reforming the United States' Economic Model after the Failure of Unfettered Financial Capitalism', 85 *Chicago-Kent Law Review* (2010), 686-693.

Frey, B. and Eichenberger, R., 'FOCJ: competitive governments for Europe', 16 *International Review of Law and Economics* (1996), 315-327.

Frey, B. and Eichenberger, R., 'A Proposal for Dynamic European Federalism: FOCJ' in R. Mudaubi, P. Navarro and G. Sobbino (eds.), *Rules and Reason. Perspectives on Constitutional Political Economy* (Cambridge, Cambridge University Press, 2001), 237-257.

Frey, B. and Eichenberger, R., 'The New Democratic Federalism for Europe: Functional, Overlapping and Competing Jurisdictions' in J. Backhaus and D. Doering, *The Political Economy of Secession* (Zürich, Neue Zürcher Zeitung Publishing, 2004), 231-280.

Friend, M., 'Enforcing the ECSC Treaty in National Courts', 20 *European Law Review* (1995), 58-65.

Fritzsche, A., 'Discretion, Scope of Judicial Review and Institutional Balance in European Law', 47 *Common Market Law Review* (2010), 361-403.

GarcíaValdecasas, R. and Montesa Lloreda, A., 'A New Life for Commtiment Decisions under Article 9 of Regulation 1/2003? The Aftermath of the ECJ Judgment of 29 June 2010 in Case C-441/07P, Commission v. Alrosa' in T. Baumé, E. Oude Elferink, P. Phoa and D. Thiaville (eds.), *Today's Multi-Layered Legal Order: Current Issues And Perspectives* (Zutphen, Paris, 2011), 97-114.

Gardner, A., 'The Velvet Revolution: Article 90 and the Triumph of the Free Market in Europe's Regulated Sectors', 16 *European Competition Law Review* (1995), 78-86.

Gatto, A., 'Governance in the European Union: a Legal Perspective', 12 *Columbia Journal of European Law* (2006), 487-514.

Geens, K., 'Post Financial Crisis Regulation in Belgium', 8 *European Company Law* (2011), 207-213.

Gelter, M. ,'The Structure of Regulatory Competition in European Corporate Law' 5 *Journal of Corporate Legal Studies* (2005), 247-284.

Geradin, D., 'Institutional Aspects of EU Regulatory Reforms in the Telecommunications Sector: An Analysis of the Role of National Regulatory Authorities',1 *Journal of Network Industries* (2000), 5-32.

Geradin, D. (ed.), *The Liberalization of State Monopolies in the European Union and Beyond* (The Hague, Kluwer, 2000), 384 pp.

Geradin, D. (ed.), *The Liberalization of Electricity and Natural Gas in the European Union* (The Hague, Kluwer, 2001), 328 pp.

Geradin, D., 'Competition between Rules and Rules of Competition: a Legal and Economic Analysis of the proposed modernization of the enforcement of EC Competition law', 9 *Columbia Journal of European Law* (2002), 1-27.

Geradin, D. and Petit, N., 'The Development of European Regulatory Agencies: What the EU Should Learn From American Experience', 11 *Columbia Journal of European Law* 2004, 1-52.

Geradin, D. and J. McCahery, 'Regulatory Co-opetition: Transcending the Regulatory Competition Debate', *TILEC Discussion Paper DP 2005-020*, 24 pp.

Geradin, D. and Henry, D., 'The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts' judgments', 1 *European Competition Journal* (2005), 401-473.

Geradin, D., 'Public Compensation for Services of General Economic Interest: An Analysis of the 2011 European Commission Framework', *TILEC Discussion Paper 2012-023,* available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2031564, 19 pp.

Gerard, D., 'EU cartel law and the shaking foundations of judicial review' in D. Gerard, P. Goffinet, T. Joris, P. Nihoul and P. Wytinck (ed.), *Consacré à la concurrence: in honorem Bernard van de Walle de Ghelcke* (Maklu, Antwerp 2011), 11 -23.

Gerard, D., 'Breaking the EU antitrust enforcement deadlock: re-empowering the courts?', 36 *European Law Review* (2011), 457-479.

Gerber, D., 'The Origins of the European Competition Law Tradition in Fin-de-Siècle Austria', 36 *American Journal of Legal History* (1992), 405-440.

Gerber, D., 'The Transformation of European Community Competition Law?', 35 *Harvard International Law Journal* (1994), 97-148.

Gerber, D., *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford, Oxford University Press, 1998), 504 pp.

Gerber, D. and Cassinis, P., 'The "modernization" of European Community competition law: achieving consistency in enforcement', 27 *European Competition Law Review* (2006), 10-18 and 51-57.

Gerbrandy, A., 'Annotation of Case C-8/08, T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV, Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit, Judgment of the Court (Third Chamber) of 4 June 2009', 47 *Common Market Law Review* (2010), 1199-1220.

Gersten-Beuerle, C., 'United in Diversity: maximum v. minimum harmonisation in EU securities regulation', 7 *Capital Markets Law Journal* (2012), 317-342.

Gijlstra, D. and Murphy, D., 'EEC Competition Law after the Brasserie De Haecht II and SABAM Cases', 1 *Legal Issues of European Integration* (1974), 79-109.

Gil Ibañez, A., *The Administrative Supervision and Enforcement of EC Law: Powers, Procedures and Limits* (Oxford, Hart, 1999), 356 pp.

Gil Ibañez, A., 'The "Standard" Administrative Procedure for Supervising and Enforcing EC Law: EC Treaty Articles 226 and 228', 68 *Law and Contemporary Problems* (2004), 135-159.

Gilliams, H., 'Modernisation: from policy to practice', 28 *European Law Review* (2003), 451-474.

Giovanoli, M. and Devos, D. (ed.), *International Monetary and Financial Law. The Global Crisis* (Oxford, OUP, 2010), 146-176.

Girerd, P., Les principes d'équivalence et d'effectivité: encadrement ou désencadrement de l'autonomie procédurale des Etats membres?', 38 *Revue Trimesterielle de Droit Européen*. (2002), 75-102.

Goh, J., 'Enforcing EC Competition Law in Member States', 14 *European Competition Law Review* (1993), 114-117.

Gomez, F. and Ganuza, J.J., 'An economic analysis of harmonization regimes: full harmonization, minimum harmonization or optional instrument?', 7 *European Review of Contract Law* (2011), 275-294.

Gormley, L., 'Competition and Free Movement: Is the Internal Market the Same as a Common Market?', *European Business Law Review* (2002), 517-522.

Gormley, L., 'Some Further Reflections on the development of General Principles of Law within Article 10 EC' in U. Bernitz, J. Nergelius and C. Cardner (eds.), *General Principles of EC law in a Process of Development* (Alphen a/d Rijn, Kluwer, 2008), 303-314.

Gormley, L., 'Free Movement of Goods and their Use – What Is the Use of It?', 33 *Fordham International Law Journal* (2011), 1589-1628.

Goucha Soares, A., 'Pre-Emption, Conflicts of Power and Subsidiarity', 23 *European Law Review* (1998), 132-145.

Goucha Soares, A., 'The Principle of Conferred Powers and the Division of Powers between the European Community and the Member States', 23 *Liverpool Law Review* (2001), 57-78.

Graham, C., 'The Enterprise Act 2002 and Competition Law', 67 *Modern Law Review* (2004), 273-288.

Grasseti, C., 'La Communauté et les entreprises' in *Actes officiels du congress international d'études sur la communauté européenne du charbon et de l'acier. Volume IV* (Milan, Giuffré 1957), 93 pp.

Greaves, R., 'Concurrent jurisdiction in EEC Competition Law: when should a national court stay proceedings?', 8 *European Competition Law Review* (1987), 256-272.

Greenawalt, K., 'The Enduring Significance of Neutral Principles', 78 *Columbia Law Review* (1978), 982-1021.

Griffin, P., 'The Delaware Effect: Keeping the Tiger in Its Cage: The European Experience of Mutual Recognition in Financial Services', 7 *Columbia Journal of European Law* (2001), 337-355.

Griller, S. and Orator, A., 'Everything under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine', 35 *European Law Review* (2010), 3-35.

Groenleer, M., *The Autonomy of European Union Agencies. A Comparative Study of Institutional Development* (Delft, Eburon, 2009), 432 pp.

Grossman, E. and Leblond, P., 'European financial integration – Finally the great leap forward', 49 *Journal of Common Market Studies* (2011), 413-435.

Gruson, M. and Nikowitz, W., 'The Second Banking Directive of the European Economic Community and Its Importance for Non-EEC Banks', 12 *Fordham International Law Journal* (1989), 205-241.

Gustaffson, M., 'Some Legal Implications Facing the Realisation of the Commission White Paper on Modernisation of EC Antitrust Procedure and the Role of National Courts in a Post-White Paper Era', 27 *Legal Issues of Economic Integration* (2000), 159-184.

Gutman, K., 'Case C-66/04, Smoke Flavourings; Case C-436/03, SCE; & Case C-217/04, ENISA', 13 *Columbia Journal of European Law* (2006-2007), 147-188.

Gutman, K., 'The evolution of the action for damages against the European Union and its place in the system of judicial protection', 48 *Common Market Law Review* (2011), 695-750.

Gutman, K., 'The Commission's 2010 Green Paper on European Contract Law: Reflections on Union Competences in light of the Proposed Options', 7 *European Review of Contract Law* (2011), 151-172.

Haapaniemi, P., 'Procedural Autonomy: A Misnomer?' in L. Ervo *et al.* (eds.), *The Europeanization of Procedural Law and New Challenges to a Fair Trial* (Europa Law Publishing, Groningen 2009), 87-121.

Halberstam, D., 'The Bride of Messina: constitutionalism and democracy in Europe', 30 *European Law Review* (2005), 775-801.

Halberstam, D., 'Comparative Federalism and the Role of the Judiciary' in K. Whittington, R. D. Kelemen and G. Caldeira (eds.), *The Oxford Handbook of Law and Politics* (Oxford, Oxford University Press, 2008), 142-164.

Haller, M., 'Is the European Union Legitimate? To what extent?', 60 *International Social Science Journal* (2009), 223-234.

Hancher, L. and Moran, M., 'Organizing Regulatory Space' in L. Hancher and M. Moran (eds), *Capitalism, Culture and Economic Regulation* (Oxford, Oxford University Press, 1989), 271-301.

Hancher, L. and Larouche, P., 'The coming of age of EU regulation of network industries and services of general economic interest' in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 2nd Edition, 2011), 743-782.

Harbo, T.-I., 'The Function of the Proportionality Principle in EU Law', 16 *European Law Journal* (2010), 158-185.

Harlow, C., 'European Administrative Law and the Global Challenge', *European University Institute RSC Working Paper,* No 98/23, 1998, http://www.eui.eu/DepartmentsAndCentres/RobertSchumanCentre/Publications/WorkingPapers/9823, 25 pp.

Harlow, C., *Accountability in the European Union* (Oxford, Oxford University Press, 2002), 214 pp.

Harrison, V., 'Subsidiarity in Article 3b of the EC Treaty: Gobbledegook or Justiciable Principle?', 45 *International and Comparative Law Quarterly* (1996), 431-439.

Hartmann, M., 'Administrative Constitutionalism and the Political Union', 14 *German Law Journal* (2013), 695-714.

Heede, K., 'Enhancing the Accountability of Community Institutions and Bodies: The Role of the European Ombudsman', 5 *European Public Law* (1997), 587-605.

Henkel, C., 'The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity', 20 *Berkeley Journal of International Law* (2002), 359-386.

Heremans, D. and Pacces, A., 'Regulation of Banking and Financial Markets', *Rotterdam Institute of Law and Economics (RILE) Working Paper No. 2011/04*, 45 pp.

Heremans, D. and Bosquet, K., 'The Future of Law and Finance after the Financial Crisis: New Perspectives on Regulation and Corporate Governance for Banks', *University of Illinois Law Review* (2011), 1551-1576.

Heremans, T., *Professional Services in the EU Internal Market* (Oxford, Hart, 2012), 388 pp.

Hertig, 'Imperfect Mutual Recognition for EU Financial Services' in R. Buxbaum, G. Hertig, A. Hirsch and K. Hopt (eds.), *European Economic and Business Law. Legal and Economic Analyses on Integration and Harmonization* (New York, de Gruyter, 1996), 218-229.

Hertig, G., 'Imperfect Mutual Recognition for EC Financial Services', 14 *International Review of Law and Economics* (1994), 177-186.

Hertig, G., 'Regulatory Competition in EU Financial Services', 3 *Journal of International Economic Law* (2000), 349-375.

Hertig, G. and Lee, R., 'Four predictions about the Future of EU Securities Regulation', *Journal of Corporate Law Studies* (2003), 359-378.

Hertig, G. and McCahery, J., 'Company and Takeover Law Reforms in Europe: Misguided Harmonization Efforts or Regulatory Competition?', 4 *European Business Organization Law Review* (2003), 179-211.

Heyvaert, V., 'No data, no market. The future of EU chemicals control under the REACH Regulation', 9 *Environmental law review* (2007), 201-206.

Heyvaert, V., 'The EU Chemicals Policy: Towards Inclusive Governance?' in E. Vos (ed.) *European risk governance: its science, its inclusiveness and its effectiveness* (CONNEX - Network of Excellence Report Series 06, 2008), 185-221.

Heyvaert, V., 'Globalizing regulation: reaching beyond the borders of chemical safety', 36 *Journal of Law and Society* (2009), 110-128.

Himsworth, C., 'Things fall apart: the harmonisation of Community judicial procedural protection revisited', 22 *European Law Review* (1997), 291-311.

Hiljemark, L., 'Enforcement of EC Competition Law in National Courts—The Perspective of Judicial Protection', 17 *Yearbook of European Law* (1997), 83-134.

Hills, R., 'The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't', 96 *Michigan Law Review* (1997-1998), 813-944.

Hilson, C., 'The role of discretion in EC law on non-contractual liability', 42 *Common Market Law Review* (2005), 677-695.

Hinarejos, A., *Judicial Control in the European Union* (Oxford, Oxford University Press 2009), 232 pp.

Hofmann, H. and Türk, A., 'Conclusions: Europe's integrated administration' in H. Hofmann and A. Türk (eds.), *EU administrative governance* (Cheltenham, Edward Elgar, 2006), 573-595.

Hofmann, H., 'Negotiated and Non-Negotiated Administrative Rule-Making: the Example of EC Competition Policy', 43 *Common Market Law Review* (2006), 153-178.

Hofmann, H., 'Which Limits? Control of Powers in an Integrated Legal System' in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford, Hart, 2009), 45-62.

Hofmann, H. and Morini, A., 'Constitutional aspects of the pluralisation of the EU executive through "agencification"', 37 *European Law Review* (2012), 419-443.

Hohfeld, W., 'Some Fundamental Conceptions as Applied in Judicial Reasoning', 23 *Yale Law Journal* (1913), 16-59.

Hopt, K., 'The Necessity of Co-Ordinating or Approximating Economic Legislation, or of Supplementing or Replacing It By Community Law. Report.', 13 *Common Market Law Review* (1976), 245-251.

Horsley, T., 'Anyone for Keck? – Comment on Case C-110/05, Commission v. Italy, Judgment of the Court (Grand Chamber) of 10 February 2009, nyr; Case C-142/05, Åklagaren v. Percy Mickelsson and Joakim Roos, Judgment of the Court (Second Chamber) of 4 June 2009, nyr; Case C-265/06, Commission v. Portugal, Judgment of the Court (Third Chamber) of 10 April 2008, [2008] ECR 1-2245', 46 *Common Market Law Review* (2009), 2001-2019.

Horsley, T., 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?', 50 *Journal of Common Market Studies* (2012), 267-282.

Höss, N., 'The Principle of Proportionality in the *Viking* and *Laval* cases: an appropriate standard of judicial review?', *EUI Law Department Working Paper* 2009/06, 37 pp.

Hou, L., *Competition law and regulation in the EU electronic communications sector: a comparative legal approach* (Ph.D. thesis KU Leuven – University of Leuven, 2011), 331 pp.

Huberfeld, N., Weeks Leonard, E. and Outterson, K., 'Plunging into Endless Difficulties: Medicaid and Coercion in the Healthcare cases', Boston University School of Law Working Paper 12-40, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128760, 89 pp.

Humpe, C. and Bourgeois, J., 'The Commission's draft "new Regulation 17"', 23 *European Competition Law Review* (2002), 43-51.

Hurdik, J., 'The system of consumer law on its way to integration into the system of private law' in H. Schulte-Nölke and L. Tichý (eds.), *Perspectives for European Consumer Law. Towards a Directive on Consumer Rights and Beyond* (Munich, Sellier, 2010), 117-126.

Ibanez Colomo, P., 'Market failures, transaction costs and article 101(1) TFEU case law', 37 *European Law Review* (2012), 541-562.

Iglesias Sanchez, S., 'The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights', 49 *Common Market Law Review* (2012), 1565-1612.

Incalza, T., 'Toezicht op de financiële sector volgens het twin-peaks model: ander en beter?', 24 *Tijdschrift voor Rechtspersoon en Vennootschap* (2012), 173-185.

Jacqué, J., 'The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms', 48 *Common Market Law Review* (2011), 995-1024.

Jaeger, M., 'Standard of Review in Competition Cases: Can the General Court Increase Coherence in the European Union Judicial System?' in T. Baumé, E. Oude Elferink, P. Phoa and D. Thiaville (eds.), *Today's Multi-Layered Legal Order: Current Issues And Perspectives* (Zutphen, Paris, 2011), 119-130.

Jaeger, M., 'The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?', 3 *Journal of European Competition Law & Practice* (2012), 295-314.

Jans, J., de Lange, R., Prechal, S. and Widdershoven, R., *Europeanisation of Public Law* (Groningen, Europa Law Publishing, 2007), 418 pp.

Jans, J., 'Harmonization of National Procedural Law via the Back Door? Preliminary Comments on the ECJ's Judgment in *Janecek* in a Comparative Context' in M. Bulterman *et al.* (eds.), *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot* (Kluwer, Alphen a/d Rijn 2009), 267-275.

Jans, J., 'Who is the Referee? Access to Justice in a Globalised Legal Order', 4 *Review of European Administrative Law* (2011), 85-97.

Jansen, O. and and Schöndorf-Haubold, B. (eds.), *The EU Composite Administration* (Antwerp, Intersentia, 2011), 610 pp.

Jedličková, B. 'One among many or one above all? The role of consumers and their welfare in competition law', 33 *European Competition Law Review* (2012), 568-575.

Jenny, F., 'Implications of the EC Regulation 1/2003 in the Area of National Courts' in A. Mateus and T. Moreira (eds.), *Competition Law and Economics. Advances in Competition Policy and Antitrust Enforcement* (Alphen a/d Rijn, Kluwer, 2007), 78-83.

Jenny, F., 'Improving judicial control of administrative decisions in competition enforcement' in A. Mateus and T. Moreira (eds.), *Competition law and Economics. Advances in Competition Policy Enforcement in the EU and North America* (Cheltenham, Edward Elgar, 2010), 71-84.

Johnston, A. and Syrpis, P., 'Regulatory Competition in European company law after Cartesio', 34 *European Law Review* (2009), 378-404

Jones, C. and Sharpston, E., 'Beyond Delimitis: Pluralism, Illusions and Narrow Constructionism in Community Antitrust Litigation', 3 *Columbia Journal of European Law* (1997), 85-108.

Jones, C. (ed.), *EU Energy Law. Volume 1. The Internal Energy Market. The Third Liberalization Package* (Leuven, Claeys & Casteels, 2010), 1176 pp.

Jordan, K., 'The Shifting Preemption Paradigm: Conceptual and Interpretive Issues', 51 *Vanderbilt Law Review* (1998), 1149-1229.

Joshua, J., 'The Right to be Heard in EEC Competition Procedures', 15 *Fordham International Law Journal* (1991-1992), 16-91.

Joshua, J., 'The European Cartel Enforcement Regime Post-Modernization: How is it Working?', 13 *George Mason Law Review* (2006), 1247-1271.

Joshua, J. and Harding, C., *Regulating Cartels in Europe* (Oxford, Oxford University Press, 2nd Edition, 2010), 440 pp.

Kahan, M. and Kamar, E., 'The Myth of State Competition in Corporate Law', 55 *Stanford Law Review* (2002-2003), 679-749.

Kakouris, C., 'Do the Member States Possess Judicial Procedural Autonomy?', 34 *Common Market Law Review* (1997), 1389-1412.

Katsoulacos, Y. and Ulph, D., 'Optimal Enforcement Structures for Competition Policy: Implications of Judicial Reviews and of Internal Correction Mechanisms', 7 *European Competition Journal* (2011), 71-88.

Keirsbilck, B., *Foundations of Economic Law in Europe: a harmonised law of Unfair Commercial Practices and its Interaction with Competition Law after Modernisation*, Faculty of Law K.U. Leuven, doctoral dissertation, 2010, 593 pp.

Keirsbilck, B., *The New Law of Unfair Commercial Practices and Competition Law* (Oxford, Hart, 2011), 766 pp.

Keirsbilck, B., 'The interaction between consumer protection rules on unfair contract terms and unfair commercial practices: *Perenič ová and Perenic*', 50 *Common Market Law Review* (2013), 247-264.

Kelemen, R. D., *Eurolegalism. The Transformation of Law and Regulation in the European Union* (Cambridge, Harvard University Press, 2011), 366 pp.

Kelleher, G., 'The Common Market Antitrust Laws: the first ten years', 12 *Antitrust Bulletin* (1967), 1219-1259.

Kelsen, H., *General Theory of Law and State* (translated by A. Wedberg), (Harvard University Press, Cambridge 1945), 516 pp.

Kennedy, David and Fisher, W., *The Canon of American Legal Thought* (Princeton, Princeton University Press, 2006), 952 pp.

Kennedy, David, *The Dark Sides of Virtue. Reassessing International Humanitarianism* (Princeton, Princeton University Press, 2007), 400 pp.

Kennedy, Duncan, *The Rise and Fall of Classical Legal Thought* (Washington D.C., Beard Books, 2006), 320 pp.

Kerber, W., 'Interjurisdictional Competition within the European Union', 23 *Fordham International Law Journal* (1999), S217-S248.

Keyaerts, D., 'Ex ante evaluation of EU legislation intertwined with EU judicial review? Comment on Vodafone Ltd v Secretary of State for Business, Enterprise and Regulatory Reform (C-58/08)', 35 *European Law Review* (2010), 869-884.

Keyaerts, D., *Better regulation en de EU-rechter: een overbrugbare kloof* (Bruges, Die Keure, 2012), 279 pp.

Khan, A., 'Corporate Mobility under Article 49 TFEU: A Question of Means, not Ends', *European Business Law Review* (2011), 847-870.

Kilbey, I., 'Financial Penalties under Article 228(2) EC: Excessive Complexity?', 44 *Common Market Law Review* (2007), 743-759.

Killick, J. and Berghe, P., 'This is not the time to be tinkering with Regulation 1/2003 – It is time for fundamental reform – Europe should have change we can believe in', 6 *Competition Law Review* (2010), 259-285.

Kingham, R., Bogaert, P. and Eddy, P., 'The new European Medicines Agency', 49 *Food and Drug Law Journal* (1994), 301-322.

Kingston, S., 'A "new division of responsibilities" in the proposed regulation to modernise the rules implementing Articles 81 and 82 EC? A warning call', 22 *European Competition Law Review* (2001), 340-350.

Kjaer, P., 'Embeddedness through Networks: A Critical Appraisal of the Network Concept in the Oeuvre of Karl-Heinz Ladeur', 10 *German Law Journal* (2009), 483-500.

Klees, A., 'Breaking the Habits: The German Competition Law after the 7th Amendment to the Act against Restraints of Competition (GWB)', 7 *German Law Journal* (2006), 399-420.

Knill, C. and Lehmkuhl, D., 'An Alternative Route of Legal Integration: the Community's Railways Policy', 2 *European Integration Online Papers* (1998), No. 3, http://eiop.or.at/eiop/texte/1998-003.htm.

Knook, A., 'The Court, the Charter, and the Vertical Division of Powers in the European Union', 42 *Common Market Law Review* (2005), 367-398.

Kocaoglu, K., 'A Comparative Bibliography: Regulatory Competition on Corporate Law', available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103644, 98 pp.

Kobayashi, B. and Ribstein, L., 'The Economics of Federalism' in B. Kobayashi and L. Ribstein (eds.), *Economics of Federalism* (Cheltenham, Edward Elgar, 2007), 1-24.

Komárek, J., 'Federal Elements in the Community Judicial System – Building Coherence in the Community Legal Order', 42 *Common Market Law Review* (2005), 9-34.

Komesar, N., *Law's Limits. The Rule of Law and the Supply and Demand for Rights* (Cambridge, Cambridge University Press 2001), 220 pp.

Komninos, A., 'Modernisation and Decentralisation: Retrospective and Prospective' in G. Amato and C.D. Ehlermann (eds.), *EC Competition Law. A Critical Assessment* (Oxford, Hart, 2007), 629-674.

Kon, S., 'Article 85, para 3: a Case for Application by National Courts', 19 *Common Market Law Review* (1982), 541-561

Konstadinides, T., *Division of Powers in European Union Law. The Delimitation of Internal Competence between the EU and the Member States* (Alphen a/d Rijn, Kluwer Law International, 2009), 352 pp.

Konstadinides, T., 'Wavering between centres of gravity: comment on Ireland v Parliament and Council', 35 *European Law Review* (2010), 88-102.

Korah, V., 'The Rise and Fall of Provisional Validity – The Need for a Rule of Reason in EEC Antitrust', 3 *Northwestern Journal of International Law & Business* (1981), 320-357.

Kovar, R., *Le pouvoir réglémentaire de la Communauté européenne du charbon et de l'acier* (Paris, LGDJ, 1964), 348 pp.

Krajewski, M., Neergaard, U. and van der Gronden, J. (eds.), *The changing legal framework of services of general interest in Europe: between competition and solidarity* (The Hague, TMC Asser, 2009), 544 pp.

Krueger, B. and Klimisch, A., 'Decentralised application of E.C. Competition law: current practice and future prospects' in 24 *European Law Review* (1999), 463-482.

Kumm, M., 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union', 12 *European Law Journal* (2006), 503-533.

Ladeur, K.-H., *The Europeanisation of Administrative* Law (Aldershot, Ashgate, 2002), 159 pp.

Lafarge, F., 'Administrative Cooperation between Member States and Implementation of EU Law', 16 *European Public Law* (2010), 597-616.

Lamandini, M., 'Towards a New Architecture for European Banking Supervision', 6 *European Company Law* (2009), 6-13.

Lamandini, M., 'When More is Needed: The European Financial Supervisory Reform and Its Legal Basis', 6 *European Company Law* (2009), 197-202.

Larouche, P., *Competition Law and Regulation in European Telecommunications* (Oxford, Hart, 2000), 504 pp.

Larouche, P., 'Legal Emulation between Regulatory Competition and Comparative Law', *TILEC Discussion Paper* 2012-17, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2044679, 35 pp.

Lasserre, B., 'The European Competition System in Context: Matching Old Constitutional Principles and New Policy Challenges' in C.D. Ehlermann and M. Marquis (ed.), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Oxford, Hart, 2011), 61-78.

Lastra, R. and Wood, G., 'The Crisis of 2007-09: Nature, Causes, and Reactions', 13 *Journal of International Economic Law* (2010), 531-550.

Lavrijssen, S. and Hancher, L., 'Networks on Track. From European Regulatory Networks to European Regulatory "Network Agencies"', 34 *Legal Issues of Economic Integration* (2008), 23-55.

Lavrijssen, S. and Ottow, A., 'Independent Supervisory Authorities: A Fragile Concept', 39 *Legal Issues of Economic Integration* (2012), 419-446.

Lee, R., 'The Legal Foundation for Competition in EC Capital Markets: The Gap Between Rhetoric and Reality', 17 *International Review of Law and Economics* (1994), 163-173.

Lefterov, A., 'How feasible is the proposal for establishing a new European system of financial supervisors?', 38 *Legal Issues of European Integration* (2011), 33-64.

Lenaerts, K., *Le juge et la constitution aux Etats Unis de l'Amérique et dans l'ordre juridique européen* (Brussels, Bruylant, 1988), 817 pp.

Lenaerts, K., 'Constitutionalism and the Many Faces of Federalism', 38 *American Journal of Comparative Law* (1990), 205-263.

Lenaerts, K., 'Regulating the regulatory process: "delegation of powers" in the European Community', 18 *European Law Review* (1994), 23-49.

Lenaerts, K. and Vanhamme, J., 'Procedural Rights of Private Parties in the Community Administrative Process', 34 *Common Market Law Review* (1997), 531-569.

Lenaerts, K., 'Fundamental Rights in the European Union', 25 *European Law Review* (2000), 575-600.

Lenaerts, K. and Verhoeven, A., 'Towards a Legal Framework for Executive Rule-Making in the EU? The Contribution of the New Comitology Decision', 37 *Common Market Law Review* (2000), 645-686.

Lenaerts, K. and Verhoeven, A., 'Institutional Balance as a Guarantee for Democracy in EU Governance" in C. Joerges and R. Dehousse (eds.), *Good Governance in Europe's Integrated Market,* Oxford, Oxford University Press, 2002, 37-49.

Lenaerts, K., 'Modernisation of the Application and Enforcement of European Competition Law – An Introductory Overview' in J. Stuyck and H. Gilliams (eds.), *Modernisation of European Competition Law. The Commission's proposal for a new regulation implementing Articles 81 and 82 EC* (Antwerp, Intersentia, 2002), 11-40.

Lenaerts, 'Interlocking legal orders in the European Union and Comparative Law', 52 *International and Comparative Law Quarterly* (2003), 873-906.

Lenaerts, K. and Gerard, D., 'Decentralisation of EC Competition Law Enforcement: Judges in the Frontline', 27 *World Competition* (2004), 313-349.

Lenaerts, K. and Corthaut, T., 'Of Birds and Hedges: The Role of Primacy in invoking norms of EU law', 31 *European Law Review* (2006), 287.

Lenaerts, K., Van Nuffel, P. and Bray, R. (ed.), *Constitutional Law of the European Union* (London, Sweet & Maxwell, 2006, 2nd ed.), 969 pp.

Lenaerts, K., Arts, D. and Maselis, I., *Procedural Law of the European Union* (London, Sweet & Maxwell, 2nd Edition, 2006), 1026 pp.

Lenaerts, K., 'The Rule of Law and the Coherence of the Judicial System of the European Union, 44 *Common Market Law Review* (2007), 1625-1659.

Lenaerts, K., 'Federalism and the Rule of Law: Perspectives from the European Court of Justice', 33 *Fordham International Law Journal* (2009-2010), 1338-1387.

Lenaerts, K. and Guttierez-Fons, J., 'The constitutional allocation of powers and general principles of EU law', 47 *Common Market Law Review* (2010), 1629-1669.

Lenaerts, K. and Van Nuffel, P., *European Union Law* (Robert Bray & Nathan Cambien, eds.) (London, Sweet & Maxwell, 2011), 1334 pp.

Lenaerts, K., 'EU Federalism in 3-D' in E. Cloots, G. De Baere and S. Sottiaux (eds.), *Federalism and EU law* (Oxford, Hart, 2012), 13-44.

Lessig, L., *Code and other laws of Cyberspace* (New York, Basic Books, 1999), 297 pp.

Levine, M., and Forrence, J., 'Regulatory Capture, Public Interest and the Public Agenda: Towards a Synthesis', 6 *Journal of Law, Economics & Organization* (1990), 167-198.

Lévi-Strauss, C., *La Pensée Sauvage* (Paris, Plon, 1962), 395 pp.

Levitt, M. and Hutchings, M., 'Concurrent jurisdiction', 15 *European Competition Law Review* (1994), 119-126.

Levitt, M., 'Access to the File: The Commission's Administrative Procedures in Cases under Articles 85 and 86 EC', 34 *Common Market Law Review* (1997), 1413-1444.

Lianos, I., 'Shifting Narratives in the European Internal Market: Efficient Restrictions of Trade and the Nature of "Economic Integration"', *European Business Law Review* (2010), 705-760.

Licht, A., 'Regulatory Arbitrage for Real: International Securities Regulation in a World of Interacting Securities Markets', Harvard Law School John M. Olin Law and Economics Working Paper (1997), available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/219_2.pdf, 90 pp.

Lipsett, O., 'The Failure of Federalism: Does Competitive Federalism actually Protect Individual Rights?', 10 *Journal of Constitutional Law* (2008), 643-664.

Lipsky, A. and Sidak, J. Gregory, 'Essential Facilities', 51 *Stanford Law Review* (2009), 1187-1248.

Liu, H.-W., 'Harmonizing the Internal Market or Public Health? – Revisiting Case 491/01 (British American Tobacco) and Case 380/03 (Tobacco Advertising II)', *Columbia Journal of European Law Online* (2009), http://www.cjel.net/online/15_2-liu/.

Lock, T., 'EU accession to the ECHR: implications for the judicial review in Strasbourg', 35 *European Law Review* (2010), 777-798.

Lock, T., 'Walking on a tightrope: the draft ECHR accession agreement and the autonomy of the EU legal order, 48 *Common Market Law Review* (2011), 1025-1054.

Lomnicka, E., 'The Home Country Control Principle in Financial Services Directives and the Case Law' in M. Andenas and W. H. Roth (eds.), *Services and Free Movement in EU law* (Oxford, Oxford University Press, 2001), 295-320.

Lord, C. and Magnette, P., 'E Pluribus Unum? Creative Disagreement about Legitimacy in the EU', 32 *Journal of Common Market Studies* (2004) 183-202.

Louis, F. and Accardo, G., '*Ne Bis in Idem*, part "*Bis*"', 34 *World Competition* (2011), 97-112.

Louis, F., 'L'arrêt de la Cour de Justice dans l'affaire VEBIC: une opportunité de parfaire l'organisation de l'autorité belge de concurrence', *Tijdschrift voor Belgische Mededinging – Revue de la Concurrence Belge* (2011), 12-16.

Lucey, C., 'Unforeseen consequences of Article 3 of EU Regulation 1/2003', 27 *European Competition Law Review* (2006), 558 – 563.

Ludwigs, M., 'Annotation of Case C 380/03, *Federal Republic of Germany* v. *European Parliament and Council of the European Union (Tobacco Advertising II)*. Judgment of the Court (Grand Chamber) of 12 December 2006, [2006] ECR I-11573', 44 *Common Market Law Review* (2007), 1159-1176.

MacCormick, N., 'The Relative Heteronomy of Law', 3 *European Journal of Philosophy* (1995), 69-85.

Macey, J., 'Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public Choice Explanation of Federalism', 76 *Virginia Law Review* (1990), 265 - 291.

MacGregor, A. and Gecic, B., 'Due Process in EU Competition Cases Following the Introduction of the New Best Practices Guidelines on Antitrust Proceedings', 3 *Journal of European Competition Law & Practice* (2012), 425-438.

MacGregor A. and Gecic, B., 'EU antitrust proceedings and national competition authorities: a leap in the wrong direction', 18 *International Trade Law & Regulation* (2012), 1-9.

Macmaoláin, C., *EU Food Law. Protecting Consumers and Health in a Common Market* (Oxford, Hart, 2007), 356 pp.

Maduro, M., *We the Court. The European Court of Justice and the European Economic Constitution: a critical reading of Article 30 of the EC Treaty* (Oxford, Hart 1998), 208 pp.

Maher, I., 'Alignment of Competition Laws in the European Community', 16 *Yearbook of European Law* (1996), 223-242.

Maher, I., 'Regulation and Modes of Governance in EC Competition Law. What's new in enforcement?', 31 *Fordham International Law Journal* (2007-2008), 1713-1740.

Maher, I., 'Competition Law Modernization: An Evolutionary Tale?' in P. Craig and G. De Búrca, *The Evolution of EU Law* (Oxford, Oxford University Press, 2nd Edition, 2011), 717-741.

Majocchi, A., 'Theories of Fiscal Federalism and the European experience', *Società Italiana di Economia Pubblica Working Paper 608* (2008), 13 pp.

Majone, G., 'Europe's Democratic Deficit', 4 *European Law Journal* (1998), 5-28.

Majone, G., *Europe as the Would-be World Power. The EU at Fifty* (Cambridge, Cambridge University Press 2008), 266 pp.

Mancini, F., 'The Making of a Constitution for Europe', 26 *Common Market Law Review* (1989), 595-614.

Marciano, A. and Josselin, J.-M. (eds.), *The Economics of Harmonizing European Law* (Cheltenham, Edward Elgar, 2002), 288 pp.

Marenco, G., 'Does a legal exception system require an amendment of the Treaty?' in C.-D. Ehlermann and I. Atanasiu (ed.), *European competition law annual 2000: The Modernization of EC Antitrust Policy* (Oxford, Hart, 2001), 145-196.

Markert, K., 'Some Legal and Administrative Problems of the Co-Existence of Community and National Competition Law in the EEC', 11 *Common Market Law Review* (1974), 92-104.

Marsden, P., 'Inducing Member State enforcement of European competition law: a competition policy approach to "antitrust federalism"' 18 *European Competition Law Review* (1997), 234-241.

Martinico, G., 'Dating Cinderella: On Subsidiarity as a Political Safeguard of Federalism in the European Union, 17 *European Public Law* (2011), 649-660.

Marzal Yetano, T., 'The Constitutionalisation of Party Autonomy in European Family Law', 6 *Journal of Private International Law* (2010), 155-193.

Mateus, A., 'Ensuring a more level playing field in competition enforcement throughout the European Union', 31 *European Competition Law Review* (2010), 514-529.

Mayer, F., 'Competences- Reloaded? The Vertical Division of Powers in the EU after the New European Constitution' in J.H.H. Weiler and C. Eisgruber (eds.), 'Altneuland: The EU Constitution in a Contextual Perspective', *Jean Monnet Working Paper* 5/04, 38 pp.

McKee, M., 'The Unpredictable Future of European Securities Regulation: A Response to Four Predictions about the Future of EU Securities Regulation by Gerard Hertig and Ruben Lee', *Journal of International Banking Law and Regulation* (2003), 277-283.

Meij, A., 'Judicial Review in the EC Courts: *Tetra Laval* and Beyond' in O. Essens, A. Gerbrandy and S. Lavrijssen (eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Groningen, Europa Law Publishing, 2009), 7-22.

Mendes, J., 'Delegated and Implementing Rule Making: Proceduralisation and Constitutional Design', 19 *European Law Journal* (2013), 22-41.

Merlin, M., 'Le plan d'action sur les services financiers', *Revue du droit de l'Union Européenne* (2002), 687-709.

Mestmäcker, E. J., 'The EC Commission's Modernization of Competition Policy: a Challenge to the Community's Constitutional Order', 1 *European Business Organization Law Review* (2000), 401-444.

Mestmäcker, E. J., 'The Modernisation of EC Antitrust Policy: Constitutional Challenge or Administrative Convenience in C.-D. Ehlermann and I. Atanasiu (ed.), *European competition law annual 2000: The Modernization of EC Antitrust Policy* (Oxford, Hart, 2001), 223-240.

Meunier, P., 'La Cour de justice des Communautés européennes et l'applicabilité directe des règles de concurrence du Traité CECA', *Revue trimestrielle de droit européen* (1996), 243-258

Mikroulea, A., 'Case Allocation in Antitrust and Collaboration berween the National Competition Authorities and the European Commission' in I. Lianos and I. Kokkoris (eds.),

The Reform of EC Competition Law. New Challenges (Alphen a/d Rijn, Kluwer, 2010), 55-74.

Michaels, R., 'The Functional Method of Comparative Law' in M. Reimann (ed.), *The Oxford Handbook of Comparative Law* (Oxford, Oxford University Press, 2008), 339-382.

Millstone, E. and Van Zwanenberg, P., 'The Evolution of Food Safety Policy – making Institutions in the UK, EU and Codex Alimentarius', 36 *Social Policy & Administration* (2002), 593-609.

Mishkin, F.S. (ed.), *Prudential Supervision: what works and what doesn't?* (Chicago, University of Chicago Press, 2001), 295 pp.

Mogg, J., 'Regulating Financial Services in Europe: A New Approach', 26 *Fordham International Law Journal* (2002-2003), 58-82.

Mok, M.R., 'The procedure of the E.E.C.-Commission in Antitrust Cases', 1 *Common Market Law Review* (1963), 327-334.

Moloney, N., *EC Securities Regulation* (Oxford, Oxford University Press, 2002), 976 pp.

Moloney, N., 'Law-making Risks in EC Financial Market Regulation after the Financial services Action Plan' in S. Weatherill (ed.), *Better Regulation* (Oxford, Hart, 2007), 321-368.

Moloney, N., 'EU financial market regulation after the global crisis: "more Europe" or "more risks"?', 47 *Common Market Law Review* (2010), 1317-1383.

Moloney, N., 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market –A Tale of Two Competences: Part (1) Rule-Making', 12 *European Business Organization Law Review* (2011), 41-86.

Moloney, N., 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (2) Rules in Action', 12 *European Business Organization Law Review* (2011), 177-225.

Monti, G., 'Article 81 EC and Public Policy', 39 *Common Market Law Review* (2002), 1057-1099.

Morano-Foadi, S. and Andreadakis, S., 'Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights', 17 *European Law Journal* (2011), 595-610.

Morgan, G. and Quack, S., 'Law as a Governing Institution' in G. Morgan, J. Campbell, C. Crouch, O. Pedersen and R. Whitley (eds.), *The Oxford Handbook of Comparative Institutional Analysis* (Oxford, Oxford University Press, 2010), 275-308.

Mortelmans, K., 'The Common Market, the Internal Market and the Single Market: what's in a market?', 35 *Common Market Law Review* (2010), 101-136.

Möstl, M., 'Preconditions and Limits of Mutual Recognition', 47 *Common Market Law Review* (2010), 405-436.

Murdock, C., 'The Dodd-Frank Wall Street Reform and Consumer Protection Act: What Caused the Financial Crisis and Will Dodd-Frank Prevent Future Crises?', 64 *Southern Methodist University Law Review* (2011), 1243-1327.

Musgrave, R., *The Theory of Public Finance: a study in public economy* (New York, McGraw-Hill, 1959), 628 pp.

Myers, F., 'Adversarial Counsel in an Inquisitorial System', 37 *North Carolina Journal of International Law and Commercial Regulation* (2011), 411-435.

Nazzini, R., *The Foundations of European Union Competition Law. The Objective and Principles of Article 102* (Oxford, Oxford University Press, 2012), 400 pp.

Nazzini, R., 'Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition law: a Comparative Contextual-Functionalist Perspective', 49 *Common Market Law Review* (2012), 971-1006.

Nebbia, P. and Askham, T., *EU Consumer Law* (Richmond, Richmond Law & Tax, 2007), 361 pp.

Neergaard, A., 'European Supervisory Authorities. A New Model for the Exercise of Powers in the European Union?', *Euredia* (2009), 603-630.

Neergaard, U., 'Services of general (economic) interest: What aims and values count?' in U. Neergaard, R. Nielsen and R. M. Roseberry (eds.), *Integrating Welfare Functions into EU Law: From Rome to Lisbon* (Copenhagen, DJOEF Forlag, 2009), 191-225.

Nergelius, J., *The Constitutional Dilemma of the European Union* (Groningen, Europa Law Publishing 2009), 125 pp.

Nicholson, M., Cardell, S. and McKenna, B., 'The Scope of Review of Merger Decisions under Community Law', 1 *European Competition Journal* (2005), 123-152.

Nicola, F. and Marchetti, F., 'Constitutionalizing Tobacco: The Ambivalence of European Federalism', 46 *Harvard International Law Journal* (2005), 507-525.

Nicolaïdis, K. and Howse, R. (eds.), *The Federal Vision. Legitimacy and Levels of Governance in the United States and the European Union* (Oxford, Oxford University Press, 2001), 558 pp.

Nicolaïdis, K. and Shaffer, G., 'Transnational Mutual Recognition Regimes: Governance without Global Government', 68 *Law and Contemporary Problems* (2005), 263-317.

Nicolaïdis, K. and Schmidt, S., 'Mutual Recognition on Trial: the long road to Services Liberalization', 14 *Journal of European Public Policy* (2007), 717- 734.

Nicolaidis, K., 'Trusting the Poles? Constructing Europe through Mutual Recognition', 14 *Journal of European Public Policy* (2007), 682-698.

Nihoul, P. and Rodford, P., *EU Electronic Communications Law. Competition and Regulation in the European Telecommunications Market* (Oxford, Oxford University Press, 2004), 856 pp.

Nihoul, P., *Les télécommunications en Europe. Concurrence ou organisation de marché?* (Louvain-La-Neuve, Presses universitaires de Louvain, 2005), 600 pp.

Nihoul, P. and Rodford, P., *EU Electronic Communications Law. Competition and Regulation in the European Telecommunications Market* (Oxford, Oxford University Press, 2nd Edition, 2011), 536 pp.

Nikolic, I., 'Full judicial review of antitrust cases after KME: a new formula of review?', 33 *European Competition Law Review* (2012), 583-588.

Nistor, L., *Public Services and the European Union. Healthcare, Health Insurance and Education Services* (The Hague, T.M.C. Asser Press, 2011), 445 pp.

Noyer, C., 'Les défis de la nouvelle architecture de la supervision européenne', *Euredia* (2010), 151-155.

Oates, W., 'The Theory of Public Finance in a Federal System', 1 *The Canadian Journal of Economics* (1968), 37-54.

Oates, W., 'On Local Finance and the Tiebout Model', 71 *The American Economic Review* (1981), 93-98.

Oates, W. and Schwab, R., 'Economic competition among jurisdictions: efficiency enhancing or distortion inducing?', 35 *Journal of Public Economics* (1988), 333-354.

Oates, 'An Essay on Fiscal Federalism', 37 *Journal of Economic Literature* (1999), 1120-1149.

Oates, W., 'Toward a second-generation theory of fiscal federailsm', 12 *International Tax and Public Finance* (2005), 349-374.

Ogus, A., *Regulation. Legal Form and Economic Theory* (Oxford, Clarendon, 1994), 380 pp.

Ogus, A., 'Competition between national legal systems: a contribution of economic analysis to comparative law', 48 *International and Comparative Law Quarterly* (1999), 405-418.

Oliver, P., 'Le Règlement 1/2003 et les principes d'efficacité et d'équivalence', 40 *Cahiers de droit européen* (2005), 351-394.

Oliver, P. and Henning-Roth, W., 'The Internal Market and the Four Freedoms', 41 *Common Market Law Review* (2004), 407-441.

Oliver, P. 'Of Trailers and Jetskis: Is the Case Law on Article 34 TFEU Hurtling in a new Direction?', 33 *Fordham International Law Journal* (2009-2010), 1423-1471.

Oliver, P. (ed.), *Oliver on Free Movement of Goods in the European Union* (Oxford, Hart, 2010), 628 pp.

Oliver, P., '"Diagnostics" – a Judgment Applying the Convention of Human Rights to the Field of Competition', 3 *Journal of European Competition Law & Practice* (2012), 163-165.

Ortega Gonzalez, A., 'The cartel settlement procedure in practice', 32 *European Competition Law Review* (2011), 170-177.

Ortino, M., 'The Role and Functioning of Mutual Recognition in the European Market of Financial Services', 56 *International and Comparative Law Quarterly* (2007), 309-338.

Ortiz Blanco, L., *EC competition procedure* (Oxford, Clarendon, 1996), 634 pp.

Oster, J., 'The Commission Proposal to Amend the Regulation on Credit Rating Agencies', 19 *Maastricht Journal of European and Comparative Law* (2012), 206-211.

Ottow, A., 'Europeanization of the Supervision of Competitive Markets', 18 *European Public Law* (2012), 191-221.

Pacces, A. and Van den Bergh, R., 'An introduction to the Law and Economics of Regulation' in A. Pacces and R. Van den Bergh (eds.), *Regulation and Economics – Encyclopaedia of Law and Economics* (2nd Edition, Cheltenham, Edward Elgar, 2012), 1-22.

Pan, E., 'Four Challenges to financial regulatory reform', 55 *Villanova Law Review* (2009), 743-772.

Pappadopoulos, Y., 'Problems of Democratic Accountability in Network and Multilevel Governance', 13 *European Law Journal* (2007), 469-486.

Paulweber, M., 'The end of a Success Story? The European Commission's White Paper on the Modernisation of the European Competition Law. A Comparative Study about the Role of the Notification of Restrictive Practices within the European Competition and American Antitrust Law', 23 *World Competition* (2000), 3-44.

Pauwelyn, J., Wessel, R. and Wouters, J., 'The Exercise of Public Authority through Informal International Lawmaking: an Accountability Issue?', *Jean Monnet Working Paper* 06/11, 42 pp.

Pech, L., 'Between judicial minimalism and avoidance: the Court of Justice's sidestepping of fundamental constitutional issues in *Römer* and *Dominiguez*', 49 *Common Market Law Review* (2012), 1841-1880.

Peers, S., *EU Justice and Home Affairs Law*. (Oxford, Oxford University Press, 3rd edition, 2011), 1104 pp.

Peers, S. and Costa, M., 'Accountability for Delegated and Implementing Acts after the Treaty of Lisbon', 18 *European Law Journal* (2012), 427-460.

Peers, S., 'Sanctions for Infringement of EU Law after the Treaty of Lisbon', 18 *European Public Law* (2012), 33-64.

Peeters, M., *Staatssteun in de Europese Unie* (Brugge, Die Keure, 2012), 732 pp.

Pelkmans, J., 'Testing for Subsidiarity', *Bruges Economic Policy Briefing No.* 13, 2006, http://www.coleurop.be/content/studyprogrammes/eco/publications/BEEPs/BEEP13.pdf, 38 pp.

Pernice, I., 'The Treaty of Lisbon and Fundamental Rights' in S. Griller and J. Ziller (eds.), *The Lisbon Treaty: EU constitutionalism without a constitutional Treaty?* (Vienna, Springer, 2008), 235-256.

Perrin, K., 'Challenges facing the EU network of competition authorities: insights from a comparative criminal law perspective', 31 *European Law Review* (2006), 540-564.

Perroud, T., 'The Impact of Article 6(1) ECHR on competition law enforcement: A comparison between France and the United Kingdom', *Global Antitrust Review* (2008), 48-68.

Peters, A., 'The European Ombudsman and the European constitution', 42 *Common Market Law Review* (2005), 697-743.

Petit, N. and Rabeux, L., 'Judicial Review in French Competition Law and Economic Regulation. A Post *Commission v Tetra Laval* Assessment' in O. Essens, A. Gerbrandy and S. Lavrijssen (eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Groningen, Europa Law Publishing, 2009), 103-126.

Petit, N., 'The judgment of the European Court of Justice in VEBIC: Filling a Gap in Regulation 1/2003', 2 *Journal of European Competition Law & Practice* (2011), 340-344.

Pigou, A., *Wealth and Welfare* (London, MacMillan, 1912), 493 pp.

Pijetlovic, K., 'Reform of EC antitrust enforcement: criticism of the new system is highly exaggerated', 25 *European Competition Law Review* (2004), 356-369.

Piris, J., *The Lisbon Treaty. A Legal and Political Analysis*, (Cambridge, Cambridge University Press, 2010), 450 pp.

Poncibò, C., 'Networks to Enforce European Law: The Case of the Consumer Protection Cooperation Network', 35 *Journal of Consumer Policy* (2012), 175-195.

Portuese, A., 'The Principle of Subsidiarity as a Principle of Economic Efficiency', 17 *Columbia Journal of European Law* (2011), 231-262.

Posner, E. and Véron, N., 'The EU and Financial Regulation: Power without Purpose?', 17 *Journal of European Public Policy* (2010), 400-415.

Posner, R., 'Theories of Economic Regulation', 5 *Bell Journal of Economics and Management Science* (1974), 335-358.

Posner, R., 'The Future of the Law and Economics Movement in Europe', 17 *International Review of Law and Economics* (1997), 3-14.

Posner, R., *Economic Analysis of Law* (New York, Aspen Publishers, 8th edition, 2010), 928 pp.

Posner, R., *A Failure of Capitalism: The Crisis of '08 and the Descent into Depression* (Cambridge, Harvard University Press, 2009), 368 pp.

Poto, M., *Financial Supervision in a Comparative Perspective* (Antwerp, Intersentia, 2010), 102 pp.

Power, V., 'The Relative Merits of Courts and Agencies in Competition Law – Institutional Design: Administrative Models; Judicial Models; And Mixed Models', 6 *European Competition Journal* (2010), 91-127.

Prechal, S., 'Institutional Balance: A Fragile Principle with Uncertain Contents' in T. Heukels, N. Blokker and M. Brus (eds.), *The European Union after Amsterdam. A Legal Analysis*, (The Hague, Kluwer Law International, 1998), 273-294.

Prechal, S., *Directives in EC law* (Oxford, Oxford University Press, 2nd Edition, 2005), 383 pp.

Prechal, S., 'Competence Creep and General Principles of Law', 3 *Review of European Administrative Law* (2010), 5-22.

Prechal, S. and Widdershoven, R., 'Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection', 4 *Review of European Administrative Law* (2011), 31-50.

Prete, L. and Smulders, B., 'The Coming of Age of Infringement Proceedings', 47 *Common Market Law Review* (2010), 9-61.

Prosser, T., *The Limits of Competition Law. Markets and Public Services* (Oxford, Oxford University Press, 2005), 262 pp.

Quaglia, L., *Governing Financial Services in the European Union* (London, Routledge, 2010), 198 pp.

Quessette, L., 'L'Europe des rails, ou les influences de la construction européenne sur les chemins de fer en France', 42 *Cahiers de Droit Européen* (2007), 631-656.

Raaijmakers, G.T.M.J., *De effectiviteit van regels in het ondernemings- en effectenrecht*, Inaugurele Rede Universiteit Maastricht, http://www.maastrichtuniversity.nl/web/Main1/Pers/OratiesEnRedes2010/OratiesEnRedes2005.htm

Rab, S., Monnoyeur, D. and Sukhtankar, A., 'Commitments in EU Competition Cases Article 9 of Regulation 1/2003, its application and the challenges ahead', 1 *Journal of European Competition Law & Practice* (2010), 171-188.

Rachlinski, J., 'Bottom-Up versus Top-Down Lawmaking', 73 *University of Chicago Law Review* (2006), 933-964.

Radaelli, C., 'The Puzzle of Regulatory Competition', 24 *Journal of Public Policy* (2004), 1-23.

Raffaelli, E., 'National Judges and the Application of Regulation 1/2003: Remarks and Proposals' in B. Hawk (ed.), *International Antitrust Law & Policy. Annual Proceedings of the Fordham Competition Law Institute* (Huntington, Juris, 2011), 237-275.

Randazzo, V., 'Annotation of Case C-217/04, *United Kingdom* v. *European Parliament and Council of the European Union*, judgment of the Grand Chamber of 2 May 2006, nyr', 44 *Common Market Law Review* (2007), 155-169.

Ratliff, J., 'Judicial Review in EC competition cases before the European Courts: Avoiding double renvoi' in C. D. Ehlermann and M. Marquis (eds.), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Oxford, Hart, 2011), 453-472.

Recine, F. and Teixeira, P.G., 'The New Financial Stability Architecture in the EU', *Paolo Baffi Centre Research Paper No. 2009-62*, available at http://ssrn.com/abstract=1509304 or http://dx.doi.org/10.2139/ssrn.1509304, 23 pp.

Regan, D., 'The Problem of Social Cost Revisited', 15 *Journal of Law and Economics* (1972), 427-437.

Reich, N., 'Competition between legal orders: a new paradigm of EC law?', 29 *Common Market Law Review* (1992), 861-896.

Revesz, R., 'Rehabilitating Interstate Competition: Rethinking the "Race-to-the-bottom" Rationale for Federal Environmental Regulation', 67 *New York University Law Review* (1992), 1210-1254.

Richter, M.-T., 'The settlement procedure in the context of the enforcement tools of European competition law – a comparison and impact analysis', 33 *European Competition Law Review* (2012), 537-542.

Riesenhuber, K., 'A competitive approach to EU Contract law', 7 *European Review of Contract Law* (2011), 115-133.

Riley, A., 'More radicalism, please: the Notice on Co-operation between National Courts and the Commission in applying Articles 85 and 86 of the EEC Treaty', 14 *European Competition Law Review* (1993), 91-96.

Riley, A., 'The ECHR Implications of the Investigation Provisions of the Draft Competition Regulation', 51 *International and Comparative Law Quarterly* (2002), 55-89.

Riley, A., 'EC antitrust modernisation: the Commission does very nicely - thank you! Part 1: Regulation 1 and the notification Burden', 24 *European Competition Law Review* (2003), 604-615.

Riley, A., 'EC antitrust modernisation: the Commission does very nicely - thank you! Part 2: between the idea and the reality: decentralisation under Regulation 1', 24 *European Competition Law Review* (2003), 657-672.

Riley, A., 'Editorial. Developing Due Process in EC Competition Law', 2 *Competition Law Review* (2005), 1-3.

Ritzer, C., Ruttloff, M. and Linhart, K., 'How to Sharpen a Dull Sword – The Principle of Subsidiarity and its Control', 7 *German Law Journal* (2006), 733-760.

Rivero, J., 'Vers un droit commun européen: nouvelles perspectives en droit administratif' in M. Capelletti (ed.), *New perspectives for a common law of Europe*, (Nijhoff, Leiden, 1978) 389-406.

Rizzuto, F., 'Parallel Competence and the Power of the EC Commission under Regulation 1/2003 according to the Court of First Instance', 29 *European Competition Law Review* (2008), 286-297.

Rizzuto, F., 'Competition Law Enforcement in Belgium: The System Remains Flawed and Uncertain Despite Recent Reform', 29 *European Competition Law Review* (2008), 367-375.

Rizzuto, F., 'Article 5 of Regulation 1/2003: the limits to national procedural autonomy', 32 *European Competition Law Review* (2011), 564-572

Rizzuto, 'The procedural implications of VEBIC', 32 *European Competition Law Review* (2011), 285-296.

Roe, M., 'Regulatory Competition in Making Corporate Law in the United States – and its Limits', 21 *Oxford Review of Economic Policy* (2005), 232-242.

Romano, R., 'The State Competition Debate in Corporate Law', 8 *Cardozo Law Review* (1987), 709-758.

Romano, R., 'Regulatory Competition a Problem or Irrelevant for Corporate Governance?', 21 *Oxford Review of Economic Policy* (2005), 212-231.

Romano, R., 'For Diversity in the International Regulation of Financial Institutions: Rethinking the Basel Architecture', draft available at http://www.nd.edu/~ndlaw/prog-law-economics/Romano.pdf, 120 pp.

Rosato, S., *Europe United. Power Politics and the Making of the European Community* (Ithaca, Cornell University Press, 2011), 265 pp.

Rose, D. and Richards, T., 'Appeal and Review in the Competition Appeal Tribunal and High Court', www.blackstonechambers.com, 22 pp.

Rosen, M.D., 'Contextualizing Preemption', 102 *Northwestern University Law Review* (2008), 781-810.

Ross, M., 'Article 16 EC and Services of General Interest: From Derogation to Obligation?', 25 *European Law Review* (2000), 22-38.

Ross, M., 'Effectiveness in the European legal order(s): beyond supremacy to constitutional proportionality?', 31 *European Law Review* (2006), 476-498.

Rossi, L., 'How Fundamental are Fundamental Principles? Primacy and Fundamental Rights after Lisbon', 29 *Yearbook of European Law* (2010), 65-87.

Roth, W.-H., 'The Court of Justice's Case Law on Freedom to Provide Services: is *Keck* relevant?' in M. Andenas and W.-H. Roth (eds.), *Services and Free Movement in EU law* (Oxford, Oxford University Press, 2001), 1-24.

Rubin, E., 'Institutional Analysis and the New Legal Process', *Wisconsin Law Review* (1995), 463-478.

Rubin, E., 'The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions', 109 *Harvard Law Review* (1996), 1393-1438.

Ruffert, M., 'The European Debt Crisis and European Union law', 48 *Common Market Law Review* (2011), 1777-1806.

Sabel, C. and Gerstenberg, O., 'Constitutionalising an overlapping consensus: The ECJ and the emergence of a coordinate constitutional order', 16 *European Law Journal* (2010), 511-550.

Sabel, C. and Zeitlin, J., 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU', 14 *European Law Journal* (2008), 271-327

Salord, A., 'Concurrent application, the April 1999 White Paper and the future of national laws', 21 *European Competition Law Review* (2000), 128-141.

Samuelson, P., 'The Pure Theory of Public Expenditures', 36 *Review of Economics and Statistics* (1954), 387-389.

Samuelson, P., 'Diagrammatic Exposition of a Pure Theory of Public Expenditures', 37 *Review of Economics and Statistics* (1956), 350-356.

Sanchez Graells, A., 'The EU's Accession to the ECHR and Due Process Rights in EU Competition Law Matters: Nothing New under the Sun?', *SSRN Working Paper*, available at http://ssrn.com/abstract=2156904, 18 pp.

Sauter, W., 'The Commission's new SGEI package: the rules for state aid and the compensation of services of general economic interest', *TILEC Discussion Paper* 2012-018, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2044680, 12 pp.

Schammo, P., *EU Prospectus Law. New Perspectives on Regulatory Competition in Securities Markets* (Cambridge, Cambridge University Press, 2011), 385 pp.

Schammo, P., 'The European Securities and Markets Authority: Lifting the Veil on the Allocation of Powers', 48 *Common Market Law Review* (2011), 1879-1914.

Schammo, P., 'EU Day-to-Day Supervision or Intervention-based Supervision: Which Way Forward for the European System of Financial Supervision?', *Oxford Journal of Legal Studies* (2012), 771-797.

Schiek, D., 'Re-embedding economic and social constitutionalism: normative perspectives for the EU' in D. Schiek, U. Liebert and H. Schneider (eds.), *Economic and social constitutionalism after the Treaty of Lisbon* (Cambridge, Cambridge University Press 2011), 17-46.

Schilling, T., 'A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle', 14 *Yearbook of European Law* (1994), 203-255.

Schilling, T., 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations', 37 *Harvard International Law Journal* 1996, 389-410.

Schimmel, M. and Widdershoven, R., *Judicial Review after Tetra Laval. Some Observations From a European Administrative Law Point of View* in O. Essens, A. Gerbrandy and S. Lavrijssen (eds.), *National Courts and the Standard of Review in Competition Law and Economic Regulation* (Groningen, Europa Law Publishing, 2009), 51-78.

Schwarze, J., 'Tendencies towards a Common Administrative Law in Europe', 16 *European Law Review* '1991), 3-19.

Schwarze, J., *European Administrative Law* (London, Sweet & Maxwell, 2006), 1562 pp.

Sachdeva, A., 'Regulatory competition in European company law', 30 *European Journal of Law and Economics* (2010), 137-170.

Scharpf, F., *Governing in Europe. Effective and Democratic?* (Oxford, Oxford University Press, 1999), 256 pp.

Schlag, P., 'Four conceptualizations of the relations of law to economics (tribulations of a positivist social science)', 33 *Cardozo Law Review* (2012), 2357-2371.

Schmidt, V., 'Democracy and Legitimacy in the European Union Revisited: Output, Input and Throughput', KFG Working Paper Series, No. 21, November 2010, *Kolleg-Forschergruppe* (KFG) "The Transformative Power of Europe", Freie Universität Berlin, available at http://userpage.fu-berlin.de/kfgeu/kfgwp/wpseries/WorkingPaperKFG_21.pdf, 32 pp.

Schrauwen, A., 'Fishery, waste management and persistent and general failure to fulfill control obligations: The role of lump sums and penalty payments in enforcement actions under Community law', 18 *Journal of Environmental Law* (2006), 289-299.

Schweitzer, H., 'The European Competition Law Enforcement System and the Evolution of Judicial Review' in C. D. Ehlermann and M. Marquis (eds.), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Oxford, Hart, 2011), 79-146.

Schweitzer, H., 'Judicial Review in EU Competition Law' in D. Geradin and I. Lianos (eds.), *Research Handbook on EU Antitrust Law* (Cheltenham, Edward Elgar, 2013), available at http://ssrn.com/abstract=2129147, 42 pp.

Scicluna, N., 'When Failure isn't Failure: European Union Constitutionalism after the Lisbon Treaty', 50 *Journal of Common Market Studies* (2011), 441-456.

Schmitt, C., *Verfassungslehre* (Berlin, Duncker & Humboldt, 1954), 404 pp.

Scholten-Verheijen, M. *et al, Roadmap to EU Food Law* (Den Haag, SDU Uitgevers, 2011), 214 pp.

Schutte, C. B., *The European Fundamental Right to Property* (Deventer, Kluwer, 2004), 81 pp.

Schütze, R., 'Cooperative federalism constitutionalised: the emergence of complementary competences in the EC legal order', 31 *European Law Review* (2006), 167-184.

Schütze, R., 'Supremacy without Pre-emption? The very slowly emergent doctrine of Community Pre-emption', 43 *Common Market Law Review* (2006), 1023-1048.

Schütze, R., 'Dual Federalism constitutionalised: the emergence of exclusive competences in the EC legal order', 32 *European Law Review* (2007), 3-28.

Schütze, R., 'Lisbon and the federal order of competences: a prospective analysis', 33 *European Law Review* (2008), 709-722.

Schütze, R., *From dual to cooperative federalism. The changing structure of European law* (Oxford, Oxford University Press, 2009), 432 pp.

Schütze, R., 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?', 68 *Cambridge Law Journal* (2009), 525-536.

Schütze, R., 'From Rome to Lisbon: "Executive federalism" in the (New) European Union', 47 *Common Market Law Review* (2010), 1385-1427.

Schütze, R., '"Delegated Legislation in the (new) European Union: A Constitutional Analysis', 74 *Modern Law Review* (2011), 661-693.

Schütze, R., *European Constitutional law* (Cambridge, Cambridge University Press, 2012), 533 pp.

Scott, C., 'Analysing Regulatory Space: fragmented resources and institutional design', *Public Law* (2001), 329-353.

Scott, C., 'The Governance of the European Union: The Potential for Multi-Level Control', 8 *European Law Journal* (2002), 59-79.

Scott, J. and Sturm, S., 'Courts as Catalysts: Re-thinking the judicial role in new governance', 13 *Columbia Journal of European Law* (2007), 565-594.

Scott, J., 'From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction', 57 *American Journal of Comparative Law* (2009), 897-942.

Scott, J., 'REACH: Combining Harmonisation with Dynamism in the Regulation of Chemicals' in J.Scott (ed.), *Environmental Protection: European Law and Governance* (Oxford, Oxford University Press, 2009), 56-91.

Sefton-Green, R., 'Choice, Certainty and Diversity: Why More is Less', 7 *European Review of Contract Law* (2011), 134-140.

Sefton-Green, R., 'Multiculturalism, Europhilia and Harmonization: harmony or disharmony?', 6 *Utrecht Law Review* (2010), 50-67.

Seligman, J., 'The Case for Minimum Corporate Law Standards', 49 *Maryland Law Review* (1990), 947-974.

Selznick, P., 'Focusing Organizational Research on Regulation' in R. Noll (ed.), *Regulatory Policy and the Social Sciences* (Berkeley, University of California Press 1985), 363-367.

Senden, L., *Soft Law in European Community Law* (Oxford, Hart, 2004), 533 pp.

Senden, L., 'Soft Post-Legislative Rulemaking: A Time for More Stringent Control', 19 *European Law Journal* (2013), 57-75.

Senn, M., 'Decentralisation of Economic Law – An Oxymoron?', 5 *Journal of Corporate Law Studies* (2005), 427-464.

Shavell, S. and Kaplow, L., 'Fairness versus Welfare', 114 *Harvard Law Review* (2000), 961-1388

Shavell, S., *Foundations of Economic Analysis of Law* (Cambridge, Harvard University Press, 2004), 768 pp.

Shy, O., *The economics of network industries* (Cambridge, Cambridge University Press, 2001), 332 pp.

Sieberson, S., 'Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity under the Treaty of Lisbon', 50 *Virginia Journal of International Law* (2009-2010), 919-995.

Sibony, A.-L., 'Annotation of Case C-272/09 P, *KME Germany, KME France SAS and KME Italy SpA v Commission*, judgment of 8 December 2011, nyr', 49 *Common Market Law Review* (2012), 1977-2002.

Siegel, N., 'Commandeering and its Alternatives: A Federalism Perspective', 59 *Vanderbilt Law Review* (2006), 1629-1691.

Singh Grewal, D., *Network Power. The Social Dynamics of Globalization* (New Haven, Yale University Press, 2008), 405 pp.

Siragusa, M., 'A Critical Review of the White Paper on the Reform of the EC Competition Law Enforcement Rules', 23 *Fordham International Law Journal* (1999), 1089-1127.

Slater, D., Thomas, S. and Waelbroeck, D., 'Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?', 5 *European Competition Journal* (2009), 97-143.

Slaughter, A.M., *A New World Order* (Princeton, Princeton University Press, 2004), 342 pp.

Sluijs, J., 'Network neutrality and internal market fragmentation', 49 *Common Market Law Review* (2012), 1647-1674.

Snell, J., 'Who's got the power? Free Movement and Allocation of Competences in EC law', 22 *Yearbook of European Law* (2003), 323-351.

Snyder, F., 'Soft law and Institutional Practice in the EC' in S. Martin (ed.), *The construction of Europe. Essays in honour of Emile Noël* (The Hague, Kluwer, 1994), 197-226.

Soltesz, U. and Von Kockritz, C., 'EU Cartel Settlements in Practice – The Future of EU Cartel Enforcement', 32 *European Competition Law Review* (2011), 258-265.

Soltesz, U., 'Due process and judicial review - mixed signals from Luxembourg in cartel cases', 33 *European Competition Law Review* (2012), 241-247.

Somek, A., *Individualism. An essay on the authority of the European Union* (Oxford, Oxford University Press 2008), 307 pp.

Sondergaard Birkmose, H., 'Regulatory Competition and the European Harmonisation Process', 17 *European Business Law Review* (2006), 1075-1097.

Sousi, B., 'La réglementation bancaire de l'Union européenne après la crise: un monde sans conscience et sans confiance?', *Euredia* (2011), 121-132.

Spaventa, E., 'Federalisation Versus Centralisation: Tensions in Fundamental Rights Discourse in the EU' in M. Dougan and S. Currie (eds.), *50 years of the European Treaties. Looking back and thinking forward* (Oxford, Hart, 2009), 343-364.

Steenbergen, J., 'Decision-making in Competition Cases: The Investigator, the Prosecutor and the Judge' in L. Gormley (ed.), *Current and Future Perspectives on EC Competition Law* (The Hague, Kluwer Law International, 1997), 101-108.

Stehmann, O. and Zellhofer, G., 'Dominant Rail Undertakings under European Competition Policy', 10 *European Law Journal* (2004), 327-352.

Stein, E. and Halberstam, D., 'The United Nations, the European Union and the King of Sweden: Economic sanctions and individual rights in a plural world order', 46 *Common Market Law Review* (2009), 13-72.

Steindorff, E., 'Article 85, para 3: No case for application by national courts', 20 *Common Market Law Review* (1983), 125-130.

Stephan, A., 'The Direct Settlement of EC Cartel Cases', 58 *International and Comparative Law Quarterly* (2009), 627-654.

Stephenson, M., 'Mixed Signals: Reconsidering the Political Economy of Judicial Deference to Administrative Agencies', 56 *Administrative Law Review* (2004), 657-738.

Stephenson, M., 'Information Acquisition and Institutional Design', 124 *Harvard Law Review* (2011), 1422 – 1483.

Stewart, R., 'Federalism and Rights', 19 *Georgia Law Journal* (1984-1985), 917-980.

Stigler, G., 'The Theory of Economic Regulation', 2 *Bell Journal of Economics and Management Science* (1971) 3-21.

Suetens, L.P., 'Belgian Antitrust Law "In Action"', 2 *Common Market Law Review* (1965), 325-339.

Sun, M. and Pelkmans, J., 'Regulatory competition in the single market', 33 *Journal of Common Market* Studies (1995), 67-89.

Swaine, E., 'Subsidiarity and Self-Interest: Federalism at the European Court of Justice', 41 *Harvard International Law Journal* (2000), 1-128.

Sykes, A., 'Regulatory Competition or Regulatory Harmonization? A Silly Question?', 3 *Journal of International Economic Law* (2000), 257-264.

Syrpis, P., 'In Defence of Subsidiarity', 24 *Oxford Journal of Legal Studies* (2004), 323-334.

Szydlo, M., 'National Parliaments as Regulators of Network Industries: In search for the dividing line between regulatory powers of national parliaments and national regulatory authorities', 10 *International Journal of Constitutional Law* (2012), 1134-1166.

Szydlo, M., 'Independent Discretion or Democratic Legitimisation? The Relations between National Regulatory Authorities and National Parliaments under EU Regulatory Framework for Network-Bound sectors', 18 *European Law Journal* (2012), 793-820.

Szyszczak, E., *The Regulation of the State in Competitive Markets in the EU* (Oxford, Hart, 2007), 322 pp.

Tagaras, H. and Waelbroeck, M., 'Les autorités nationales de la concurrence et l'article 234 du traité un étrange arrêt de la cour de justice', 40 *Cahiers de droit européen* (2005), 465-492.

Taylor, M., '"Twin Peaks": a regulatory structure for the new century', (London, Centre for the Study of Financial Innovation, 1995), 18 pp.

Taylor, M., 'The Road from "Twin Peaks" – and the way back', 16 *Connecticut Insurance Law Journal* (2009), 61-96.

Temple Lang, J., 'The Procedure of the Commission in Competition Cases', 14 *Common Market Law Review* (1977), 155-173.

Temple Lang, J., 'Community Constitutional Law: Article 5 EEC Treaty', 27 *Common Market Law Review* (1990), 654-659.

Temple Lang, J., 'European Community Constitutional Law and the Enforcement of Community Antitrust Law' in B. Hawk (ed.), *Antitrust in a Global Economy. Annual Proceedings of the Fordham Corporate Law Institute 1993* (The Hague, Kluwer, 1994), 525-604.

Temple Lang, J., 'The Core of the Constitutional Law of the Community – Article 5 EC' in L. Gormley (ed.), *Current and Future Perspectives on EC Competition Law* (The Hague, Kluwer Law International, 1997), 41-72.

Temple Lang, J., 'The Development by the Court of Justice of the duties of cooperation of national authorities and Community institutions under Article 10 EC', 31 *Fordham International Law Journal* (2007-2008), 1483-1532.

Teubner, G., *Law as an Autopoietic System* (Oxford, Blackwell, 1993), 256 pp.

Teubner, G., 'A constitutional moment? The Logics of "Hitting the Bottom"' in P. Kjaer, G. Teubner and A. Febbrajo (ed.), *The financial crisis in constitutional perspective: the dark side of functional differentiation* (Oxford, Hart, 2011), 3-43.

Thurner, P. and Binder, M., 'European Union Transgovernmental Networks: The Emergence of a new Political Space beyond the Nation State', 48 *European Journal of Political Research* (2009), 80-106.

Tiebout, C., 'A Pure Theory of Local Expenditures', 64 *The Journal of Political Economy*, (1956), 416-424.

Tiili, V. and Vanhamme, J., 'The "Power of Appraisal" (Pouvoir D'Appreciation) of the Commission of the European Communities vis-`a-vis the Powers of Judicial Review of the Communities' Court of Justice and Court of First Instance', 22 *Fordham International Law Journal* (1998), 885-901.

Tison, M., 'Unravelling the General Good Exception: The Case of Financial Services' in M. Andenas and W. H. Roth (eds.), *Services and Free Movement in EU law* (Oxford, Oxford University Press, 2001), 321-382.

Tison, M., 'Do not attack the watchdog! Banking Supervisors Liability after Peter Paul', 42 *Common Market Law Review* (2005), 639-675.

Todino, M., 'Modernisation from the perspective of national competition authorities: impact of the reform on decentralized application of E.C. competition law', 21 *European Competition Law Review* (2000), 348-358.

Toth, A., 'The Principle of Subsidiarity in the Maastricht Treaty', 29 *Common Market Law Review* (1992), 1079-1105.

Trebilcock, M. and Iacobucci, E., 'Designing Competition Law Institutions: Values, Structure, and Mandate', 41 *Loyola University of Chicago Law Journal* (2010), 455-471.

Tridimas, G. and Tridimas, T., 'The European Court of Justice and the Annulment of the Tobacco Advertisement Directive: Friend of National Sovereignty or Foe of Public Health?', 14 *European Journal of Law and Economics* (2002), 171-183.

Tridimas, T., 'EU Financial Regulation: From Harmonization to the Birth of EU Federal Financial Law' in P. Birkinshaw and M. Varney (eds.), *The European Union Legal Order after Lisbon* (The Hague, Kluwer, 2010), 117-135.

Tridimas, T., 'EU Financial Regulation: Federalization, Crisis Management, and Law Reform' in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 2nd Edition, 2011), 783-804.

Tridimas, T., 'Financial Supervision and Agency Power' in N. Nic Shuibhne and L. Gormley (eds.), *From Single Market to Economic Union. Essays in Memory of John A Usher* (Oxford, Oxford University Press 2012), 55-83.

Trstenjak, V. and Beysen, E. 'European Consumer Protection Law: *Curia semper dabit remedium?*', 48 *Common Market Law Review* (2011), 95-124.

Truli, E., 'White Paper on Damages Actions for the Breach of EC Antitrust Rules:The Binding Effect of Decisions Adopted By National Competition Authorities', 5 *European Competition Journal* (2009), 795-821.

Türk, A., 'Modernisation of EC antitrust enforcement' in H. Hofmann and A. Türk (eds.), *EU Administrative Governance* (Cheltenham, Edward Elgar, 2006), 215-243.

Tuytschaever, F., *Differentiation in European Union Law* (Oxford, Hart, 1999), 256 pp.

Ullrich, H., 'Harmonisation within the European Union', 17 *European Competition Law Review* (1996), 178-184.

Urania-Galetta, D., *Procedural autonomy of EU Member States: Paradise Lost?* (Heidelberg, Springer, 2010), 216 pp.

Usher, J., 'The "Good Administration" of European Community Law', *Current Legal Problems* (1985), 269- 288.

Van Bael, I., 'The Antitrust Settlement Practice of the EC Ecommission', 23 *Common Market Law Review* (1986), 61-90.

Van Bael, I., 'The role of national courts', 15 *European Competition Law Review* (1994), 3-7.

Van Bael, I. and Bellis, J. F., *Competition Law of the European Community* (Alphen a/d Rijn, Kluwer, 5th Ed. 2010), 1674 pp.

van Boom, W. and Loos, M. (eds.), *Collective enforcement of Consumer Law* (Groningen, Europa Law Publishing, 2007), 254 pp.

Van Cauwenberghe, A., 'De sanctieprocedure van de FSMA na de *Twin Peaks* hervorming van het financieel toezicht' in Instituut voor Financieel Recht (ed.), *Financiële regulering in the kering* (Antwerp, Intersentia, 2012), 566-571.

Van Cleynenbreugel, P., 'European Law in times of European Governance', *Jura Falconis* (2008-2009), 393-416.

Van Cleynenbreugel, P., 'Individuele rechtsbescherming, Europese netwerken van nationale toezichthouders en Lamfalussy-convergentie', *SEW – Tijdschrift voor Europees en Economisch Recht* (2010), 13-31

Van Cleynenbreugel, P., 'Transforming shields into swords. The Vebic judgment, Adequate Judicial Protection Standards and the Emergence of Procedural Heteronomy in EU law', 18 *Maastricht Journal of European and Comparative law* (2011), 511-547.

Van Cleynenbreugel, P., 'The Hearing Officer's extended mandate. Whose special friend in the conduct of EU competition proceedings?', 36 *European Competition Law Review* (2012), 286-293.

Van Cleynenbreugel, P., 'The Confusing Constitutional Status of Positive Procedural Obligations in EU law', 5 *Review of European Administrative Law* (2012), 81-100.

Van Cleynenbreugel, P., 'Judicial Protection against EU Financial Supervisory Authorities in the Wake of Regulatory Reform', 2 *Elsa Malta Law Review* (2012), 231-263.

Van Cleynenbreugel, P., 'Institutional assimilation in the wake of EU competition law decentralisation', 8 *Competition Law Review* (2012-2013), 285-312.

Van Cleynenbreugel, P., 'Constitutionalizing comprehensively tailored judicial review in EU competition law', 18 *Columbia Journal of European Law* (2013), 519-546.

Van den Bergh, R., 'The Subsidiarity Principle in European Community Law: Some Insights from Law and Economics', 1 *Maastricht Journal of European and Comparative Law* (1994), 337-354.

Van den Bergh, R., 'Economic Criteria for Applying the Subsidiarity Principle in the European Community: The Case of Competition Policy', 16 *International Review of Law & Economics* (1996), 363 -383.

Van den Bergh, R. and Camesacsa, P., *European Competition Law and Economics: A Comparativie Perspective* (London, 2nd Edition, Sweet & Maxwell, 2006), 464 pp.

Van der Woude, M., 'Hearing Officers and EC antitrust procedures; the art of making subjective procedures more objective', 33 *Common Market Law Review* (1996) 531-546.

Van der Woude, M., 'National Courts and the Draft Regulation on the application of Articles 81 and 82 EC' in J. Stuyck and H. Gilliams (eds.), *Modernisation of European Competition Law. The Commission's proposal for a new regulation implementing Articles 81 and 82 EC* (Antwerp, Intersentia, 2002), 41-60.

Van de Walle de Ghelcke, B., 'Modernisation: Will it increase litigation in the national courts and before national authorities?' in D. Geradin (ed.), *Modernisation and Enlargement: Two major challenges for EC competition law* (Antwerp, Intersentia, 2004), 129-158.

Van de Walle de Ghelcke, B., 'Limits to the Power of National Authorities in the Application of EU Competition Law', 2 *Journal of European Competition Law & Practice* (2011), 477-479.

Van Gerven, W., 'Of Rights, Remedies and Procedures', 37 *Common Market Law Review* (2000), 501-536.

Van Gerven, W., 'Codifying European Private Law? Yes if…', 25 *European Law Review* (2002), 156-176.

Van Gerven, W., 'Bringing (Private) Laws Closer to Each Other at the European Level' in F. Caffagi (ed.), *The Institutional Framework of European Private Law*, (Oxford, OUP, 2006), 37-77.

Van Gerven, W. and Lierman, S., *Algemeen Deel – 40 jaar later. Privaat- en publiekrecht in een meergelaagd kader van regelgeving, rechtsvorming en regeltoepassing* (Mechelen, Kluwer, 2010), 603 pp.

van Gestel, R.A.J., Vranken, J.B.M., Gribnau, J.L.M. en Tijssen, H.E.B., 'Rechtswetenschappelijke artikelen. Naar criteria voor methodologische verantwoording', *Nederlands Juristenblad* 2007, 1448-1461.

van Gestel, R.A.J. and Micklitz, H.-W., 'European integration through Standardization: How judicial review is breaking down the club house of private standardization bodies', 50 *Common Market Law Review* (2013), 145-182.

van Harten, H., 'National judicial autonomy. The Example of National European Law Precedents in the Dutch Case-Law on the Free Movement of Services and the Freedom of Establishment', 2 *Review of European Administrative Law* (2009), 135-153.

Van Malleghem, P.-A., '*Pringle*: A Paradigm Shift in the European Union's Monetary Constitution', 14 *German Law Journal* (2013), 141-168.

van Ooik, R., *De keuze der rechtsgrondslag voor besluiten van de Europese Unie* (Deventer, Kluwer 1999), 483 pp.

van Ooik, R., 'The European Court of Justice and the Division of Competence in the European Union' in D. Obradovic and N. Lavranos (eds.), *Interface between EU Law and National Law* (Groningen, Europa Law Publishing 2007), 13-41.

Vaccari, B., 'Le processus Lamfalussy: enjeux, leçons et perspectives', *Revue du droit de l'Union Européenne* (2007), 41-72.

Vedder, H., 'Spontaneous Harmonisation of (National) Competition Laws in the wake of the Modernisation of EC Competition Law', 1 *Competition Law Review* (2004), 5-21.

Venit, J., 'Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty', 40 *Common Market Law Review* (2003), 545-580.

Verdier, P.H., 'Mutual Recognition in International Finance', 52 *Harvard International Law Journal* (2011), 55-108.

Verloren van Themaat, P., *Economic law of the member states of the European Communities in an economic and monetary union an interim report with provisional conclusions and recommendations, based on reports or interim reports on the economic law of Belgium, Germany, France, Italy, The Netherlands and the United Kingdom,* Commission of the European Communities, Studies: Competition - Approximation of legislation, Series 20 (Brussels 1973), 75 pp.

Verloren van Themaat, P., 'Introductory remarks on the role of national economic law in an economic and monetary union', 13 *Common Market Law Review* (1976), 153-158.

Verstrynge, J. F., 'The Relationship between National and Community Antitrust Law: An Overview After the Perfume Cases', 3 *Northwestern Journal of International Law & Business* (1981), 358-383.

Vesterdorf, B., 'Complaints concerning Infringements of Competition Law within the Context of European Community Law', 31 *Common Market Law Review* (1994), 77-104.

Vesterdorf, B., 'Standard of proof in merger cases: reflections in the light of recent case law of the Community courts', 1 *European Competition Journal* (2005), 3-33.

Vincents, O.B., 'The application of EC competition law and the European Convention on Human Rights', 27 *European Competition Law Review* (2006), 693-699.

Volden, C., 'The Politics of Competitive Federalism: A Race to the Bottom in Welfare Benefits?', 46 *American Journal of Political Science* (2002), 352-363.

Von Bogdandy, A. and Bast, J., 'The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform', 39 *Common Market Law Review* (2002), 227-268.

Von Bogdandy, A. and Bast, J., 'The Federal Order of Competences' in A. Von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Oxford, Hart, 2nd Edition, 2009), 275-308.

Von Bogdandy, A., 'Founding principles of EU law: A Theoretical and Doctrinal Sketch', 16 *European Law Journal* (2010), 95-111.

Von Bogdandy, A., Kottmann, M., Antpöhler, C., Dikschen, J., Hentrei, S.and Smrkolj, M., 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States', 49 *Common Market Law Review* (2012), 489-520.

von Borries, R. and Hauschild, M., 'Implementing the Subsidiarity Principle', 5 *Columbia Journal of European Law* (1999), 369-388.

Voermans, W., 'Delegation is a matter of confidence. The New EU Delegation System under the Treaty of Lisbon', 17 *European Public Law* (2011), 13-30.

Vos, E. and Wendler, F., 'Food Safety Regulation at the EU Level' in E. Vos and F. Wendler (eds.), *Food Safety Regulation in Europe. A Comparative Institutional Analysis* (Antwerp, Intersentia, 2006), 65-138.

Vos, E., 'Fifty Years of European Integration, Forty-Five Years of Comitology' in A. Ott and E. Vos (eds.), *Fifty Years of European Integration: Foundations and Perspectives* (The Hague, T.M.C. Asser Press, 2009), 31-56.

Waelbroeck, D., 'National Courts: What is Expected from them?' in D. Geradin (ed.), *Modernisation and Enlargement: Two major challenges for EC competition law* (Antwerp, Intersentia, 2004), 185-207.

Waelbroeck, M., 'The emergent doctrine of Community Pre-emption – consent and redelegation' in E. Stein and T. Sandalow, *Courts and Free Markets: Perspectives from the United States and Europe* (Oxford, Clarendon, 1982), 458-480.

Wagner, R. E., 'Competitive Federalism in Institutional Perspective," in D. Racheter and R. E. Wagner (eds.), *Federalist Government in Principle and Practice* (Norwell, MA: Kluwer, 2001), 19-37.

Wahl, N., 'Standard of Review – Comprehensive or Limited?' in C.D. Ehlermann and M. Marquis (eds.), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Oxford, Hart, 2011), 285-294.

Walker, N., 'EU Constitutionalism and New Governance' in G. De Búrca and J. Scott (eds.), *Law and New Governance in the EU and the US* (Oxford, Hart, 2006), 15-36.

Ward, A., *Individual Rights and Private Party Review in the EU* (Oxford, Oxford University Press, 2nd Edition, 2007), 500 pp.

Ward, I., *A critical introduction to European Law* (Cambridge, Cambridge University Press, 2nd Ed., 2003), 336 pp.

Warren, M. G., 'The Harmonization of European Securities Law', *The International Lawyer* (2003), 211-220.

Wasmeier, M. and Thwaites, N., 'The development of ne bis in idem into a transnational fundamental right in EU law: comments on recent developments', 31 *European Law Review* (2006), 565-578.

Weatherill, S., 'Competence Creep and Competence Control', 23 *Yearbook of European Law* (2004), 1-55.

Weatherill, S., 'Better Competence Monitoring', 30 *European Law Review* (2005), 23-41.

Weatherill, S., *EU Consumer Law and Policy* (Cheltenham, Edward Elgar, 2005), 272 pp.

Weatherill, S., 'Competence and Legitimacy' in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford, Hart, 2009), 17-34.

Weatherill, S., 'The Limits of Legislative Harmonization Ten Years after *Tobacco Advertising*: How the Court's Case Law has become a "Drafting Guide"', 12 *German Law Journal* (2011), 827-864.

Weatherill, S., 'The Consumer Rights Directive: how and why a quest for "Coherence" has (largely) failed', 49 *Common Market Law Review* (2012), 1279-1314.

Weatherill, S., 'National parliaments as regulators of network industries: A reply to Marek Szydło', 10 *International Journal of Constitutional Law* (2012), 1167-1173.

Weber, F., 'European integration assessed in in the light of the "rules v. standards debate"', *European Journal of Law and Economics* (2011), Online publication, 24 pp.

Wechsler, H., 'Toward neutral principles of constitutional law' 73 *Harvard Law Review* (1959), 1-35.

Weiler, J.H.H., 'The Community System: the Dual Character of Supranationalism', 1 *Yearbook of European Law* (1981), 267-306.

Weiler, J.H.H., Haltern, U. and Mayer, F., 'European democracy and its critique' in J. Hayward (ed.), *The crisis of representation in Europe* (London, Frank Cass, 1995), 4-39.

Weiler, J.H.H. (ed.), *The Constitution of Europe* (Cambridge, Cambridge University Press 1999), 384 pp.

Weiss, W., 'Human Rights in the EU: Rethinking the Role of the European Convention of Human Rights after Lisbon', 7 *European Constitutional Law Review* (2011), 64-95.

Weitbrecht, A., 'The Network of Competition Authorities – How will it work in practice: Remarks from a practitioner' in D. Geradin (ed.), *Modernisation and Enlargement: Two major challenges for EC competition law* (Antwerp, Intersentia, 2004), 123-128.

Wenneras, P., 'Sanctions against Member States under Article 260 TFEU: Alive, but not kicking?', 49 *Common Market Law Review* (2012), 145-176.

Wennerström, E., *The Rule of Law and the European Union* (Upsalla, Iustus Forlag, 2007), 56-57.

Werhan, K., 'The Neoclassical Revival in Administrative Law', 44 *Administrative Law Review* (1992), 567-627.

Wertheimer, H., 'The *Haecht II* judgment and its repercussions', 10 *Common Market Law Review* (1973), 386-424.

Wesseling, R., 'The Commission Notices on decentralisation of E.C. antitrust law: in for a penny, not for a pound', 18 *European Competition Law Review* (1997), 94-97

Wesseling, R., *The Modernisation of EC Antitrust Law* (Oxford, Hart, 2000), 252 pp.

Wesseling, R., 'The draft-regulation modernising the competition rules: the Commission is married to one idea', 26 *European Law Review* (2001), 357-378.

Wesseling, R. and van der Woude, M., 'The lawfulness and acceptability of enforcement of European cartel law', 35 *World Competition* (2012), 573-598.

Widdershoven, R., 'European Administrative Law' in R. Seerden (ed.), *Administrative Law of the European Union, its Member States and the United States* (Antwerp, Intersentia, 2012), 283-343.

Wiesbrock, A., 'E.ON/GDF: Revisiting the Standard of Judicial Review for Fines in Competition Cases', 4 *Journal of European Competition Law & Practice* (2013), 58-60.

Wilks, S., 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?', 18 *Governance* (2005), 431-452.

Wilks, S., 'Institutional Reform and the Enforcement of Competition Policy in the UK', 7 *European Competition Journal* (2011), 1-23.

Willis, P., '"You have the right to remain silent", or do you? The privilege against self-incrimination following Mannesmannrohren-Werke and other recent decisions', 22 *European Competition Law Review* (2001), 313-321.

Wils, W., 'Notification, clearance and exemption in E.C. competition law: an economic analysis', 24 *European Law Review* (1999), 139-156.

Wils, W. 'The Modernization of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation No. 17', 24 *Fordham International Law Journal* (2001), 1655-1717.

Wils, W., 'Regulation 1/2003: A Reminder of the Main Issues' in D. Geradin (ed.), *Modernisation and Enlargement: Two major challenges for EC competition law* (Antwerp, Intersentia, 2004), 9-81.

Wils, W., 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis', 27 *World Competition* (2004), 201-224.

Wils, W., 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003', 29 *World Competition* (2006), 345-366.

Wils, W., 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles', 31 *World Competition* (2008), 335-352.

Wils, W., *Efficiency and Justice in European Antitrust Enforcement* (Oxford, Hart, 2008), 206 pp.

Wils, W., 'The Increased Level of Antitrust Fines, Judicial Review and the ECHR', 33 *World Competition* (2010), 5-29.

Wils, W., 'Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement', 34 *World Competition* (2011), 357-360.

Wils, W., 'The Oral Hearing in Competition Proceedings before the European Commission', 35 *World Competition* (2012), 397-430.

Wils, W., 'The Role of the Hearing Officer in Competition Proceedings before the European Commission', 35 *World Competition* (2012), 431-456.

Winter, R., 'State law, Shareholder Protection and the Theory of the Corporation', 6 *Journal of Legal Studies* (1977), 251-292.

Wissmann, T., 'Decentralised Enforcement of EC Competition Law and the New Policy on Cartels. The Commission White Paper of 28th April 1999', 23 *World Competition* (2000), 123-154.

Wodz, B., 'Comfort letters and other informal letters in E.C. competition proceedings – why is the story not over?', 21 *European Competition Law Review* (2000), 159-169.

Wouters, J., 'European Company Law: Quo Vadis?', 37 *Common Market Law Review* (2000), 257-307.

Wouters, J. and Van Kerckhoven, S., 'The EU's Internal and External Regulatory Actions after the Outbreak of the 2008 Financial Crisis', 8 *European Company Law* (2011), 201-206.

Wright, K., 'The 'Judicial', the 'Administrative' and consistent application after the decentralisation of EC antitrust enforcement', Paper for European Union Studies Association Eleventh Biennial International Conference, April 2009, available at www.eustudies.org,

Wright, K., 'European Commission interventions as amicus curiae in national competition cases: the preliminary reference in X BV', 30 *European Competition Law Review* (2009), 509-513.

Wright, K., 'The European Commission's Own "Preliminary Reference Procedure" in Competition Cases', 16 *European Law Journal* (2010), 736-759.

Wyatt, D., 'Community Competence to Regulate the Internal Market' in M. Dougan and S. Currie (eds.), *50 years of the European Treaties. Looking back and thinking forward* (Oxford, Hart, 2009), 93-136.

Wylie, S. and Rodger, B., 'Taking the Community interest line: decentralization and subsidiarity in EC competition law enforcement', 18 *European Competition Law Review* (1997), 485-491.

Wymeersch, E., 'Aspecten van toezicht op het financieel bestel' in M. Tison, C. Van Acker en J. Cerfontaine (ed.), *Financiële regulering: op zoek naar nieuwe evenwichten? Volume II. Financiële transacties – financiële markten – prudentieel recht*, (Antwerp, Intersentia, 2003), 227-249.

Wymeersch, E., 'The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors', 8 *European Business Organisation Law Review* (2007), 237-306.

Wymeersch, E., 'Het financiële recht, naar Europese maatstaven herijkt' in M. Tison (ed.), *Belgisch kapitaalmarktrecht op Europese leest* (Antwerp, Intersentia, 2007), 425-440.

Wymeersch, E., '"Het "Committee of European Securities Regulators" of "CESR"', *Forum Financier/Droit Bancaire et Financier* (2007), 211-224.

Wymeersch, E., 'The Institutional Reforms of the European Financial Supervisory System, an Interim Report', http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1541968, 19 pp.

Wymeersch, E., 'The New European Financial Regulatory Bodies', *Financial Forum – Revue Bancaire and Financière* (2012), 28-39.

Wymeersch, E., Hopt, K. and Ferrarini, G. (eds.), *Financial Regulation and Supervision. A Post-Crisis Analysis* (Oxford, Oxford University Press, 2012), 560 pp.

Wymeersch, E., 'The European Investment Fund Management Directive' in E. Wymeersch (ed.), *Alternative Investment Fund Regulation* (The Hague, Kluwer Law International, 2012), 433-496.

Wymeersch, E., 'The European Banking Union: a First Analysis', available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2171785, 29 pp.

X., The scope of application of the general principles of Union law: An ever expanding Union?', 47 *Common Market Law Review* (2010), 1589 -1596.

X., 'Some thoughts concerning the Draft Treaty on Reinforced Economic Union', 49 *Common Market Law Review* (2012), 1-14.

X.(ed.), LE LIVRE BLANC DE LA COMMISSION SUR LA MODERNISATION DES RÈGLES DE CONCURRENCE. Actes de la Journée d'études organisée le 26 mai 2000 à l'occasion du 35e anniversaire des Cahiers de droit européen', 35 *Cahiers de droit européen* (2000), 103-236.

X. (ed.), 'A Panoramic View Of The Financial Crisis That Began In 2008: The Need For Domestic And International Regulatory Reform'35 *University of Dayton Law Review* (2009).

Yataganas, X., 'Delegation of Regulatory Authority in the European Union – The Relevance of the American Model of independent Agencies', *Jean Monnet Working Paper* 3/01, 68 pp

Young, A., 'The Politics of Regulation and the Internal Market', in K.E. Jorgensen, M. Pollack and B. Rosamond (eds.), *Handbook of European Union Politics* (London, Sage, 2007), 373-390.

Young, E., 'Protecting Member State Autonomy in the European Union: some cautionary tales from American Federalism', 77 *New York University Law Review* (2002), 1612-1733.

Young, E., 'Institutional Settlement in a Globalizing Legal System', 54 *Duke Law Journal* (2004-2005), 1101-1210.

Zingales, N., 'The Hearing Officer in EU Competition Law Proceedings: Ensuring Full Respect for the Right to be Heard?', 7 *Competition Law Review* (2010), 129-156.

Zinzani, M., *Market integration through 'Network Governance'* (Antwerp, Intersentia, 2012), 304 pp.

Zywicki, T. and Sanders, A., 'Posner, Hayek and the Economic Analysis of Law', 93 *Iowa Law Review* (2008), 559-603.