

JUDICIAL PROTECTION AGAINST EU FINANCIAL SUPERVISORY AUTHORITIES IN THE WAKE OF REGULATORY REFORM

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1. Introduction¹

European Union (hereinafter 'EU') law recently witnessed the creation of a new breed of supervisory authorities capable of addressing binding decisions to market participants.² The field of financial regulation offers a most salient illustration. Following a global financial crisis which demonstrated a lack of coordinated and integrated supervisory tools, post-crisis reform initiatives at EU level enabled the introduction of new and upgraded EU supervisory arrangements.³ The EU's reform package resulted in the establishment of three fully-fledged supervisory authorities (hereinafter 'ESAs'), which assemble national supervisors' representatives. These authorities can adopt binding decisions. Unlike their predecessors, who were informal committees of national supervisors, these authorities have also fully been integrated in the EU institutional framework⁴ and its constitutional provisions,⁵ demanding effective judicial protection against EU-wide supervisory decisions.⁶

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² See for an overview Saskia Lavrijssen and Leigh Hancher, 'Networks on Track: from Regulatory Networks to Regulatory "Network Agencies"', (2008) 34 *Legal Issues of Economic Integration* 23-55.

³ For an overview, see Niamh Moloney, 'EU Financial Market Regulation after the Global Financial Crisis: 'More Europe' or more Risks?', (2010) 47 *CML Rev* 1317 – 1383; Hala Rumeau – Maillot, 'Les mesures prises par l'Union européenne en réponse à la crise: inventaire, présentation et commentaire', (2010) *Euredia* 495-540. On the causes of the crisis, see Rosa Lastra and Geoffrey Wood, 'The Crisis of 2007-09: Nature, Causes, and Reactions', (2010) 13 *Journal of International Economic Law* 531-550.

⁴ Regulatory bodies or agencies have generated a vast amount of scholarship, particularly as to their position in the EU institutional system, their functioning and their accountability towards those governed. Legal control and judicial protection have also been touched upon, albeit less systematically, see for a general overview Herwig Hofmann and Alexander Türk, 'The Development of Integrated Administration in the EU and its Consequences', (2007) 13 *European Law Journal* 253-271; Stefan Griller and Andreas Orator, 'Everything under Control? The "way forward" for European agencies in the footsteps of the Meroni doctrine' (2010) 35 *EL Rev.* 3-35; at the same time however, the efficiency of judicial review has been severely questioned by some, see Maartje De Visser, 'Judicial accountability and new governance', (2010) 37 *Legal Issues of Economic Integration* 41-60.

⁵ These constitutional requirements are not only found in the art 19 TFEU and the arts 251-281 TFEU determining the competences of the Court of Justice, but also in the Convention on the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights (ECHR), adopted by the Council of Europe. Art 6(1) of the Convention guarantees the right to a remedy and to access to courts as confirmed by the European Court of Human Rights, see among many others cases *Posti and Rakho v*

The upgraded supervisory system therefore opened judicial review avenues for market participants and national supervisory authorities against ESA decisions. The ESA remedies system aims to ensure that any person affected by the ESAs' decisions has the faculty to refer them for review by an independent judicial body. It allows individuals to contest particular ESA decisions before a joint Board of Appeal and subsequently, before the Court of Justice.⁷ Concurrently, it specifically allows national supervisory authorities to engage in the judicial review process.

This article analyses the new judicial review provisions and explores the extent to which the new system enables complete judicial protection against ESA decisions, affecting the legal position of Union Institutions, Member States, independent national authorities and market participants. It argues that the remedies framework presents inconsistencies and gaps that render complete legal control of the operations of the ESAs difficult to achieve in practice. To the extent that the ESA regulations remain silent on these issues, it will be left to the Board of Appeal – a *de facto* EU administrative court – and to the Court of Justice to address any inconsistencies and fill such gaps. The following sections identify particular inconsistencies and gaps and suggest alternative solutions or interpretations to overcome these identified shortcomings. These suggestions attempt to provide a framework of reference for future legislative or judicial adaptations to the organisation of judicial review.

The article is structured as follows (i) Section two places the creation of remedies in the overall scheme of EU institutional reform of financial markets. It also revisits the pre-crisis system's lack of EU remedies; (ii) Section three introduces the ESA remedies system as a particular way to integrate legal control of supervisory decision-making within the EU Institutional framework. It focuses on the creation of a joint ESA Board of Appeal and the review options granted to this Board and the Court of Justice on 'appeal'; (iii) Section four highlights particular inconsistencies in the new remedies system; (iv) Section five focuses on significant gaps in that system. Both sections call for enhanced clarification at EU level, either by means of judicial interpretation or by adaptation of the supervisory authorities' establishing regulations; (v) Section six concludes by more generally emphasising the constitutional necessity of such interpretation or adaptation.

2. Enhancing Judicial Protection in Supervisory Decision-making: the EU Financial Regulatory Reform Momentum and the Creation of Supervisory Authorities

This section provides a succinct overview of the creation of European supervisory authorities in financial law and the role attributed to judicial review therein. A first subsection focuses on the pre-crisis system and the roles of informal level three network committees as quasi-supervisory authorities. The second subsection briefly

Finland, App no 27824/95 (ECtHR, 24 September 2002); *Cordova v Italy* (No. 2), App no 45649/99 (ECtHR, 30 September 2003); *Mendel v Sweden*, App no 28426/06 (ECtHR, 7 April 2009).

⁶ For an overview of effective judicial protection in a shared and integrated legal order, see Jan Jans, Roel de Lange, Sacha Prechal and Rob Widdershoven, *Europeanization of Public Law* (Europa Law Publishing 2007) 241-317.

⁷ References to the Court of Justice or the Court in this contribution indicate the general Union Institution, comprising the European Court of Justice, the General Court, and the Civil Service Tribunal. Particular references to either the European Court of Justice or the General Court will be indicated as such.

describes the post-crisis establishment of EU supervisory authorities. The creation of these authorities is part of a broader institutional reform movement.⁸

2.1. Before the Crisis: Hybrid Network Committees as Quasi-supervisors

Despite intense ‘Europeanisation’ of financial regulation, an integrated EU system of financial market supervision was absent at the outset of the 2008 crisis.⁹ The 1999 Financial Services Action Plan had revitalised the completion of the Internal Market in financial services and resulted in extensive EU financial regulatory activity.¹⁰ The Institutional changes required to smoothen this process, evidenced in the Final Report of the Committee of Wise Men chaired by Alexandre Lamfalussy, did not however envisage the creation of EU supervisory authorities.¹¹

The ‘Lamfalussy’ Report initially aimed to facilitate the adoption and implementation of EU securities regulation. It proposed a four-level approach to EU regulatory action. Level one action aimed to adopt general principles in EU Regulations and Directives.¹² Level two intended to implement these principles at EU level through technical and detailed level two Directives or Regulations.¹³ Level three contained convergence mechanisms for coordinated implementation of levels one and two measures. Contrary

⁸ The other components part of this reform have been extensively been discussed elsewhere and will therefore not be analysed in this paper. See for an overview, Jean Victor Louis, ‘The Implementation of the Larosière Report: A Progress Report’ in Mario Giovanoli and Diego Devos (ed.), *International Monetary and Financial Law. The Global Crisis* (OUP, 2010) 146-176; Takis Tridimas, ‘EU Financial Regulation: Federalization, Crisis Management, and Law Reform’ in Paul Craig and Grainn De Búrca, *The Evolution of EU Law* (OUP, 2011) 783-804. See also Niamh Moloney (n 3). On the interaction between institutional and substantive reform, see Blanche Sousi, ‘La réglementation bancaire de l’Union européenne après la crise: un monde sans conscience et sans confiance?’ (2011) *Euredia* 121-132. Reform measures introduced a European Systemic Risk Board, see Eillis Ferran and Kern Alexander, ‘Can soft law bodies be effective? The special case of the European Systemic Risk Board’ (2010) 6 *EL Rev* 751-776. For a general critique, see Christian Noyer, ‘Les défis de la nouvelle architecture de la supervision européenne’ (2010) *Euredia* 151-155.

⁹ That was even the case where the Treaty explicitly provided for financial supervision. According to art 127 (6) TFEU, the European Central Bank can be conferred a role in prudential supervision of individual financial institutions. As such, a legal basis for integrated market supervision in the hands of the ECB did exist. Art 127 (5) TFEU authorises the European System of Central Banks to contribute to the smooth conduct of prudential supervision policies.

¹⁰ COM (1999) 232, 11 May 1999, ‘Financial Services: Implementing the Framework for Financial Markets: An Action Plan’ 32 <http://ec.europa.eu/internal_market/finances/docs/actionplan/index/action_en.pdf> accessed April 2012.

¹¹ ‘Final Report of the Committee of Wise Men on the regulation of European Securities Markets’, 15 February 2001 117 <http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf> (hereafter referred to as Lamfalussy report) accessed April 2012. See among many others Jan Andersson, ‘The Regulatory Technique of EU Securities Law – A Few Remarks’ (2002) 13 *European Business Law Review* 313 – 322.

¹² Lamfalussy Report, 22-23.

¹³ Lamfalussy Report, 28. On the differences between Levels 1 and 2, see Yannis Avgerinos, ‘Essential and Non-essential Measures: Delegation of Powers in EU Securities Regulation’, (2002) 8 *European Law Journal* 269-289. Level 2 measures extensively relied on Committee deliberations (so-called Comitology procedures).

to level one and two, level three operated in the shadows of EU legislative procedures and EU law. A network of national supervisory authorities—the Committee of European Securities Regulators (hereinafter ‘CESR’)¹⁴—would issue non-binding guidelines and recommendations on the transposition and interpretation of level one and two Directives or Regulations.¹⁵ Furthermore, the CESR was also invited to adopt guidelines to ensure regulatory convergence in fields not explicitly covered by the Level one and two measures and to design a common set of supervisory guidelines.¹⁶ Level four focused on enhanced enforcement by the European Commission through the infringement procedure in the EC Treaty (now Article 258 of the Treaty on the Functioning of the European Union (hereinafter ‘TFEU’)).¹⁷

The Council and European Parliament endorsed this regulatory approach and subsequently extended it to banking and insurance regulation.¹⁸ The extension also resulted in the creation of a Committee of European Banking Regulators (hereinafter ‘CEBS’) and a Committee of European Insurance and Occupational Pension Supervisors (hereinafter ‘CEIOPS’) in addition to CESR at level three.¹⁹

Level three committees comprised an institutional peculiarity in the overall EU regulatory framework. Created by a Commission Decision, the Committees lacked independent EU legal personality.²⁰ This structure inspired some scholars to conclude that the Committees did not enjoy any legal personality at all.²¹ All committees had however been incorporated under the national corporate laws of Member States and thus operated as legal persons in terms of national law. CESR for example, was officially²² a legal person under the 1901 Statute on the contract of association.²³

¹⁴ Commission Decision 2001/527/EC, [2001] O.J. L 191/43, replaced by Commission Decision 2009/77/EC, [2009] O.J.L 25/18 (hereinafter ‘2009 CESR Decision’).

¹⁵ On CESR, see Eddy Wymeersch, “Het “Committee of European Securities Regulators” of “CESR” (2007) *Forum Financier/Droit Bancaire et Financier* 211-224.

¹⁶ Lamfalussy Report, 37-38.

¹⁷ Lamfalussy Report, 40.

¹⁸ See on these evolutions among others, Bénédicte Vaccari, ‘Le processus Lamfalussy : enjeux, leçons et perspectives’ (2007) *Revue du droit de l’Union Européenne* 41-72.

¹⁹ For CEBS, see Commission Decision 2004/5/EC, [2004] O.J.L 3/28, replaced by Commission Decision 2009/78/EC, [2009] O.J. L 25/23. For CEIOPS, Commission Decision 2004/6/EC, [2004] O.J. L 3/30, replaced by Commission Decision 2009/79/EC, [2009] O.J. L 25/28.

²⁰ According to art 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 Koen Lenaerts, Piet Van Nuffel and Robert Bray (ed.), *Constitutional Law of the European Union* (Sweet & Maxwell 2006) 784.

²¹ Saskia Lavrijssen and Leigh Hancher, ‘De rol van de netwerken van nationale mededingingstoezichthouders bij de bevordering van good governance in de Europese Unie’ in Philip Eijlander and Rob Van Gestel (ed.), *Domeinconflicten tussen nationaal en Europees toezicht* (Boom 2006), 98; Dorothee Fischer-Appelt, ‘Does the EU need a single European securities regulator?’ in Herwig Hofmann and Alexander Türk, *EU Administrative Governance* (Edward Elgar, 2006) 254.

²² Although this fact had hardly been publicised on the CESR website, its chairman nevertheless explicitly stated so in a scholarly article, see Eddy Wymeersch (n 15).

According to that Statute, an association comprises members that bring together their knowledge or activities into a single legal structure.²⁴ That structure is recognised as a legal person under French law.²⁵ Both CEBS and CEIOPS relied on similar statutes in German and English law to gain legal personality.²⁶

Before the crisis, the level three system was perceived as a model for new bottom-up law making methods in the EU. 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.²⁷ In so acting, level three committees would function as unofficial supranational supervisory authorities.²⁸ The informal coordination roles of level three network committees also justified their limited legal status at EU level. Their national law incorporation limited the committees' capacities to act on an EU-wide basis. To some extent, the private laws of Member States 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 were not binding as a matter of EU law. 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.²⁹

Due to the heterodox status of the level three Committees, the authority of their 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, that is, the national supervisory authorities, without recourse to

²³ Loi du 1er Juillet 1901 relative au contrat d'association <www.legifrance.gouv.fr> (hereinafter '**Loi 1901**').

²⁴ Art 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.

²⁵ Art 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.*

²⁶ The Commission itself referred to this legal personality in terms of national law 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> accessed April 2012.

²⁷ See Walter van Gerven, 'Bringing (Private) Laws Closer to Each Other at the European Level' in Fabrizio Caffagi (ed.), *The Institutional Framework of European Private Law* (OUP 2006) 57- 60.

²⁸ Niamh Moloney, 'Law-making Risks in EC Financial Market Regulation after the Financial services Action Plan' in S. Weatherill (ed.), *Better Regulation* (Hart 2007) 352.

²⁹ See P. Van Cleynenbreugel, 'Individuele rechtsbescherming, Europese netwerken van nationale toezichthouders en "Lamfalussy"-convergentie', (2010) *SEW - Tijdschrift voor Europees en Economisch Recht* 13-31.

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 the reasons for their refusal to do so.³⁰ The enforcement of level three guidelines thus relied on the willingness of national supervisors to ensure their application. Guidelines or recommendations were not part of EU law and could not be captured by the EU judicial review system. Nonetheless, it was also recognised that level three measures constituted much more than mere soft law guidelines.³¹ They added an additional regulatory layer.

2.2. Post-crisis Responses: New Supervisory Authorities at the EU Level

The global financial crisis proved to be a major catalyst for institutional reform at EU level. The development of a supervisory system that operated under a more stringent rule of law proved essential in that regard. The first EU assessment of the crisis in the De Larosière Report focused on the Institutional arrangements and more particularly, the role of EU Institutions in supporting, providing, or ensuring supervision.³² According to the Report, the financial crisis demonstrated the lack of equilibrium in the level three approach as it did not suffice to avert crisis dangers.³³ In order to address the financial crisis at EU level, the supervisory system was to be strengthened and integrated into the EU constitutional system. The creation of new supervisory authorities would be required in that regard.³⁴

In response to these proposals, the Commission supported the creation of EU supervisory agencies and succeeded in convincing the Council and European Parliament to adopt legislative proposals.³⁵ The regulatory update logically resulted in the creation of three ESAs: the European Banking Authority (hereinafter the '**EBA**'), the European Insurance and Occupational Pensions Authority (hereinafter '**EIOPA**'), and the European Securities and Markets Authority (hereinafter '**ESMA**'). The regulations establishing these authorities, the ESA Regulations,³⁶ frequently refer to concepts such

³⁰ This is apparent from art 14 2009 CESR decision (n 14).

³¹ T. Tridimas (n8) 787.

³² The High Level Group on Financial Supervision in the EU: Report, 25 February 2009 85 (hereinafter '**De Larosière Report**') <http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf> accessed April 2012. See also C. Gortsos, 'The proposals of the Larosière Group on the Future of Financial Supervision in the European Union' in M. Giovanoli and D. Devos (ed.) (n8) 128-145.

³³ *Ibid.*, 41.

³⁴ *Ibid.*, 52.

³⁵ On these proposals in particular, see Asen Lefterov, 'How feasible is the proposal for establishing a new European system of financial supervisors?' (2011) 38 *Legal Issues of Economic Integration* 33-64; Anders Neergaard, 'European Supervisory Authorities. A New Model for the Exercise of Powers in the European Union?' (2009) *Euredia* 603-630; E. Wymeersch, 'The Institutional Reforms of the European Financial Supervisory System, an Interim Report' 19 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1541968> accessed April 2012.

³⁶ 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 (hereafter referred to as EBA Regulation); Regulation 1094/2010 of the European Parliament and of the Council of 24

as rights, remedies, legal personality among others.³⁷ The introduction of elaborate legal guarantees aimed to overcome the structural limits reflected by level three network committees.

These three authorities³⁸ constitute improved successors to CEBS, CEIOPS, and CESR from a number of perspectives.³⁹

Firstly, these authorities have been explicitly granted legal personality in terms of EU law.⁴⁰ The complicated structures of legal persons at national law contributed to EU convergence and ensuing uncertainties regarding the legal status of ESAs' decisions have thus been abandoned.

Secondly, their internal functioning and decision-making structure has been streamlined: all authorities consist of a Board comprising representatives of all national supervisors, a Management Board, a full-time Chairperson, and an Executive Director.⁴¹ Most decisions are adopted by the Board of Supervisors by means of qualified majority voting similar to the procedures in the Council.⁴²

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 (hereafter 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 (hereafter called ESMA Regulation). All Regulations follow the same structure and numbering of Articles. I will refer to all Regulations collectively as the ESA Regulations. The new authorities are crucial for the establishment of a European System of Financial Supervisors (ESFS, arts 2 ESA Regulations). See Eillis Ferran, 'Understanding the New Institutional Architecture of EU Financial Market Supervision', University of Cambridge Faculty of Law Research Paper 29/2011, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1701147> accessed April 2012.

³⁷ Remarkably, the establishment of the internal market is no longer the expressed focus of these regulations; see Elaine Fahey, 'Does the Emperor have Financial Crisis Clothes? Reflections on the Legal Basis of the European Banking Authority' (2011) 74 *Modern Law Review* 586.

³⁸ Even though the regulations refer to them as 'authorities', they function and operate as regulatory agencies, see Niamh Moloney (n 3) 1341.

³⁹ Their seat remains where the level three Committees used to be stationed; see ESA Regulations, art 7. See among others Dorothee Fischer-Appelt, 'The European Securities and Markets Authority: the beginnings of a powerful European Securities Authority?' (2011) *Law and Financial Markets Review* 21-32; Niamh Moloney, 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (1) Rule-Making' (2011) 12 *European Business Organization Law Review* 41-86; Niamh 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' (2011) 12 *European Business Organization Law Review* 177-225.

⁴⁰ ESA Regulations, art 5.

⁴¹ ESA Regulations, arts 6 and 40-53.

⁴² ESA Regulations, art 44(1). 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.

Thirdly, accountability mechanisms, consultation, and transparency obligations⁴³ have significantly improved by incorporating those obligations within the general EU legal and budgetary framework.⁴⁴ The authorities are themselves non-contractually liable towards third parties.⁴⁵ Permanently institutionalised stakeholder groups allow the ESAs to interact with selected market participants.⁴⁶

Fourthly, the authorities officially cooperate more closely with national supervisory authorities and foster the establishment of colleges of supervisors for cross-border financial institutions.⁴⁷ The ESAs also regularly convene in a joint committee.⁴⁸

Fifthly, 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,⁴⁹ in 'emergency situations'⁵⁰ and towards the settlement of disagreements between competent national authorities in cross-border situations.⁵¹ The ESAs can also issue prohibitions or restrictions on practices that affect consumer protection.⁵²

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 non-binding advice to the Member State concerned. In addition, the ESA body can only adopt a decision addressed to individual market participants or financial institutions where the relevant requirements of the

⁴³ ESA Regulations, art 29-35.

⁴⁴ ESA Regulations, art 62-66.

⁴⁵ ESA Regulations, art 69.

⁴⁶ ESA Regulations, art 37.

⁴⁷ ESA Regulations, art 21.

⁴⁸ ESA Regulations, art 54-57.

⁴⁹ ESA Regulations, art 17.

⁵⁰ ESA Regulations, art 18.

⁵¹ ESA Regulations, art 19.

⁵² ESA Regulations, art 9. These practices will have to be specifically indicated in new regulations or directives on financial services. At present, a so-called omnibus directive has been adopted, but does not contain particular innovative consumer oriented prohibition options, see 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. A proposal for an Omnibus II directive remains rather limited in that respect as well, see <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0008:FIN:EN:PDF>>. See also 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 for additional powers for ESMA to adopt guidelines concerning remuneration policies.

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* in that respect. These decisions are always supposedly addressed to individual supervisors or market participants and are not general in nature. The ESAs remain competent 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.⁵³ Guidelines and recommendations are non-binding: competent national authorities and financial institutions shall make every effort to comply with them and can be obliged to report in a clear and detailed way on their compliance.

In addition to their supervisory roles, the authorities are involved in preparing, drafting, and, in most instances, semi-adopting regulatory and implementing technical standards.⁵⁴ According to the ESA regulations, technical standards do not imply strategic decisions or policy choices. They implement requirements imposed by level 1 Acts. The process of drafting these Acts allows little latitude 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 word on the contents of these standards.⁵⁵ The drafting of these standards is also supported by consultations of market participants, who have been granted participation rights in the decision-making process.

The most important innovation comprises the introduction of remedies in the ESA Regulations, as the following sections will demonstrate. These remedies have elevated the operations of former level three committees firmly outside the shadows of EU law and into the framework of the EU rule of law.

3. Judicial Protection Against ESA Decisions

Dedicated attention to rights and remedies is, in the author's view, the most remarkable structural innovation in the ESA Regulations. Unfortunately, it is largely ignored in the vast regulatory reform context. The ESA Regulations seek to 'ensure that the parties

⁵³ ESA Regulations, art 16.

⁵⁴ These procedures reflect the new delegated and implementing Acts in arts 290-291 TFEU. Delegated Acts are based upon the legislative Act, which explicitly defines the objectives, content, scope and duration of the delegation. On art 290 TFEU, see Johannes Driessen, 'Delegated legislation after the Treaty of Lisbon: An Analysis of Article 290 TFEU' (2010) 35 *EL Rev* 837-848. In adopting delegated acts related to financial services, the Commission will nevertheless continue to rely on experts, as Declaration 39 on art 290 of the Treaty on the Functioning of the European Union states, see [2008] O.J. C 115/350. 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. On implementing acts, see Jean Claude Piris, *The Lisbon Treaty. A Legal and Political Analysis*, (CUP 2010) 103. Implementing acts will be adopted in accordance the newly updated comitology procedure 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. L 55/13.

⁵⁵ ESA Regulations, art 10-15. On the delegated lawmaking procedures in arts 290-291 TFEU and their roles in financial regulation, Gabriela 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' (2011) *Euredia* 217-239.

affected by decisions adopted by the Authorities may have recourse to the necessary remedies'.⁵⁶ To this end, they introduce a two-stage review procedure:

To protect effectively the rights of parties, and for reasons of procedural economy, where the Authority has decision-making powers, parties should be granted a right of appeal to a Board of Appeal. For reasons of efficiency and consistency, the Board of Appeal should be a joint body of the ESAs, independent from their administrative and regulatory structures. The decisions of the Board of Appeal should be subject to appeal before the Court of Justice.⁵⁷

The ESA Regulations build upon these premises by stating that any natural or legal person (including competent national authorities) may appeal against a decision⁵⁸ of the Authority related to a breach of Union law procedure, an emergency procedure, or a supervisors' disagreement settlement. Additionally, any other decision taken by the Authority in accordance with its powers granted in specific financial services legislation referred to in Article 1 (2) could also be the subject of an appeal. Appeals may be brought by the person which is addressed in the decision, or who is directly and individually concerned by a decision not addressed to him. In order to be admissible, the appeal has to be lodged in writing, within two months of notification or (website) publication and should state the grounds of appeal.⁵⁹

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.⁶⁰ The regulations provide similar Board of Appeal review in cases related to (refusal of) access to documents.⁶¹

⁵⁶ ESA Regulations, recital 58.

⁵⁷ ESA Regulations, recital 58.

⁵⁸The notion of decision is problematic in EU law. Whereas art 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 art 263 TFEU. On that discussion and the transformation from decision to act, see Hans Christian Röhl, 'The voidable decision of art 230 (4) of the Treaty establishing the European Community as a form of legal protection' in Oswald Jansen and Bettina Schöndorf-Haubold (eds.), *The European Composite Administration* (Intersentia, 2011) 412.

⁵⁹ ESA Regulations, art 60.

⁶⁰ ESA Regulations, art 60 (3) and (4).

⁶¹ ESA Regulations, art 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](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](https://eiopa.europa.eu/fileadmin/tx_dam/files/aboutceiops/Public-Access-(EIOPA-MB-11-051).pdf)> accessed April 2012.

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 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 (i.e. the Board of Supervisors or the management board). That body 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.⁶² The Board cannot (re-)adopt a particular decision itself.⁶³

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.⁶⁴ 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.⁶⁵ 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.⁶⁶ The European Court of Justice would then only be able to review these decisions on points of law.⁶⁷ According to Article 263 TFEU, parties can initiate proceedings on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. 'In the event that an Authority has an obligation to act and 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.⁶⁸

4. Inconsistencies in Judicial Review of ESA Decisions

Despite their apparent clarity of scope, particular elements of the ESA remedies' system present inconsistencies in the overall scope of protection offered by the Board of Appeal and by the Court of Justice.

Firstly, the scope of individuals' access to the Board of Appeal appears to be inconsistent with the general standing requirements, restricting direct access of

⁶² ESA Regulations, art 60 (5) – (7).

⁶³ As had originally been conceived, see J. V. Louis (n 8) 165.

⁶⁴ The procedural provisions of art 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.

⁶⁵ ESA Regulations, art 61 (1) and (2).

⁶⁶ Combined reading of art 256 (1) TFEU and art 51 Statute of the European Court of Justice.

⁶⁷ Art 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.

⁶⁸ ESA Regulations, art 61(3). The same procedural conditions apply to arts 263 and 265 actions. In the remainder of this Article, I only refer to art 263 or annulment procedures.

individuals to the European Courts. 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. 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.

4.1. Less stringent individual access to the Board of Appeal and to the General Court?

The ESA Regulations are particularly ambiguous in delineating the scope of individual access to the Board of Appeal. Although they rely on familiar categories of direct⁶⁹ and individual⁷⁰ concern, the extent to which these standing conditions apply to ESA decisions is fraught with uncertainty. Article 60 of the ESA Regulations allows a natural or legal person to obtain Board of Appeal review when a decision is addressed to that person, or in alternative cases, whenever a person is directly and individually concerned. Leaving aside discussions on the scope and identification of an ESA decision,⁷¹ the Regulations distinguish Article 17, 18, and 19 decisions (breach of Union law, emergency situations, and settlement of supervisory disputes) from other decisions based on substantive financial services Regulations or Directives (the substantive law framework).⁷² The grammatical construction of the text leaves it unclear whether the individual addressee or direct and individual concern requirements apply to both types of decisions. Article 60 (1) states that:

[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,⁷³ 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.

While one would be tempted to argue that conditions of direct and individual concern apply to both types of decisions, the lack of a comma between the second type of

⁶⁹ The Court has consistently defined a Union measure to be of direct concern if the contested measure directly affects the legal situation of the individual and leaves no discretion to its addressees, allowing for merely automatic implementation resulting from EU rules without the application of other intermediate rules, see Case C-386/96 P, *Dreyfus v Commission* [1998] ECR I-2309, para 43; Case C-486/01 P, *Front National v Parliament*, [2004] ECR I-6289, para 34; Case C-417/04 P, *Regione Siciliana v Commission* [2006] ECR I-3881, para 28.

⁷⁰ A person to whom a decision is not addressed is individually concerned only if that decision affects him by reason of certain attributes which are peculiar to him or by reason of circumstances in which he is differentiated from all other persons and, by virtue of these factors, distinguishes him individually just as in the case of the person addressed, see Case 25/62, *Plaumann v Commission*, [1963] ECR 95, 107.

⁷¹ See Hans Christian Röhl (n 58) 416-419 for reflections on that role.

⁷² The substantive law (referred to in that way by Takis Tridimas (n 8) 799) framework encapsulates the overall set of financial law provisions adopted at the EU level referred to in art 1(2) of the ESA Regulations. These provisions substantiate and determine concrete competences of ESAs in particular situations.

⁷³ Emphasis is the author's.

decisions and ‘which is addressed to’ might at least invite another interpretation, as comma before a ‘which’ construction normally indicates a non-restrictive subordinate clause. A ‘which is addressed to’ construction immediately following Article 1(2) would however restrict the scope of being individually addressed to that type of decisions. That would also imply that the conditions of direct and individual concern apply only to that category of decisions. In line with such interpretation, any decision taken by the Authority in accordance with the Union acts referred to in Article 1(2) can be appealed by an individual if addressed to it. To the extent the decision is not addressed to the appellate party, direct and individual concern would provide alternative access to the Board. A decision of the Authority based on Articles 17, 18 and 19 could on the contrary, be appealed by any natural or legal person without that recourse being limited to the addressee or a person directly and individually concerned.

Constitutionally, this approach presents a viable alternative. Article 263(5) TFEU states that:

acts setting up bodies, offices or agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

The abovementioned interpretation would precisely support specific conditions: they allow any natural or legal person and competent national authority to obtain review for any Article 17, 18 and 19 decision, even if not directly addressed to them and even if they are not directly or individually concerned. That interpretation would introduce a new approach to individual standing before the Board of Appeal in the ESA Regulations. More lenient Board of Appeal access standards would thus be introduced for Article 17, 18 and 19 decisions but not for other ESA decisions. Should this interpretation become generally accepted, the Court might even be willing to extend this interpretation to systems of judicial review against other regulatory agencies.

This interpretation is nevertheless countenanced by the Regulations’ preambles, by other language versions, and by the overall access to court approach entertained by the Court of Justice. The ESA Regulations preambles refer to ‘parties’ that should have recourse to the necessary remedies in all instances. As such, the Regulations would seem to require similar addressee or concern requirements for all types of decisions.⁷⁴ In the same way, the French version states that every natural or legal person can:

former un recours contre une décision de l’Autorité visée aux articles 17, 18 et 19 et toute autre décision arrêtée par l’Autorité conformément aux actes de l’Union visés à l’article 1er, paragraphe 2, dont elle est le destinataire [...].

The comma following ‘paragraphe 2’ seems to highlight that the individuality and as a result, requirements of direct and individual concern requirements apply to all decisions amenable to Board of Appeal review. The German and Spanish language versions support this approach.⁷⁵

⁷⁴ ESA Regulations, recital 58 states that ‘[i]t is necessary to ensure that the parties affected by decisions adopted by the Authority may have recourse to the necessary remedies. In individual decisions, this refers to the individuals affected by those decisions and not just any third party’.

A general application of (direct and) individual concern requirements is more consistent with the limited access of individuals the Court of Justice has maintained throughout its case law.⁷⁶ In light of preceding case law, it would be surprising if the Court readily acknowledged the general standing for any person against an Article 17, 18, and 19 decision. If that were the case, the Court would indirectly broaden individual Court access, as non-admissibility Board of Appeal decisions could be reviewed by the General Court.

Article 60(1) leaves too much uncertainty to adopt such extension, but it ultimately also allows for the possibility of that extension. It would therefore be advisable that the Board of Appeal (and ultimately, the Court itself) establishes clarity on these grounds and develop an authoritative interpretation of Article 60. The scope of access would also gain much clarity from the insertion of a comma in the English language version.

4.2. Member States and/versus National Supervisory Authorities

The ESA Regulations allow national financial supervisory authorities to initiate proceedings before the Board of Appeal. National supervisory authorities play a crucial role in the implementation and application of EU financial law provisions. As independent supervisors, they form part – in different degrees of directness – of Member States’ systems of administrative organisation.⁷⁷ The ESA Regulations nevertheless specifically distinguish them from Member States at large. Article 17, 18, and 19 decisions will be directed to individual competent supervisory authorities and not to individual Member States. That authority can subsequently obtain judicial

⁷⁵ Both versions introduce a comma: *gegen einen gemäß den Artikeln 17, 18 und 19 getroffenen Beschluss der Behörde, gegen jeden anderen von der Behörde gemäß den in Artikel 1 Absatz 2 genannten Rechtsakten der Union getroffenen, an sie gerichteten Beschluss* and *el artículo 1, apartado 2, de las que sea destinataria*.

⁷⁶ The Court maintained a strict interpretation of direct and individual concern ever since case 25/62, *Plaumann v Commission*, [1963] ECR 95, 107. The ECJ refused to extend the standing conditions for individuals in Case C-50/00 P *Unión de Péqueños Agricultores v Council* [2002] ECR I-6677, and rebuked the then Court of First Instance in its willingness to allow individual access in case of non-individual acts against which no review before national judges was possible (Case T-177/01, *JégoQuéré v Commission* [2002] ECR II-2365). The Court subsequently shifted towards national judges and their obligation to provide remedies, see e.g. case C-432/05, *Unibet*, [2007] ECR I-2271. On this issue, see among others Marie-Pierre Granger, ‘Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *JégoQuéré et Cie SA v Commission* and *Unión de Péqueños Agricultores v Council*’, (2003) 66 MLR 124-138.

⁷⁷ On the requirements of autonomy and independence, the ECJ ruled in a case on data protection that ‘the supervisory authorities responsible for supervising the processing of personal data outside the public sector must enjoy an independence allowing them to perform their duties free from external influence. That independence precludes not only any influence exercised by the supervised bodies, but also any directions or any other external influence, whether direct or indirect, which could call into question the performance by those authorities of their task consisting of establishing a fair balance between the protection of the right to private life and the free movement of personal data’, see case C-518/07, *Commission v Germany* [2010] ECR I-0000, para 30. See also the Opinion of AG Mazák, para 14-29. Whether this judgment constitutes a precedent for all independent national supervisors – i.e. outside the data protection context – is unclear, as the Court interpreted the conditions of independence in light of the directive’s referral to that concept. On the other hand, the Advocate General did indeed refer to independence as a functional concept applicable to all supervisory authorities, see para 13-14. The independence notions have indeed been repeated in a different setting by Case C-119/09, *Société fiduciaire nationale d’expertise comptable*, judgment of 5 April 2011, Opinion of AG Mazák, para 54.

protection against ESA decisions if addressed to them. To the extent that those decisions are not addressed to them, the generally accepted interpretation of Article 60 allows them to have access to the Board if they are directly and individually concerned by the decision adopted. Member States and Union Institutions cannot commence proceedings before the Board, as the ESA regulations (and the TFEU) distinguish them from natural or legal persons.⁷⁸ National supervisory authorities thus represent Member States' interests or concerns before the Board of Appeal. At the level of the Court of Justice, Member States are invited directly to engage in proceedings against ESA decisions. Member States are considered privileged applicants and therefore do not have to demonstrate any direct and/or individual concern to obtain standing before the Court.⁷⁹

Questions arise as to the extent to which the interests and representative actions of national competent authorities and Member States can and should be equated in Board of Appeal and Court proceedings. National competent authorities have to lodge actions before the Board in most circumstances, but Member States have not been granted the same opportunity. In case of decisions adversely affecting their interests, the latter could therefore directly commence proceedings before the General Court. In instances where an individual decision addressed against a national supervisory authority cannot be contested by a particular supervisory authority for lack of direct and individual concern, the Member State concerned could directly address the General Court instead. To the extent that the national supervisory authority is involved in representing the Member State before the General Court, any reliance on the Board of Appeal procedure by a supervisory authority would be superfluous. The Board of Appeal stage would only remain obligatory if an ESA decision is directly addressed to that national supervisory authority. The Member State to which the supervisory authority belongs would nevertheless also be able to initiate proceedings before the General Court without being obliged to engage in Board of Appeal proceedings. Both the national authority and 'its' Member State would thus be able to initiate proceedings against a similar decision. In appellate proceedings by a national authority following a Board of Appeal decision addressed to it, 'its' Member State could still independently intervene to clarify its own position or to support its authority, which is a party to the proceedings.⁸⁰

The abovementioned hypothetical situations seem to hold only on the presumption that Member States and their independent national supervisory authorities project different interests or at least could do so for the purposes of obtaining judicial review against ESA decisions. The presumption of different interests is not however reflected in the underlying organisational framework of the ESA Regulations. Firstly, Member States are only represented by their national supervisory authorities in the Board of Supervisors. In addition, the ESAs settle disputes between national supervisory authorities, without elevating these disputes to the political realm of Council decision-making and thus bringing the Member States in to check the interests supervisory authorities might have in that particular case. More practically, decision-making procedures and the qualified majority requirements apply in similar ways as to Member States themselves. The Council is not represented in the deliberations of the ESAs, contrary to the Commission, but national supervisory authorities enjoy voting rights similar to the ones held by

⁷⁸ ESA Regulations art 60(1) and art 61(2).

⁷⁹As apparent from art 263(1) TFEU.

⁸⁰ Art 40 Statute of the Court of Justice of the European Union.

Member States in the Council. References to both national supervisory authorities and Member States as presumably differently interested process parties in the remedies sections of the ESA Regulations therefore appear inconsistent with the overall ESA decision-making scheme.

The Court of Justice's approach to the scope of a Member State in Article 263 TFEU might however favour differential standing conditions for Member States and their national supervisory authorities. The Court does not equate a Member State and its decentralised authorities like federated states for purposes of the Article 263 TFEU action for annulment.⁸¹ The latter have to demonstrate direct concern in relation to regulatory acts and direct and individual concern in relation to other types of acts or decisions not directly addressed to them.⁸² References to both supervisory authorities and Member States could therefore be interpreted as an explicit invitation to distinguish the standing conditions for national supervisory authorities from the privileged Member State standing requirements. The independence of national supervisory authorities, as interpreted by Advocate General Mazák in *Commission v Germany* could also be understood as confirmation of such argument. The Advocate General stated that independence should be applied 'in relation to other parts of the executive, of which they form an integral part, and to a degree that ensures that their functions are exercised effectively'.⁸³ The Executive would comprise all directly dependent departments as inherent parts of a Member State, whereas independent supervisory authorities, performing an executive function, could not be equated with the Member State as such.

Two arguments could nevertheless be adduced to question that understanding of independence. First and specifically, the Advocate General and the Court in the *Commission v Germany* stated that independence should not be compared to judicial independence, because 'independence in exercising their functions must be defined only in the context of the executive and not in relation to the other branches of the State'.⁸⁴ That position seems to presuppose a 'unitary executive' from the Court of Justice's standing point of view. All parts of a Member States' executive, no matter whether they act as independent authorities, are part of the Member State level having privileged standing before the European Courts. As national supervisory authorities in most cases operate at the central executive level, they thus inherently form part of the 'Member State'. Second and more generally, a distinction between a Member State and its supervisory authority would render the scope of privileged 'Member State' applicants too narrow. Only those parts of the Executive immediately accountable to executive decision makers could still be considered a Member State for privileged applicant status. If that were the case, how does one define directly accountable decision makers?

⁸¹ See on that issue and for an overview of case law, Piet Van Nuffel, 'What's in a Member State? Central and Decentralized Authorities before the Community Courts' (2001) 38 *CML Rev.* 871-901. Somewhat contradictory, the Court does apply an equation in actions taken against infringements of EU law by the European Commission and subsequently the Court of Justice, see *Ibid.*, 883.

⁸² In accordance with art 263 (4) TFEU, see also Koen Lenaerts, Dirk Arts, Ignace Maselis and Robert Bray (ed.), *Procedural Law of the European Union* (Sweet & Maxwell 2006) 243.

⁸³ Opinion AG Mazák, *Commission v Germany* (n 77) para. 23.

⁸⁴ Opinion AG Mazák, *Commission v Germany* (n 77) para. 23; Case C-518/07, *Commission v Germany*, para. 19.

In addition, many regulatory disputes would potentially remain sealed from direct appeals before the European Courts, which would endanger the system of complete judicial protection in relation to Member State structures. It would in that respect become difficult for national supervisory authorities directly to initiate proceedings against actions taken by EU regulatory agencies that affect their legal position without them being individually addressed as such. The alignment of interests between a Member State and independent authorities as part of its Executive therefore seems to present the most feasible option in a system aiming for more complete legal control.

To the extent that a Member State and 'its' national supervisory authority should thus entertain similar or equal interests as a matter of EU law, references to both Member States and national authorities in the ESA remedies' sections could be interpreted in ways that minimise potential collusion of interests in court proceedings. One particular solution could be to initiate proceedings through the national competent authority in cases where decisions are addressed to it or where that authority has standing before the Board because of direct and individual concern, but to grant Member States the right directly to initiate proceedings before the Court in cases of decisions where the supervisory authority could not first act before the Board. The two month time period to initiate Court proceedings should then only start following a decision of non-admissibility by the Board of Appeal, unless Board of Appeal precedents clearly imply that the national supervisory authority would not gain standing before the Board in this kind of dispute.⁸⁵ Only in those instances should direct court proceedings be initiated, in which a member of the national supervisory authority could represent the Member State *qua* Member State.

The Court of Justice will thus have to establish the extent to which the roles of national supervisory authorities and Member States align or differ in the context of ESA remedies. Although in both instances particular avenues for judicial review remain open, a consistent involvement of Member States and their supervisory authorities could be preferred. Judicial clarification is therefore most welcome here.

4.3. The Scope of Review by the Board of Appeal

The scope of review presents additional inconsistencies. Scope of review could be understood in two ways, either referring to the categories of reviewable decisions or to the substantive bases for review. In both situations, the ESA Regulations appear to detract from long standing Treaty interpretations delineating the scope of judicial review in EU law.

⁸⁵ Those instances will only gradually become clear in the Board of Appeal's case law. This reasoning could be based on the Court's case law on the obligations to refer a question for preliminary ruling on the interpretation of EU law by a Member State court. Although making a reference is obligatory in cases where no judicial remedy is available according to art 267 TFEU, the Court of Justice fashioned exceptions in case of identical questions, questions the answer to which can clearly be deduced from the case law and situations where the correct application of Union law are so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Case 283/81, *Cilfit*, [1982] ECR 3415, para. 13-16 and para. 21. More recently, see Case C-461/03, *Gaston Schul*, [2005] ECR I-10513, para. 16-19; Case C-260/07, *Pedro IV Servicios*, [2009] ECR I-2437, para. 36. In cases where the scope of standing for particular types of decisions has become so clear as to render the application before the Board useless for lack of standing, direct appeals to the Court by the Member States could be preferred.

4.3.1. Categories of Decisions Amenable to Review

On the one hand, the categories of decisions against which judicial review can be organized are confusing in some cases. According to the ESA Regulations, decisions not amenable to Board of Appeal review can be directly appealed before the Court of Justice in accordance with Article 263 TFEU.⁸⁶ The number of decisions of this kind is purportedly limited as all decision-making activity incorporated in EU substantive financial law is amenable to Board review. The following decisions can be directly appealed to the Court: a decision to publish reasons for non-compliance with guidelines,⁸⁷ dispute settlement in relation to colleges of supervisors,⁸⁸ decisions appointing members of the Securities and Markets Stakeholders Group,⁸⁹ decisions removing the Executive Director and decisions on the appointment and removal of members of the Board of Appeal.⁹⁰

Two types of decisions stand out for their potentially atypical reviewability. Firstly, decisions appointing and removing the Chairperson and appointing the Executive Director are excluded from Board of Appeal review.⁹¹ Those decisions require the approval of the European Parliament, potentially rendering them attributable to the Parliament rather than to the Authority. Secondly, Article 9 of the ESA Regulations refers to consumer financial protection and allows for the temporary restriction or prohibition of certain activities. Restricting or prohibiting activities is not explicitly referred to as a ground for Board of Appeal review in Article 60, however the actual restriction or prohibition options have to be specified by substantive law acts and thus originate in those acts. ESA decision powers in these acts are included in the group of decisions reviewable by the Board of Appeal through Article 1(2) of the ESA Regulations.

This understanding of the scope of review does not pose particular problems because of the broad group of decisions included. The decisions not included in the group of reviewable decisions could only be extended through legislative adaptation. At present, they result from a legislative choice. It could nevertheless be questioned why Board of Appeal review does not include some of the abovementioned types of decisions, for instance decisions to publish reasons for guideline non-compliance. No particular justifications seem to have been offered in this regard.

4.3.2. Grounds of review

On the other hand, the Regulations do not specifically mention the concrete grounds of Board of Appeal review. More specifically, the substantive and procedural arguments that can be invoked and the extent to which these arguments differ from those in Article

⁸⁶ ESA Regulations, art 61 (1).

⁸⁷ ESA Regulations, art 16.

⁸⁸ ESA Regulations, art 21.

⁸⁹ ESA Regulations, art 37.

⁹⁰ ESA Regulations, art 58.

⁹¹ ESA Regulations, art 48 (2) and 51 (2).

263 TFEU remain absent. Article 263 TFEU limits the Court’s scope of review to grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any rule of law relating to their application or misuse of powers.⁹² As such, the grounds for annulment are broad, but remain limited to a legality control, without the Court being able to assess the opportunity of the substance of a particular decision. To some extent, it appears that the Board of Appeal was on the contrary, mandated to do so or could at least perceive its role in that way. The original Commission proposals for the creation of ESAs granted the Board the power to ‘exercise any competence which lies in the competence of the Authority’, thus allowing it to adopt new substantive decisions. The Council arranged for the removal of that provision, leaving the ESA Regulations with a mere option to confirm an ESA’s decision or remit the case to the ESA.⁹³ The composition of the Board similarly requires members with ‘sufficient legal expertise to provide expert legal advice on the *legality of the Authority’s exercise of powers*’.⁹⁴ It would thus appear that the Board’s role would also be confined to assessing the legality of ESA decisions. If the Board of Appeal and the Court of Justice were to apply similar review standards, the Board of Appeal could rely on the Court’s case law to determine the scope of its own review initiatives. From a consistency perspective, this should be welcomed as the Board would then be able to mirror the Court’s annulment role. The Board of Appeal’s particular competence to remit a case to the competent ESA body additionally enables it informally to assess the opportunity of the decision and perhaps to deliver suggestions on how that body should decide in case it wants to avoid annulment by the Court of Justice. The Board of Appeal itself or the Court of Justice should therefore clearly determine how this mirror approach should be applied in the case of ESA decisions.

4.4. Summary of Inconsistencies Requiring Clarification

The following table summarises the inconsistencies identified and solutions proposed in the foregoing subsections:

| | Judicial clarification | Legislative adaptation |
|----------------------------|--|--|
| Individual Access | Types of decisions requiring individual concern | Comma input in English language version |
| (Member State) Authorities | Presumption of alignment of interests among Member States and their authorities? | |
| Scope of Review | Mirroring Treaty grounds of review? | Clarifying categories not amenable to Board review |

⁹² All grounds basically amount to testing the legality and not the opportunity of the decisions taken. The focus on legality has been confirmed by Advocate General Jacobs in his Opinion to Case C-210/98 P, *Salzgitter v Commission*, [2000] ECR I-5843, para 135.

⁹³ J.V. Louis (n 8) 165.

⁹⁴ ESA Regulations, art 58 (2).

5. Gaps in judicial protection against ESA decisions

In addition to textual ambiguities and ensuing inconsistencies, the system of judicial protection inaugurated by the ESA Regulations presents gaps as well. Firstly, guidelines and recommendations are excluded from the scope of judicial protection, even if they affect the positions of market participants. Secondly, the ESAs' roles in preparing and developing regulatory and implementing technical standards remains undervalued from a judicial protection perspective. Legitimate expectations created by market participants' involvement in an ESA consultation procedure might be difficult to enforce before judges assessing the legality of technical standards formally adopted by the European Commission. Thirdly, uncertainty about the scope of market participants' 'rights' to engage in stakeholder consultations and standards' preparations highlights additional potential gaps in the remedies framework.

5.1. Guidelines and recommendations

In addition to binding individual decisions, the ESA Regulations allow the Authorities to adopt guidelines and recommendations.⁹⁵ These instruments can be general in scope and are non-binding.⁹⁶ Competent national authorities shall make every effort to comply with the guidelines and recommendations, but remain free not doing so in specific cases. The regulations specify that national authorities have to confirm whether or not they will comply with the guideline or recommendation. The fact of compliance or non-compliance shall be published. Financial institutions could also be required to report in a clear and detailed way whether they comply with a guideline or recommendation. Any reason for national authorities' or financial institutions' non-compliance can be published in particular instances on a case-by-case basis.⁹⁷

At first sight, guidelines and recommendations are mere soft law standards not amenable to judicial review. The ESA Regulations nevertheless 'proceduralised' familiar soft law characteristics to an extent that would allow judicial review in particular instances. Firstly, non-compliance with reporting obligations by national authorities or financial institutions could entice publication of the reasons for non-compliance. The decision to publish these reasons could be considered a decision subject to direct judicial review before the General Court. Beyond the reviewability of a decision to publish, the ESA could commence a procedure for breach of Union law provided in Articles 17 of the ESA Regulations. Throughout these procedures, the Court would be invited to assess the legality of the procedures followed, but could also indirectly engage in more substantive legality review of the guidelines or recommendations adopted. Secondly, the adoption of guidelines requires a particular approval procedure: national authorities have to notify the extent to which they will comply with these guidelines. In

⁹⁵ Guidelines and recommendations are relied on in other financial regulatory decisions as well. The recent Alternative Investment Fund Management Directive demonstrates this in arts 13 (2), 34 (3), 35 (12), 36 (4), 37 (16), 38, 40 (12), 42 (4), 44 and 47 of Directive 2011/61/EU (n 2) where guidelines are the instruments to be adopted by ESMA (or EBA).

⁹⁶ ESA Regulations, art 16; see on the effects of formally non-binding legal norms in EU law, Francis Snyder, 'Soft law and Institutional Practice in the EC' in Stephen Martin (ed.), *The construction of Europe. Essays in honour of Emile Noël* (Kluwer, 1994), 197- 226; Linda Senden, *Soft Law in European Community Law* (Hart 2004).

⁹⁷ ESA Regulations, art 16 (3).

case of full compliance by all authorities involved, national supervisors agree with a supranational non-binding norm, and, in so doing, turn it into a *de facto* binding supranational legal standard. It could in that regard be defended that these guidelines and recommendations as such become reviewable standards. Earlier case law confirmed that form does not matter for purposes of judicial review, as the Court derives the existence of an act from its content, implying that the act could be invoked as long as it is intended to produce legal effects.⁹⁸ It could therefore be argued that notices of compliance with those guidelines by all national authorities produce similar effects as regulations or decisions adopted by the Commission, as all Member States are bound by a Union agency's measure. Review based on Article 263 TFEU could therefore be open against these guidelines or recommendations. That requires one to assert direct and individual concern or at least direct concern should these guidelines or recommendations qualify as 'regulatory acts' (see also 5.2.).

A similar analysis is difficult to uphold in cases where only a majority of Member States committed to comply. Could it still be maintained that guidelines or recommendations produce binding effects as a *matter of Union law*? After all, a minority of Member States indicated their non-compliance and therefore they do not consider themselves bound by those guidelines as a matter of national law. Could other market participants still maintain that those provisions are binding for them as a matter of EU law, because some (including 'their') Member States' authorities rubberstamped them? It is well-known that national administrative authorities have to apply EU law and discard national provisions,⁹⁹ but that strand of case law does not provide an answer for the situation in which actions of a national supervisory authority would transform non-binding guidelines or recommendations into seemingly binding EU standards emanating from a general acceptance of these guidelines.

It would therefore be more feasible to consider the legal effects and review options of guidelines and recommendations from a national law perspective.¹⁰⁰ Guidelines and

⁹⁸ This has been confirmed by the General Court in relation to agencies' decisions in Case T-411/06, *Sogelma*, [2008] ECR II-2771, para.37 and para 48: '[...] an act emanating from a Community body intended to produce legal effects vis-à-vis third parties cannot escape judicial review by the Community judicature'. According to art 19 (1) of the Treaty on the European Union (TEU), the Court of Justice ensures that the law is observed in the application of the Treaties. The Court of Justice has long held that this commitment to the law implies that the European Union maintains a *complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the Institutions*. Case 294/83, *Parti écologiste "Les Verts" v European Parliament*, [1986] ECR 1339, para 23. The introduction of remedies against regulatory agencies' decisions expresses a similar commitment to observing the law; see Case C-160/03 *Spain v Eurojust*, [2005] ECR I-2077, Opinion of AG Maduro, para. 17.

⁹⁹ The Court's case law on this matter is voluminous and evolving, to the extent that it might require reopening of administrative decisions: see among others Case 103/88, *Fratelli Costanzo*, [1989] ECR 1893, para 31; case C-453/00, *Kühne & Heitz*, [2004] ECR I-837, para 26-28 and case C-2/06, *Kempter*, [2008] ECR I-411, para 55 establishing duties for national administrative authorities or judges to review cases at the administrative level while discarding national law provisions in favor of EU law. See also J. Komárek, 'Federal Elements in the Community Judicial System – Building Coherence in the Community Legal Order', (2005) 42 *CML Rev.* 9 - 34; M. Verhoeven, 'The Costanzo Obligation and the Principle of National Institutional Autonomy: Supervision as a Bridge to Close the Gap?', (2010) 3 *Review of European Administrative Law* 23-64; M. Verhoeven, *The Costanzo Obligation: the obligations of national administrative authorities in the case of incompatibility between national law and European law* (Intersentia, 2011).

recommendations have to be applied primarily by national authorities and by financial institutions operating under the laws of the national legal systems. In the practice of day-to-day supervision, those guidelines will have to be incorporated into (or coupled with) the existing EU and national legal frameworks of financial supervision. To the extent that guidelines produce interpretative standards of EU regulatory or implementing technical standards, it can be maintained that they add another layer to EU and national provisions that should become part of judicial analysis in supervisory disputes. These disputes could arise before national judges, in cases involving national supervisory practices, or before the Court, in references for a preliminary ruling in those cases. Guidelines and recommendations will thus have to be coupled to other national or EU legal standards more readily amenable to judicial review. The coupling assessment will most readily have to be made by national judges, who will then refer the case to the European Court of Justice for a preliminary ruling. In cases referred to the Court for a preliminary ruling, the ESA that adopted the guidelines should be notified and thus invited to intervene to clarify the boundaries of the reference made.¹⁰¹

A uniquely national law perspective nevertheless presents additional difficulties. It calls upon national judges to interpret or apply *de facto* supranational guidelines and recommendations in differentiated national settings. A particularly tailored remedy for that problem could therefore be the introduction of the ESAs as *amicus curiae* in national court proceedings concerning these guidelines and recommendations.¹⁰² Introducing the ESA as *amicus* in national law would nevertheless generate particular hurdles. On the one hand, the *amicus* is not familiar to all legal systems, even though the EU has introduced a similar regime in competition law matters.¹⁰³ In addition, the ESA's judicial intervention roles would bring it in direct competition with the European Court of Justice and the preliminary ruling system. It would be for the national court to invoke the help from either the ESA or the Court or both, depending on the circumstances of the case at hand. On the other, one constituent body of the ESA (for instance the Board

¹⁰⁰ On the potentially fruitful perspectives national judges can and should offer in an EU setting, see W. Van Gerven (n 27).

¹⁰¹ Art 23 of the ECJ Statute does indeed provide for this option, also when offices, bodies or agencies adopted particular measures having legal effect.

¹⁰² 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, see on the *Amicus* concept in US Federal law, see Rule 37 of the Rules of the Supreme Court of the United States, <<http://www.supremecourt.gov/ctrules/2010RulesoftheCourt.pdf>> accessed April 2012.

¹⁰³ Art 15 of Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty, [2003] OJ L1/1 states that '[i]n proceedings for the application of Article 81 or Article 82 of the Treaty, courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules'. The national competition authorities are granted similar powers in §3. Those options have further been worked out in the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of arts 81 and 82 EC, [2004] O.J. C 101/54. For a balanced analysis of the new *amicus curiae* phenomenon in European competition law, see Kathryn Wright, 'European Commission Interventions as Amicus Curiae in National Competition Cases: the Preliminary Reference in X BV', (2009) 30 *European Competition Law Review* 309-313. K. Wright, 'European Commission Opinions to National Courts in Antitrust Cases: Consistent Application and the Judicial-Administrative Relationship' 21-43 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1210114> accessed April 2012.

of Supervisors or the Chairperson) will have to act as *amicus curiae* in a way to clarify the independence and expertise-based structure of that body. The *amicus* role thus risks being extended beyond a consultative introduction of the national judge in the particular issues of the case and would allow it to become a judge with regard to standards it adopted itself. Any *amicus curiae* solution should thus be approached with care.

5.2. Technical Standards and ESAs

The ESAs' (future) roles in drafting regulatory and implementing technical standards cannot be underestimated. According to the ESA Regulations, regulatory and implementing technical standards are formally adopted by the Commission by means of Regulations and decisions.¹⁰⁴ Since the Commission is the formal addressor of the decision, the Board of Appeal of the ESAs cannot be called upon to review these measures. The Court of Justice could nevertheless intervene in these matters, as technical standards incorporated in Regulations and decisions present legal acts that could be challenged following Article 263 TFEU. Questions can firstly be raised in relation to the legal nature of these acts and the ensuing scope of standing for Member States and individuals. Secondly, the lack of involvement of the ESAs in Article 263 TFEU proceedings against technical standards presents a potentially significant enforcement gap.

5.2.1. Legal Nature of Technical Standards and Standing Requirements

It is well-known that Member States, individuals and Union Institutions can initiate judicial proceedings against regulations and decisions incorporating technical standards. Different Member States and their own national supervisory authorities are no longer presumed to be potentially different actors: as already mentioned, neither the ESA Regulations nor the Treaties provide for specific supervisory authorities' standing. An individual Member State can challenge the acts and could be supported by staff members of its independent national supervisory authority in doing so. The national supervisory authorities themselves cannot however be considered privileged applicants. This contrasts with Board of Appeal procedures and the particular involvement of national supervisory authorities therein, and thus potentially presents a gap between the effective enforcement of acts adopted and those 'merely' drafted by the ESAs. In addition, natural or legal persons no longer have to adduce direct concern when contesting technical standards. The Lisbon Treaty also introduced more flexible standing conditions for 'regulatory acts'. Individuals can challenge these acts if they are of direct concern to them and to the extent that they do not entail implementing measures. Whereas the General Court has already held that a directive allowing broad Member State discretion does not as such constitute a regulatory act¹⁰⁵, the extent to which regulations, decisions or directives that confer less Member State discretion are of direct concern is still unclear as case law on this subject has thus far remained

¹⁰⁴ ESA Regulations, art 10 (4) and art 15 (4).

¹⁰⁵ Case T-16/04, *Arcelor v European Parliament and Council*, [2010] ECR II-211, para 123:

the Member States have a broad discretion with regard to implementation of the contested directive. For that reason, contrary to what the applicant contends, that directive cannot, in any event, be regarded as being a regulatory act which does not entail implementing measures within the terms of the fourth paragraph of Article 263 TFEU.

scarce.¹⁰⁶ At the very least, individual concern is no longer a prerequisite for standing.¹⁰⁷

5.2.2. ESA Involvement in Technical Standards' Review Actions

A truly fundamental gap in technical standards review is the lack of mandatory ESA involvement in review proceedings of these standards. The ESAs have held the Commission's pen and have presumably a more intimate and practical knowledge of the scope, content and meaning of acts adopting technical standards. In a complete system of judicial accountability, the ESAs' drafting role should not however be neglected with a view to assist the Court in determining the scope of illegality adduced in the form of order sought. A mandatory procedural intervention, either as defendant in conjunction to the European Commission or as an intervening party, remains absent from the newly created ESA framework.

The Court could in this regard, extend its case law on judicial review of preliminary decisions or recommendations to the Commission adopted by regulatory agencies. Long standing case law states that when an agency only advises the Commission or provides draft Commission standards, the measure is imputable to the Commission and may only be subject to an action directed against that Institution.¹⁰⁸ Similarly long standing case law also holds that:

in the case of acts or decisions adopted by a procedure involving several stages, and particularly where they are the culmination of an internal procedure, it is in principle only those measures which definitively determine the position of the institution upon the conclusion of that procedure which are open to challenge, and not intermediate measures whose purpose is to prepare for the final decision.¹⁰⁹

¹⁰⁶ See for recent examples Case T-18/10, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, order of 6 September 2011, para 38-56; Case T-262/10, *Microban International and Microban (Europe) v Commission*, judgment of 25 October 2011, para 21-25. At present, an appeal is pending before the Court of Justice as well, see Case C-583/11, [2012] OJ, C58/3.

¹⁰⁷ See on the abolition of individual concern, Stephan Balthasar, 'Locus standi rules for challenges to regulatory acts by private applicants: the new art. 263 (4) TFEU, (2010) 35 *EL Rev.* 543.

¹⁰⁸ See among others 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 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 *Sogelma* (n 98) para 55-56.

¹⁰⁹ See the order in T-123/03, *Pfizer v Commission*, [2004] ECR II-1631, para. 22. More recently, see Case C-39/93 P *SFEI and Others v Commission* [1994] ECR I-2681, para 27 to 33; Case C-147/96 *Netherlands v Commission* [2000] ECR I-4723, para 26 and 27; C-521/06 P *Athinaiki Techniki v Commission* [2008] ECR I-5829, para 42; and Case C-362/08 P *Internationaler Hilfsfonds v Commission* [2010] ECR I-0000, para 52

Measures definitively determining the Institution's position could also include preparatory scientific opinions formally adopted by advisory bodies – including regulatory agencies – that have become part of the Institution's final decision.¹¹⁰ Any legal defects in these opinions may be relied upon in an action directed against the definitive act.¹¹¹ The Court has thus been willing to review the legality of preparatory opinions to the extent that the Commission had little choice but to rely on it.¹¹² 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.¹¹³

It only takes one additional step to include the ESAs as co-defendants with the Commission in actions for annulment against Commission decisions incorporating technical standards. Although actions are frequently filed against both the Commission and the advisory agency involved, the Courts have not firmly addressed that problem.¹¹⁴ The Court could thus break new ground in allowing the ESAs to be included among the

¹¹⁰ 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.

¹¹¹ Case 60/81 *IBM v Commission* [1981] ECR 2639, para 12.

¹¹² See P. Craig, '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), 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.

¹¹³ As apparent from ESA regulations, art 10 (1), 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'.

¹¹⁴ The General Court has explicitly stated so in a recent judgment concerning an action for annulment addressed against both the European Commission and the European Medicines Agency (EMA). The applicant had requested both the Commission and EMA to have to bear their own costs, because it did not know whether either one of them or both should act as defendant in an annulment case. The Court replied that:

[u]nder Article 87(3) of those rules, where the circumstances are exceptional, the General Court may order that each party bear its own costs. In the present case, the applicant stated at the hearing that it also sought an order that the Commission and EMA bear their own costs even if the action were declared inadmissible against one of them. It justified that application on the basis that the question of admissibility of an action against a decision of EMA had not yet been resolved. Nevertheless, the Court considers that such a fact cannot constitute, in the present case, an exceptional circumstance within the meaning of Article 87(3) of the Rules of Procedure.

See Case T-264/07, *CSL Behring v European Commission and EMA*, judgment of 9 September 2010, para 127. The Court thus admits that the case is not resolved and did not attempt to posit or propose a solution in its judgment either.

defendants in actions for annulment of technical standards and thereby overcome uncertainty in case law in other domains as well.

ESA interventions in actions lodged against the Commission implementing technical standards thus present the most feasible option in light of current case law evolutions. The absence of any mandatory involvement provisions does not present unmanageable problems, as the Court of Justice Statute allows the ESAs to intervene in cases regarding the annulment of technical standard regulations or decisions or in references for a preliminary ruling related to these regulations or decisions. According to Article 40 of the Statute, bodies, offices or agencies can intervene in procedures before the Court if they can establish an interest in the case at stake.¹¹⁵ The Rules of Procedure determine the formalities the application to intervene should adhere to. The President of the General Court or of the Court of Justice shall decide by order on the admissibility of the application, or can refer this decision to the Court itself.¹¹⁶ Even though the Rules of Procedure merely allow an intervener to support the form of order sought by one of the parties, intervention at least provides an opportunity for those affected by the decision to develop one's own argument in support of one of the parties.¹¹⁷

As the ESAs bear particular responsibility in drafting or editing technical standards, the Court should find no problem to recognise their status as interveners. This would encourage the ESAs to avail of that opportunity, the Court could directly and in general terms establish the presumed interest on behalf of the ESAs as original drafters of technical standards. From that perspective, the Court could be called upon to adopt an order in the first request for intervention, stating that ESAs are presumed always to be interested applicants in any intervention procedure relating to technical standards in which their involvement was required by the ESA regulations. Such an order - and the precedential value it creates¹¹⁸—would bring clarity and ensure that the technical standards gap could at least partially be overcome.

In the alternative, the Court could support the application of 'third party proceedings' review in favour of the ESAs. Third party proceedings allow bodies, offices or agencies among others of the Union to contest a judgment rendered without being heard, where the judgment is prejudicial to their rights.¹¹⁹ The ESAs would have to demonstrate that a judgment annulling or confirming technical standards without them being heard is prejudicial to their rights as drafters of these standards. In most instances however, the

¹¹⁵ At least that is the commonly accepted reading of art 40 of the Statute. A comma is again lacking in the English language version potentially restricting the interest requirements to natural or legal persons. That reading is again countered by other language versions.

¹¹⁶ Art 93 ECJ Rules of Procedure; arts 115-116 GC Rules of Procedure.

¹¹⁷ According art 40 (4) ECJ Statute, the intervener should support the form of order sought. Following the Rules of Procedure, the intervener must accept the case as he finds it at the time of intervention; see Article 93 (4) ECJ Rules of Procedure and Article 116 (3) GC Rules of Procedure.

¹¹⁸ Although the ECJ system does not engage in formal use of precedents, the precedential value of particular judgments can hardly be denied, creating a system of de facto precedents, on this topic and on ways to improve the system see Jan Komárek, 'Judicial Lawmaking and Precedent in Supreme Courts: The European Court of Justice Compared to the US Supreme Court and the French Cour de cassation' (2008-2009) 11 *Cambridge Yearbook of European Legal Studies* 399 - 434.

¹¹⁹ Art 42 of the Statute, see also arts 123-124 of the GC Rules of Procedure.

Court has been unwilling to allow third party proceedings for parties that could have relied on intervention to have their voice heard.¹²⁰ Initiating or allowing third party proceedings would also detach the ESAs' role of meaningful intervention from the dispute related to the standards it adopted. Should the Court however appear unwilling to allow the ESAs to intervene, third party proceedings present a constructive alternative.

Intervention options in Court proceedings are more limited in preliminary ruling procedures: individuals cannot show an interest to intervene in the case before the ECJ, as the case actually originated before a national court. Third party intervention should therefore take place before that national judge in accordance with national procedural rules.¹²¹ Only Union Institutions and Member States remain able to submit statements related to the reference at hand.¹²² Article 23 of the ECJ Statute extends the submission of statements procedure to 'bodies, offices and or agencies'. These should be notified of references for preliminary ruling relating to the validity or interpretation of acts adopted by them. The Statute's reference to 'adoption' of acts is problematic in this regard. Since the ESAs did not formally adopt technical standards, they are excluded from submitting statements in preliminary ruling procedures. Despite the ESAs not being the official authors of the standards under review, they are more than just a supporting implementation committee. Their involvement in the preliminary ruling procedure could guide the Court in determining the meaning of the contested provisions or the scope of the reference itself. The modification or interpretation of Article 23 of the Statute to include the ESAs as bodies to be notified in cases regarding technical standards should therefore be considered. In the alternative, the Commission could at least be represented by an agent that consults with the ESA officers on these matters.¹²³

5.3. Participatory Rights?

The ESA regulations embrace wide consultation of market participants and interested parties before adopting technical standards and guidelines or recommendations and

¹²⁰ See case T-284/08 TO, *Avaessian Avaki and Others v People's Mojahedin Organization of Iran* [2009] ECR II-161, para.14:

The Court considered third-party proceedings to be an exceptional review procedure, available to interested persons who, for valid reasons, have been unable to take part in the original proceedings. The extraordinary, even exceptional, nature of third-party proceedings is justified by the consideration that, in the interests of certainty in legal relations and the efficient administration of justice, it is necessary to prevent, so far as is possible, persons having an interest in the outcome of proceedings pending before the Court of Justice or the Court of First Instance from asserting that interest after the Community Court has delivered its judgment and thus settled the question in dispute.

¹²¹ Koen Lenaerts, Dirk Arts, Ignace Maselis and Robert Bray (ed.)(n 82) 611.

¹²² Combined reading of arts 23 (1) and 40 of the Statute.

¹²³ Art 19 of the Statute allows an Institution to be represented by an agent, assisted by a lawyer or adviser. A jurisconsult attached to one of the ESAs could thus assist the Commission in that respect.

with a view to determine future policy guidelines.¹²⁴ Consultation promotes predictability and accountability, but also legitimates ESAs' rulemaking power otherwise fraught with little democratic or parliamentary support.¹²⁵ The extent to which these consultation provisions introduce rights for market participants to have their opinion submitted and the judicial role in protecting these rights have remained unclear in the new ESA framework. As such, the enforcement of potential participatory rights potentially presents another gap in the remedies system the ESA regulations inaugurated.

To help facilitate consultation with stakeholders in areas relevant to the ESAs' tasks, each ESA is required to establish a Stakeholder Group. Stakeholder Groups are consulted on actions taken with regard to the adoption of regulatory and implementing technical standards and guidelines and recommendations that do not concern individual financial institutions. A Stakeholders Group comprises thirty members representing financial institutions operating in the Union; their employees' representatives; top ranking academics as well as consumers and representatives of small and medium enterprises (SMEs). Members serve for a period of two and a half years and may serve two successive terms. Each Stakeholders Group adopts its own rules of procedure by a majority of two-thirds of its members.¹²⁶

The Board of Supervisors appoints the Stakeholders Group Members following proposals from the relevant stakeholders. In making its decision, the Board of Supervisors shall, to the extent possible, ensure an appropriate geographical and gender balance, and representation of stakeholders across the Union. As mentioned above, this decision of the Board to appoint particular candidates is excluded from Board of Appeal review. The decision could be challenged before the Court of Justice by a candidate member not selected, who will be able to demonstrate direct and individual concern against a decision formally appointing other candidates.

The Stakeholders Group serves as a representative body of the wider financial market participants' community. In providing a consultative role, the Group – or its members for that matter – cannot claim to have their particular opinions included into concrete regulatory norms. They would merely have a right to have their opinion heard as a matter of procedural law. Refusal to grant that right to the Stakeholder Group in a particular situation could therefore infringe an 'essential procedural requirement' of consultation, resulting in annulment of the particular regulatory measure adopted.¹²⁷

¹²⁴ The Authority should consult interested parties on regulatory or implementing technical standards, guidelines and recommendations and provide them with a reasonable opportunity to comment on proposed measures, see recital 48 EBA and ESMA Regulations; Recital 47 EIOPA Regulations.

¹²⁵ On the virtues, vices and frameworks of consultation and participatory governance in agencies, see among others P. Craig, *EU administrative law* (OUP 2006) 179-180, 316-318, and 327-328.

¹²⁶ ESA Regulations, art 37.

¹²⁷ As acknowledged by the Courts, see amongst others case T-122/09, *Zhejiang Xinshiji Foods and Hubei Xinshiji Foods v Council* [2011] ECR II-0000, 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

The opinions of the Group would thus remain within the purview of judicial accountability. Two practical issues nevertheless remain unclear. Firstly, the extent to which consulting the Stakeholder Group amounts to an essential procedural requirement and therefore grants that Group a right to be consulted has to come before the Court to establish clarity on that point. Second, the Stakeholders Group could not have standing qua Group, as it does not constitute a legal person. It merely forms a supporting structure of the ESA. Its individual members could potentially have standing as directly and individually concerned because individual participation rights granted to them have been violated. The latter reasoning is dependent on the Court recognising participation rights as judicially enforceable individual rights and not merely as Group rights. The Court appears to be willing to do so in cases where consultation mechanisms are explicitly provided by Union legislation,¹²⁸ but judicial clarification is necessary to ascertain its applicability within the ESA framework.

Similar problems related to the recognition of participatory rights can be distinguished with regard to consultation mechanisms preceding the adoption of technical standards and guidelines or recommendations. In the adoption process of technical standards, the ESAs are called upon to conduct open public consultations on draft measures and to analyse the potential related costs and benefits ‘unless such consultations and analyses are disproportionate in relation to the scope and impact of the draft regulatory technical standards concerned or in relation to the particular urgency of the matter’.¹²⁹ The Stakeholders Group will be consulted as well. In this situation, the ESAs entertain significant discretion to organise and to regulate the public consultation process and the invitation process for those concerned to have their opinion registered before adopting standards. It should therefore be no surprise that the non-organisation of consultations for matters of urgency or disproportionality could trigger judicial proceedings. The grounds for these judicial proceedings – founded on an ESA decision not to organise proceedings – would remain difficult to constitute an essential procedural infringement, as the ESA regulations allow the ESAs to withdraw from organising consultative proceedings. In addition, it would seem highly unlikely that any financial market participant would be individually concerned by a decision not to organise consultations. The Courts will have to determine what limits inhibit the ESAs’ discretion in this regard and who, if anyone, might be able to challenge these ESA decisions.

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.

¹²⁸ The Court did not recognise 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 recognise their participation right status, see also P. Craig (n 125) 321.

¹²⁹ ESA Regulations, art 10 (1), para 3 and art 15 (1), para 2.

Participation requirements preceding the adoption of guidelines and recommendations allow even more discretion in consulting market participants. In this regard, the ESA organises open public consultations and cost/benefit analyses where relevant and requests an opinion from the Stakeholders group whenever it deems its input appropriate. Again, consultations and analyses have to be proportionate in relation to the scope, nature and impact of the guidelines or recommendations.¹³⁰ The different vocabulary relied on in comparison to technical standards consultations appears to indicate that the ESAs retain even more discretion to organise or omit public consultations in relation to guidelines and recommendations. It is once more unclear whether and how the non-organisation of consultations could be amenable to judicial review, but at the very least, the ESA Regulations could be interpreted to inaugurate a right to be consulted in at least some instances. The Court will have to clarify whenever the ESAs transcend the boundaries of their discretion in this regard. Such exercise could additionally provide an inroad for the Courts to review the legality of guidelines and recommendations. The scope of discretion for organising public consultations does indeed depend on the ‘scope, nature and impact’ of the guidelines or recommendations. Any assessment of the extent to which participatory rights have been granted thus requires investigation of the scope, nature and impact of the guidelines and would enable the Court to review the legality of the guidelines’ contents as well.

5.4. Summary of gaps to be addressed

This table summarises the abovementioned gaps and solutions. It is clear from the aforementioned analysis that legislative adaptation presents a more stable strategy to address gaps in the remedies’ system. Judicial clarification could nevertheless help overcoming these gaps and identifying their structural impact on judicial protection.

| | Judicial clarification | Legislative adaptation |
|----------------------------|---|---|
| Guidelines/recommendations | Substantive assessment scope National judiciary alternative | ESAs as <i>amicus curiae</i> |
| Technical standards | Intervention of ESAs (and national supervisors); direct review of draft standards? | ESA involvement in preliminary ruling proceedings |
| Participatory rights | Extent of individual consultation and participation rights | |

6. Looking towards the future: complete judicial protection as constitutional necessity

The foregoing sections highlighted particular inconsistencies and significant gaps in the ESAs’ remedies structure. Some of these inconsistencies or gaps require formal adaptation of the ESA Regulations, whereas others would benefit from clarifying judicial interpretations to render judicial review more complete. This section argues in favour of adopting this interpretative and adaptive approach as a matter of ‘constitutional’

¹³⁰ ESA Regulations, art 16 (2).

necessity that transcends the scope of financial regulation. The system created by the EU Treaties and interpreted by the European Court of Justice fundamentally requires a complete and coherent system of judicial protection, the attainment of which remains dependent on Boards of Appeal's and the Court's willingness to engage in that project.

It could be argued that the complete judicial protection project is constitutionally mandated. Article 19(1) TFEU states that in the interpretation and application of the Treaties, the ECJ has to ensure that the law is observed.¹³¹ The latter Article is relied on as a basis for the ECJ to establish a system that emphasises judicial review and effective judicial protection as intrinsic components of an EU rule of law.¹³² The observance of the law requirement allows for the progressive establishment of a complete and coherent system of judicial protection vis-à-vis actions of Union Institutions.¹³³ In particular, a combination of legal remedies and procedures before both the Union courts and national courts has to ensure that the legality of acts of Union Institutions is reviewable in all instances (completeness). Completeness thus implies that it must be possible to bring an action before the national courts if and to the extent that direct actions before European Courts are inadmissible.¹³⁴ This purportedly complete system requires a balanced division of jurisdictional competences among EU and national courts, aligned with the allocation of jurisdiction in the Treaty system (coherence). Coherence therefore implies the existence of direct and indirect routes of legality review for acts of the institutions, with differentially nuanced roles for national and EU judges.¹³⁵

The ideals of complete and coherent judicial protection have been developed with regard to acts of the Union Institutions.¹³⁶ The system of judicial protection does not

¹³¹ The Court's *Les Verts* case (n 99) remains seminal in that regard. The EU is:

a Community based on the rule of law, inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. Moreover, [n]atural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the court by reason of the special conditions of admissibility laid down in the second paragraph of article 173 of the Treaty. Where the Community institutions are responsible for the administrative implementation of such measures, natural or legal persons may bring a direct action before the Court against implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measures on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling.

¹³² See Koen Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union', (2007) 44 *CML Rev.*, 1625, 1625. For a similar perspective in from a national legal order standpoint, see W. Van Gerven, 'Of Rights, Remedies and Procedures', (2000) 37 *CML Rev.* 501-536.

¹³³ *Ibid.*, 1626.

¹³⁴ *Ibid.*, 1626.

¹³⁵ *Ibid.*, 1632. See also Koen Lenaerts, 'Federalism and the Rule of Law: Perspectives from the European Court of Justice', (2009-2010) 33 *Fordham International Law Journal* 1338-1387.

however only apply to acts of these Institutions, but also to acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.¹³⁷ Even though these acts 'may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them',¹³⁸ the basic principle of judicial review against agencies' acts remains in place. Within the realm of EU regulatory agencies, the role of national courts remains rather limited, as the abovementioned analysis demonstrates. Only with regard to guidelines and recommendations could a role for national courts be envisaged. That role should nevertheless be significantly limited, as guidelines and recommendations directly emanate from the supranational level and would therefore require supranational judicial control. Complete protection at EU level therefore remains predominantly to be realised by EU courts by virtue of their constitutional mandate.

In addition to the Courts, newly established Boards of Appeal comprising legal experts provide an additional argument in favour of developing a complete judicial review regime in supervisory decision-making. Board Members function as *de facto* administrative judges; they are knowledgeable about procedures and judicial protection as well as about substantive sector-specific regulation. A Board of Appeal familiar with and committed to enhancing the remedies' system in light of constitutional completeness and coherence requirements might indeed more readily recognise and address particular gaps and inconsistencies. Again, the commitment to law maintained by Board of Appeal members indicates that the Board is to operate within a constitutionally mandated system of judicial protection. Both Board and Courts will thus have to develop a workable set of interpretative statements that allow for the system of judicial protection against supervisory decisions to be rendered complete.

7. Conclusion

The introduction of a remedies and appeals' system in itself presents a major leap forward for the operations of European financial market supervision structures. Contrary to the situation in the level three network committees, the ESA remedies system allows the Court of Justice to confirm and extend its constitutional principles to highly specialised market supervisory regimes previously detached from direct judicial oversight. Particular gaps and inconsistencies in the remedies framework however remain to be addressed. Now that legislators have acted to create a more perfect system of market supervision based on the rule of law, the Court of Justice is invited to engage upon its constitutional role of providing complete and coherent judicial protection by filling gaps and addressing inconsistencies. In so doing, the Court will determine the extent to which the EU constitutional framework enables and restrains the operations of financial market supervision activities under a judicially sanctioned EU Rule of Law.

¹³⁶ The Union Institutions are, according to art 13 TEU, the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors.

¹³⁷ See for an evolutionary perspective in that regard, Anna Simonati, 'The principles of administrative procedure and the EU courts: an evolution in progress?', (2011) 4 *Review of European Administrative Law*, 45-81.

¹³⁸ Art 263 (4) TFEU. See also the discussions on the stringency of standing and the scope of review in 4.1 and 4.3.

Reliance on less stringent standing and 'Member State' identification requirements, extensive application of intervention provisions, incorporation of review against guidelines as essential procedural requirements amenable to review and recognition of participatory rights constitute constitutionally available elements for judges to refine and improve the current protection system.

The case of financial supervisory authorities sets an example for future market supervisory structures. Solutions proposed here could indeed be applied to different sectors welcoming judicial review against supervisory agencies' decisions and providing for additional regulation or standard-setting roles in particular market sectors. Recent initiatives in energy¹³⁹ and electronic communications market supervision¹⁴⁰ have transformed formerly informal network committees into more integrated EU agencies.¹⁴¹ These initiatives prelude potentially more intensive agency decision-making procedures and the ensuing need to rely on Treaty provisions and case law establishing judicial protection by individuals adversely affected by agency decisions. Court interventions in the ESA remedies system – in response to inconsistencies and gaps identified – might therefore prelude and support the creation of a full-fledged judicially accountable market supervision regime at EU level.

¹³⁹ In energy law, Regulation 713/2009 created an Agency (ACER) with binding individual decision making powers, see Regulation (EC) No 713/2009 of the European Parliament and the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, [2009] O.J. L 211/1.

¹⁴⁰ Regulation (EC) No 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. L 337/1. BEREC actually remains rather informal. Only the office has been granted legal personality. That does not imply that future adjustments might render BEREC more integrated into the framework of decision-making regulatory agencies.

¹⁴¹ Saskia Lavrijssen and Leigh Hancher (n 2) 23-55.