

Major Tasks and Powers of the European Supervisory Authorities and the Responsibilities in Financial Supervision for the EFTA Surveillance Authority



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Abstract

In the wake of the global financial crisis (2007/2008) the European Union (EU) responded by radically reforming the regulatory and supervisory regime applying to the EU financial markets. One of the novelties introduced was the establishment of three European Financial Market Supervisory Authorities (ESAs).

This contribution analyses the major tasks and powers of these three ESAs. Special attention is given to the power to develop draft (regulatory and implementing) technical standards, to issue guidelines and recommendations and to take (individual) binding decisions. In light of the far-reaching powers of the ESAs, this contribution also analyses the mechanisms of legal protection those concerned may avail themselves of against the ESAs. In order to secure a homogeneous finance market throughout the whole of the European Economic Area (EEA), the Regulations establishing the three ESAs were incorporated into the Agreement on the European Economic Area (EEA Agreement). When incorporating these regulations into the EEA Agreement in 2016, certain adaptations to the provisions of these regulations have been foreseen as regards the EEA EFTA States.

This contribution therefore also analyses the tasks and powers given to the EFTA Surveillance Authority (ESA) and the system of judicial protection against ESA decisions resulting from these adaptations.

Catchwords

European Supervisory Authorities; EFTA Surveillance Authority; Binding Decisions; Judicial Protection and Review.

Regulations

Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority); Decision of the EEA Joint Committee No 199/2016; Decision of the EEA Joint Committee No 200/2016; Decision of the EEA Joint Committee No 201/2016.

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I. Introduction

As a reaction to the financial crisis of 2007/2008, the European financial supervisory architecture was completely renewed. In light of the failures in financial supervision exposed by the financial crisis, European supervisory arrangements were strengthened, with the objective of establishing a more efficient, integrated and sustainable European system of supervision.¹

One of the novelties introduced was the creation of three European (Financial Market) Supervisory Authorities (ESAs): the European Securities and Markets Authority (ESMA) for the securities sector, the European Banking Authority (EBA) for the banking sector and the European Insurance and Occupational Pensions Authority (EIOPA) for the insurance and occupational pensions sector. These three authorities were set up to reinforce supervision at European Union (EU) level and to protect the EU financial system from new financial crises. In order to do so, they have been given far-reaching (and much contested) powers and are therefore sometimes referred to as the backbone of the European regulatory response to the global financial crisis.²

In Chapter II, the major tasks and powers of these ESAs are analysed and compared. Special attention is given to the power to develop draft (regulatory and implementing) technical standards, to issue guidelines and recommendations and to take individual binding decisions.

On 1 October 2016, the EU Regulations establishing the ESAs³ (ESAs founding Regulations) were incorporated into the Agreement on the European Economic Area (EEA Agreement), extending the post-crisis institutional structure to the EEA EFTA States⁴ and granting

new powers to the EFTA Surveillance Authority (ESA)⁵. Chapter III therefore gives a brief overview of the EEA Agreement, its characteristic two-pillar structure, the process of incorporation of EU acts into the EEA Agreement (in other words »*how EU acts become EEA acts*«) and the new responsibilities ESA was entrusted with.

Indeed, when incorporating the ESAs founding Regulations into the EEA Agreement in 2016, certain adaptations to the provisions of these regulations have been foreseen in order to take into account the objectives of the ESAs founding Regulations and the structure of the EEA Agreement, as well as the legal and political constraints of the EU and the EEA EFTA States.⁶ Chapter III will therefore also analyse which new responsibilities in financial supervision ESA has been given as regards the EEA EFTA States and which responsibilities in financial supervision remain, also as regards the EEA EFTA States, with the ESAs.

Entrusting ESA with new responsibilities in supervising the financial sector made it necessary to amend the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement; SCA). Chapter III will therefore also give a brief overview of these amendments to the Surveillance and Court Agreement.

As the new ESAs have been given far-reaching (decision-making) powers, the European legislator found it necessary to ensure that the parties affected by decisions adopted by these ESAs may have recourse to the necessary remedies.⁷ Chapter IV analyses the judicial remedies parties affected by decisions adopted by one of the ESAs have at their disposal and compares these with the judicial remedies parties affected by decisions adopted by ESA have at their disposal.

Chapter V finally concludes by listing some critical remarks about the tasks and powers of the ESAs, of ESA and the judicial remedies competent authorities and market operators have at their disposal against decisions adopted by one of these four Authorities.

This contribution therefore does not seek to provide a full case analysis of the complete European System of Financial Supervision (ESFS), the organisation of the

1 Report from the Commission to the European Parliament and the Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS), COM (2014) 509 final, 2.

2 Press Release by the EFTA Secretariat of 28 April 2016, EEA adaptations to the EU financial supervisory system, available at <<http://www.efta.int/EEA/news/EEA-adaptations-EU-financial-supervisory-system-128596>>.

3 Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC; Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC; Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.

4 In the present contribution, I use the term »EEA EFTA States« for the three states Iceland, Norway and Liechtenstein. However, in the EEA Agreement and legal texts linked to it (e.g. in

Joint Committee Decisions (JCDs)) the term »EFTA States« refers to Iceland, Norway and Liechtenstein (excluding Switzerland).

5 Press Release by the EFTA Secretariat of 30 September 2016, First package of acts on European Financial Supervisory Authorities incorporated into EEA Agreement, available at <<http://www.efta.int/EEA/news/First-package-acts-European-Financial-Supervisory-Authorities-incorporated-EEA-Agreement-499496>>.

6 Conclusions adopted by the EU and EEA EFTA Ministers of Finance and Economy, 14 October 2014, Incorporation of the EU ESAs Regulations into the EEA Agreement, <http://www.consilium.europa.eu/register/en/content/out/?&typ=ENTRY&i=ADV&DOC_ID=ST-14178-2014-REV-1>.

7 ESAs founding Regulations, recital 58.

ESAs or ESA nor of the Commission proposal of 2017 to adjust and upgrade the ESAs framework.⁸ This will only be covered to the extent necessary for understanding the tasks and powers of the ESAs and ESA and the judicial remedies available to parties affected by decisions adopted by one of these four Authorities.

II. The Three European Supervisory Authorities

A. Introduction

Following the global financial crisis of 2007/2008 the EU responded by radically reforming the regulatory and supervisory regime applying to the EU financial markets and established in 2010 the ESFS, to tackle the shortcomings of a supervisory regime based on purely national supervision.⁹

The ESFS came into force on 1 January 2011 and is composed of the national competent supervisory authorities, the European Systemic Risk Board (ESRB), the three ESAs and the joint Committee of the ESAs.¹⁰ Whilst the ESRB is responsible for the macroprudential oversight of the EU financial system and constitutes the »macro pillar of the ESFS«, the three ESAs (together with the national competent supervisory authorities) constitute the »micro pillar of the ESFS«, which focuses on the stability of individual firms and institutions. Together, these two pillars aim to ensure the effective supervision of the EU financial system as a whole¹¹ and in accordance with the principle of sincere cooperation all entities of the ESFS shall cooperate with trust and full mutual respect.¹²

The three ESAs are the European Banking Authority (EBA), the European Insurance and Occupational Pen-

sions Authority (EIOPA) and the European Securities and Markets Authority (ESMA). These three ESAs were designed to the same institutional template designed to reinforce supervision and to protect the EU financial system from a subsequent systemic crisis.¹³

With the objective of strengthening cooperation between the ESAs, Chapter IV of the ESAs founding Regulations also foresees two joint bodies of the ESAs: a Joint Committee of ESAs and a Board of Appeal.

The Joint Committee of ESAs is composed of the Chairpersons of the ESAs¹⁴ and serves as a forum in which the ESAs shall cooperate and ensure cross-sectoral consistency in particular regarding financial conglomerates, accounting and auditing, micro-prudential analyses of cross-sectoral developments, risks and vulnerabilities for financial stability, retail investment products, measures combating money laundering, and information exchange with the ESRB and developing the relationship between the ESRB and the ESAs.¹⁵

The second joint body of the ESAs, the Board of Appeal, is competent to decide on appeals against decisions of the ESAs and its main purpose is to provide legal protection by a group of experts in the respective fields¹⁶ (see below IV.B.1).

1. Objectives of the European Supervisory Authorities

According to the ESAs founding Regulations, the ESAs have as objective to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses.

More precisely the ESAs shall contribute to:

- a. improving the functioning of the Internal Market, including in particular a sound, effective and consistent level of regulation and supervision,
- b. ensuring the integrity, transparency, efficiency and orderly functioning of financial markets,
- c. strengthening international supervisory coordination,
- d. preventing regulatory arbitrage and promoting equal conditions of competition,
- e. ensuring the taking of risks related to insurance, reinsurance and occupational pensions activities is appropriately regulated and supervised, and
- f. enhancing customer protection.

8 Proposal for a Regulation of the European Parliament and of the Council Amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority); Regulation (EU) No 345/2013 on European venture capital funds; Regulation (EU) No 346/2013 on European social entrepreneurship funds; Regulation (EU) No 600/2014 on markets in financial instruments; Regulation (EU) 2015/760 on European long-term investment funds; Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds; and Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, COM(2017) 536 final.

9 ESAs founding Regulations, recital 1.

10 ESAs founding Regulations, Article 2(4).

11 European Systemic Risk Board (ESRB), Annual Report 2012, 43, electronic copy available at: <<https://www.esrb.europa.eu/pub/ar/html/index.en.html>>.

12 ESAs founding Regulations, Article 2.

13 Moloney, Niamh, EU Securities and Financial Markets Regulation (third Edition) (2014), Oxford University Press, 944.

14 ESAs founding Regulations, Article 55(1).

15 ESAs founding Regulations, Article 54.

16 Weismann, Paul, European Agencies and Risk Governance in EU Financial Market Law (2016), Routledge Research in EU Law, 149.

For those purposes, the ESAs shall contribute to ensuring the consistent, efficient and effective application of relevant Union law, foster supervisory convergence, provide opinions to the European Parliament, the Council, and the Commission and undertake economic analyses of the markets to promote the achievement of the ESAs' objective. In the exercise of the tasks conferred upon them, the ESAs shall pay particular attention to any potential systemic risk posed by financial institutions, the failure of which may impair the operation of the financial system or the real economy.¹⁷

This is why they do not only take over all existing and ongoing advisory tasks from their predecessor committees¹⁸, but they are also vested with considerable wider tasks and more powers, including the power to take binding decisions in relation to specific firms and to individual supervisors.¹⁹

In order for the ESAs to achieve their objectives, they are thus assigned corresponding tasks and powers. Whereas the tasks describe what the ESAs have to do, the powers form the tools the ESAs need to discharge their tasks.²⁰ As the ESAs have in principal the same tasks and powers²¹, the ESAs founding Regulations have mirror provisions on these tasks and powers.²² Therefore, below their tasks and powers are described collectively and not for each of the three ESAs separately.

Furthermore, it has to be pointed out that there are different possibilities to describe and list the tasks and powers of the ESAs. Some authors distinguish for example between the core supervisory tasks and powers of the ESAs (ESAs founding Regulations, Article 8) and the tasks related to consumer protection and financial activities (ESAs founding Regulations, Article 9).²³ Others distinguish between direct decision-making powers and the (quasi) rule-making powers of elaborating draft

technical standards²⁴ or between powers directing national competent authorities and directing and supervising market participants.²⁵

The below overview of the ESAs' tasks (see II.B) and powers (see II.C) is mainly based on the overview used by Paul Weismann in his book »European Agencies and Risk Governance in EU Financial Market Law«. ²⁶ This choice is based on the consideration that it follows as close as possible the distinction made in Article 8 of the ESAs founding Regulations between tasks and powers and lists these tasks and powers as much as possible according to the ESAs founding Regulations (Articles 8 and 9), while taking into account that a certain overlap cannot be avoided.

2. Persons Subject to Supervision by the European Supervisory Authorities

Before addressing the ESAs' tasks and powers, the persons subject to the ESAs' supervision ought to be defined.

For the purposes of the ESAs founding Regulations, Article 4 of these regulations defines in detail the financial institutions, competent authorities and (key) financial market participants they apply to. In order to take into account the different nature of these persons, this is done by referring to the corresponding definitions in the legislative acts referred to in Article 1(2) of the ESAs founding Regulations, by which the scope within which the ESAs are entitled to act is determined.

Describing these definitions is outside the scope of the present contribution. As an example however, the definition of the term »financial institution« can be used. According to Article 4(1) of the EBA founding Regulation, this term means credit institutions as defined in ..., investment firms as defined in ..., financial conglomerates as defined in ..., payment service providers as defined in ... and electronic money institutions as defined in ... Depending on the legal act under which the ESAs act, these terms may even have a different meaning²⁷ and one is well advised to check the precise definition of these terms given in the respective legal act.

17 EBA and ESMA founding Regulation, Article 1(5) and EIOPA founding Regulation, Article 1(6).

18 The Committee of European Banking Supervisors (CEBS), the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) and the Committee of European Securities Regulators (CESR); see ESAs founding Regulations, Article 8(1)(1).

19 Lastra, Rosa M., *International Financial and Monetary Law* (2nd ed.) (2015), Oxford University Press, 396.

20 Kohtamäki, Natalia, *Die Reform der Bankenaufsicht in der Europäischen Union* (2012), Mohr Siebeck, 173.

21 ESAs founding Regulations, Articles 8 and 9 for a concise overview of these tasks and powers.

22 Iris H.-Y., Chiu, *Power and Accountability in the EU Financial Regulatory Architecture: Examining Inter-Agency relations, Agency Independence and Accountability*, in Andenas, Mads & Deipenbrock, Gudula (Eds.), *Regulating and Supervising European Financial Markets, More Risks than Achievements* (2016), Springer, 73.

23 Lutter, Marcus & Bayer, Walter & Schmidt, Jessica, *Europäisches Unternehmens- und Kapitalmarktrecht* (5. Aufl.) (2012), *Zeitschrift für Unternehmens- und Gesellschaftsrecht/ZGR – Sonderheft*, De Gruyter, 334 ff.

24 Della Negra, Federico, *The Effects of the ESMA's Powers on Domestic Contract Law*, in Andenas, Mads & Deipenbrock, Gudula (Eds.), *Regulating and Supervising European Financial Markets, More Risks than Achievements* (2016), Springer, 143.

25 *Ibid* 13, 976 ff.

26 *Ibid* 16, 119 ff.

27 As an example for this, the definition of the term »financial institution« according to Article 4(1) of the EIOPA founding Regulation can be used, defining »financial institutions« as undertakings, entities and natural and legal persons subject to any of the legislative acts referred to in Article 1(2). With regard to Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing however, »financial institutions« means only insurance undertakings and insurance intermediaries as defined in that Directive.

B. The European Supervisory Authorities' Tasks

1. Unification of Regulatory and Supervisory Practices

A first key task the ESAs carry out relates to the unification of regulatory and supervisory practices, including the application of Union law.

The ESAs contribute to the establishment of high-quality common regulatory and supervisory standards and practices (the so-called Single European Rulebook for banks, for insurance and pensions and for securities markets), in particular by providing opinions to the Union institutions and by developing guidelines, recommendations, draft regulatory and implementing technical standards. Explicitly mentioned as regards the EBA is the task of developing a European supervisory handbook on the supervision of financial institutions in the Union.²⁸

The purpose of this Single Rulebook for financial legislation is to set common rules across the EU that ensures financial stability and a level playing field, as well as a high level of consumer and investor protection.²⁹ The Single Rulebook, to which the ESAs provide a significant contribution through their work³⁰, comprises various EU directives and regulations, binding for financial institutions. The legal instruments in the single rulebook thus guarantee a real single market for financial services.

As an example, the Single Rulebook for banks can be mentioned. The key elements of this Single Rulebook are the Capital Requirements Regulation³¹ and the Capital Requirements Directive³², the Bank Recovery and Resolution Directive³³, the Deposit Guarantee Schemes Directive³⁴, the corresponding technical stan-

dards developed by EBA and adopted by the Commission, as well as the EBA Guidelines and related Questions & Answers.³⁵

Next to contributing to the establishment of high-quality common regulatory and supervisory standards and practices, the ESAs have as task to contribute to the consistent application of legally binding Union acts³⁶ (in particular by contributing to a common supervisory culture)³⁷, to facilitate the delegation of tasks and responsibilities among competent authorities³⁸ and to conduct peer review analyses of competent authorities.³⁹

2. Provision of a Sound Information Flow

Secondly, the ESAs play an active role in providing a sound information flow towards the ESRB and the public.

Not only do the ESAs cooperate closely with the ESRB, in particular by providing the ESRB with the necessary information for the achievement of its tasks and by ensuring a proper follow up to the warnings and recommendations of the ESRB, they also publish on their website information relating to their field of activities, in particular on registered financial institutions and market participants.⁴⁰

To this end, the national competent authorities must provide the ESAs with all the necessary information to carry out the duties assigned to them by the ESAs founding Regulations.⁴¹

3. Long-Term Monitoring of the Market with a View to Systemic Risks

The ESAs also have the important task of monitoring and assessing market developments and economic analyses of markets and of systemic risk.⁴² In this respect, the ESAs also contribute to the development and coordination of recovery and resolution plans, providing a high level of protection to depositors and investors throughout the Union and methods for the resolution of failing financial institutions.⁴³

28 ESAs founding Regulations, Article 8(1) lit a and aa.

29 Ibid 8, 4.

30 Ibid 8, 4.

31 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176, 27.6.2013, p. 1–337.

32 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27.6.2013, p. 338–436.

33 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, OJ L 173, 12.6.2014, p. 190–348.

34 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, OJ L 173, 12.6.2014, p. 149–178.

35 <<http://www.eba.europa.eu/regulation-and-policy/single-rule-book/interactive-single-rulebook>>.

36 ESAs founding Regulations, Article 8(1) lit b.

37 ESAs founding Regulations, Articles 8(1) lit b and 29.

38 ESAs founding Regulations, Articles 8(1) lit c and 28.

39 ESAs founding Regulations, Articles 8(1) lit e and 30.

40 ESAs founding Regulations, Article 8(1) lit d and k.

41 ESAs founding Regulations Article 35.

42 ESAs founding Regulations, Article 8(1) lit f, g and i, Articles 32 (as regards assessment of market developments) and 22 to 24 (as regards systemic risks).

43 ESAs founding Regulations, Article 8(1) lit i and Articles 25 to 27.

4. Protection of Stakeholders

Fourthly, the ESAs have as important task to foster depositor and investor protection and the protection of policyholders, pension scheme members and beneficiaries by taking a leading role in promoting transparency, simplicity and fairness in the market for consumer financial products or services, by collecting, analysing and reporting on consumer trends, by reviewing and coordinating financial literacy and education initiatives by the competent authorities, by developing training standards for the industry and by contributing to the development of common disclosure rules.⁴⁴

5. Tasks Related to Financial Activities

The ESAs founding Regulations foresee in Article 9 also certain tasks related to financial activities and stipulate that the ESAs shall monitor new and existing financial activities and may adopt guidelines and recommendations with a view to promoting the safety and soundness of markets and convergence of regulatory practice.⁴⁵

In the event that a financial activity poses a serious threat to the objectives laid down in Article 1(5) or 1(6) of the ESAs founding Regulations⁴⁶, the ESAs may also issue warnings.⁴⁷

The ESAs also have the task of establishing a Committee on financial innovation, which brings together all relevant competent supervisory authorities with a view to achieving a coordinated approach to the regulatory and supervisory treatment of new or innovative financial activities and providing advice for the ESAs to present to the European Parliament, the Council and the Commission.⁴⁸

Finally, according to Article 9(5) of the ESAs founding Regulations, the ESAs also have the task to protect the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union. In order to do so, they have been vested the power to temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the financial system in the Union (see below II.C.4.e).

C. The European Supervisory Authorities' Powers

To achieve the tasks mentioned above (II.B), the ESAs have at their disposal a wide range of powers, ranging from collecting information concerning financial institutions and financial market participants⁴⁹, over drafting technical standards⁵⁰ to taking individual decisions addressed to competent authorities, financial institutions and financial market participants.⁵¹ These direct decision-making powers, together with the (quasi) rule-making power of elaborating draft technical standards, determine a real transfer of powers from the national to the EU Authorities.⁵²

In the following, the most important of these powers will be described in more detail. Important to notice is that the ESAs can only act within the powers conferred to them by the ESAs founding Regulations and within the scope of the legislative acts referred to in Article 1(2) of the ESAs founding Regulations, including all directives, regulations and decisions based on those acts, and of any further legally binding Union act which confer tasks on the ESAs.⁵³ These legislative acts however cover basically the whole financial market regulation. Furthermore, Article 1(3) of the ESAs founding Regulations enlarges the scope within the ESAs can act. According to this provision, the ESAs shall also act in relation to issues not directly covered in the acts referred to in paragraph 2, including matters of corporate governance, auditing and financial reporting, provided that such actions by the ESAs are necessary to ensure the effective and consistent application of those acts. It is therefore safe to say that the ESAs can act within the scope of the whole financial market regulation.

1. Develop Draft Regulatory Technical Standards

The ESAs powers to develop draft regulatory technical standards (RTS) are provided in Article 10 of the ESAs founding Regulations. By preparing such uniform standards for adoption by the Commission, the ESAs should shape the further development of a Single Rulebook applicable to all EU Member States and thus contribute to the functioning of the Single Market.⁵⁴

According to article 10 of the ESAs founding Regulations, RTS are delegated acts, meaning »non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act«.⁵⁵ RTS

44 ESAs founding Regulations, Articles 8(1) lit h and 9(1).

45 ESAs founding Regulations, Article 9(2).

46 For a more exhaustive list of objectives: EBA and ESMA founding Regulation, Article 1(5) and EIOPA founding Regulation, Article 1(6) and above II.A.1.

47 ESAs founding Regulations, Article 9(3).

48 ESAs founding Regulations, Article 9(4).

49 ESAs founding Regulations, Article 8(2) lit h.

50 ESAs founding Regulations, Article 8(2) lit a and b.

51 ESAs founding Regulations, Article 8(2) lit e and f.

52 Ibid 24, 143.

53 ESAs founding Regulations, Article 1(2).

54 Ibid 1, 3.

55 TFEU, Article 290(1).

shall be technical, shall not imply strategic decisions or policy choices and their content shall be delimited by the legislative acts on which they are based. In practice, most of the RTS adopted by the Commission specify certain terms or conditions set in the respective legislative acts.⁵⁶

As an example, Commission Delegated Regulation (EU) 2018/389 with regard to regulatory technical standards for strong customer authentication and common and secure open standards of communication⁵⁷ can be mentioned. This regulation establishes the requirements to be complied with by payment service providers for the purpose of implementing security measures which enable them (amongst other things) to apply the procedure of strong customer authentication, exempt the application of the security requirements of strong customer authentication and protect the confidentiality and the integrity of the payment service user's personalised security credentials.⁵⁸

While RTS are formally adopted by the Commission by means of regulations or decisions⁵⁹, and thus become directly applicable, the drafting of RTS allows the ESAs to play a pivotal role.⁶⁰ Firstly, because the ESAs, as a rule⁶¹, have to conduct open public consultations on draft RTS and analyse the potential related costs and benefits, Secondly, because they also have to request the opinion from various relevant stakeholder groups.⁶² Thirdly, and more importantly, because the procedure for adopting the RTS not only foresees that the Commission, where it intends not to endorse a draft RTS or to endorse it in part or with amendments, shall explain why it does not endorse a draft RTS or the reasons for its amendments⁶³, but also that the Commission may not change the content of a draft RTS prepared by the relevant ESA without prior coordination with the relevant ESA.⁶⁴ And finally, because there is merely a no-objection procedure for RTS foreseen⁶⁵, meaning that the European Parliament or the Council may object to a RTS

adopted by the Commission, but have to state the reasons for objecting when doing so.⁶⁶

Needless to say that these provisions give the ESAs in practice a very powerful position in the drafting of RTS. Not only is the Commission highly dependent on the ESAs' expertise, which ensures a certain quality of the draft RTS, the procedural corset that the ESAs founding Regulations foresee also make clear that the RTS are *de facto* made by the ESAs.⁶⁷

The sheer number of RTS that the ESAs have drafted and the Commission has endorsed so far, the fact that the majority of the draft RTS have been endorsed by the Commission without further changes⁶⁸ and the fact that the European Parliament or the Council have so far hardly ever raised objections to RTS adopted by the Commission⁶⁹, also clearly illustrates that the ESAs' powers to develop RTS cannot be underestimated. Over the past years, more than 200 RTS have been drafted by the ESAs, of which the Commission has endorsed more than 100 so far.⁷⁰

It is thus safe to say that the delegation of powers to the Commission to endorse draft RTS has been crucial to further develop the Single Rulebook and establish high quality rules while drawing on the particular technical expertise of the ESA concerned.⁷¹

2. Develop Draft Implementing Technical Standards

Apart from the power to develop draft RTS, the ESAs also have the power to develop draft implementing technical standards (ITS) for adoption by the Commission.⁷² The ESAs powers to develop these draft ITS are provided in Article 15 of the ESAs founding Regulations.

According to article 15 of the ESAs founding Regulations, also ITS shall be technical and shall not imply strategic decisions or policy choices. However, ITS are implementing acts, meaning that »their content shall be to determine the conditions of application of legislative acts«. The decision-making process of ITS is largely regulated equivalently to that of RTS and this is why Article 15 is structured very similarly to Article 10 of the ESAs founding Regulations.⁷³

56 Ibid 16, 122.

57 Commission Delegated Regulation (EU) 2018/389 of 27 November 2017 supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards for strong customer authentication and common and secure open standards of communication, OJ L 69, 13.3.2018, p. 23–43.

58 Ibid 57, Article 1.

59 ESAs founding Regulations, Article 9(4).

60 Ibid 16, 126.

61 When 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, public consultations are not necessary (ESAs founding Regulations, Article 10(1) 3.

62 ESAs founding Regulations, Article 10(1) 3 and Article 37.

63 ESAs founding Regulations, Article 10(1) 6.

64 ESAs founding Regulations, Article 10(1) 8.

65 Ibid 19, 396.

66 ESAs founding Regulations, Article 13.

67 Ibid 16, 126.

68 Ibid 1, Annex I, 3.

69 cepStudy, European Supervisory Authorities: Room for improvement at Level 2 and Level 3, 31–32, available at <http://www.cep.eu/fileadmin/user_upload/cep.eu/Studien/ESAs/cepStudy_ESA.pdf>.

70 See <https://ec.europa.eu/info/sites/info/files/overview-table-level-2-measures_en.pdf> (Date 14.03.2018).

71 Ibid 1, Annex I, 3.

72 ESAs founding Regulations, Article 8(2) lit.b.

73 Ibid 16, 128.

As an example Commission Implementing Regulation (EU) 2015/2011 laying down implementing technical standards with regard to the lists of regional governments and local authorities, exposures to whom are to be treated as exposures to the central government⁷⁴ can be mentioned. This Regulation is based on draft implementing technical standards submitted by EIOPA to the Commission and does nothing more than listing the regional governments and local authorities that shall be considered as entities, exposures to whom are to be treated as exposures to the central government of the jurisdiction in which they are established.⁷⁵

Also ITS are formally adopted by the Commission by means of regulations or decisions⁷⁶, and thus become directly applicable. As is the case with RTS, the drafting of ITS allows the ESAs to play again a pivotal role by conducting public consultations on draft ITS, by analysing the potential related costs and benefits, by requesting the opinion from various relevant stakeholder groups⁷⁷ and by foreseeing that the Commission may not change the content of a draft ITS prepared by the relevant ESA without prior coordination with the relevant ESA⁷⁸ and shall explain why it does not endorse or wants to amend a draft ITS.⁷⁹

However, a significant difference between the decision-making process of RTS and ITS concerns the right to object to a RTS or ITS adopted by the Commission. Whereas there is a no-objection procedure for RTS foreseen, no such equivalent procedure for controlling ITS was included in the ESAs founding Regulations.⁸⁰ The European Parliament or the Council thus do not have the right to object to an ITS adopted by the Commission.

As is the case with draft RTS, the provisions regarding draft ITS also give the ESAs in practice a very powerful position. Also here the Commission is highly dependent on the ESAs' expertise, ensuring a certain quality of the draft ITS. The procedural corset that the ESAs founding Regulations foresee is even more strict than with draft RTS, as for ITS no no-objection procedure is foreseen in the ESAs founding Regulations.

And again, the number of ITS that the ESAs have drafted and the Commission has endorsed since the start of operations of the ESAs in January 2011, and the fact that the majority of the draft ITS have been endorsed by the Commission without further changes⁸¹, clearly illustrates that also the ESAs' powers to develop ITS cannot be underestimated. Over the past years approximately 140 ITS have been drafted by the ESAs, of which approximately 100 have been endorsed so far by the Commission.⁸²

It is thus safe to say that also the delegation of powers to the Commission to endorse draft ITS has been crucial to further develop the Single Rulebook and establish high quality rules while drawing on the particular technical expertise of the ESA concerned.

3. Issue Guidelines and Recommendations

Apart from the power to develop draft RTS and ITS, the ESAs also have the power to issue guidelines and recommendations.⁸³ The ESAs powers to issue these guidelines and recommendations are provided in Article 16 of the ESAs founding Regulations.⁸⁴

According to Article 16 of the ESAs founding Regulations, the ESAs shall, with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law, issue guidelines and recommendations addressed to competent authorities or financial market participants.

Since the start of operations of the ESAs in January 2011, guidelines and recommendations are increasingly used. At the time of writing this contribution (April 2018) EBA had delivered more than 70 non-binding guidelines

74 Commission Implementing Regulation (EU) 2015/2011 of 11 November 2015 laying down implementing technical standards with regard to the lists of regional governments and local authorities, exposures to whom are to be treated as exposures to the central government in accordance with Directive 2009/138/EC of the European Parliament and of the Council, OJ L 295, 12.11.2015, p. 3–4.

75 Ibid 74, Article 1.

76 ESAs founding Regulations, Article 15(4).

77 ESAs founding Regulations, Article 15(1) 2 and Article 37.

78 ESAs founding Regulations, Article 15(1) 7.

79 ESAs founding Regulations, Article 15(1) 5.

80 Welch, Jane & Parker, Peter, European Financial Services, in Walker, George & Purves, Robert (Eds.), *Financial Services Law* (3rd ed.) (2014), Oxford University Press, 98.

81 See for technical standards in general (regulatory and implementing) Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Regulation of the European parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 345/2013 on European venture capital funds, Regulation (EU) No 346/2013 on European social entrepreneurship funds, Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2015/760 on European long-term investment funds, Regulation (EU) 2016/2011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, SWD(2017) 308 final, 152.

82 Ibid 70.

83 ESAs founding Regulations, Article 8(2) lit.c.

84 As regards the ESAs powers to address a recommendation to a competent authority in case of breach of Union law (ESAs founding Regulations, Articles 8(2) lit. d and 17(3)) see below II.C.4.

and recommendations⁸⁵, EIOPA⁸⁶ and ESMA⁸⁷ each approximately 40.⁸⁸ The three ESAs also had adopted several Joint Guidelines setting out the ESAs' joint view of appropriate supervisory practices or of how Union law should be applied in a particular area.

When drafting a guideline or recommendation, the ESAs must conduct open public consultations regarding the guidelines and recommendations and analyse the related potential costs and benefits. Such consultations and analyses must be proportionate in relation to the scope, nature and impact of the guidelines or recommendations. The ESAs must, where appropriate, also request opinions or advice from the relevant stakeholder groups.⁸⁹

Although formally not legally binding, it is clear from the wording of Article 16 of the ESAs founding Regulations that guidelines or recommendations can have a great influence on competent authorities or financial market participants. Not so much because it is explicitly stated that competent authorities and financial market participants shall make every effort to comply with those guidelines and recommendations⁹⁰, but mainly because a »comply or explain« and a »naming and shaming« mechanism has been foreseen. Especially the introduction of these two mechanisms emphasises the importance of the ESAs' guidelines or recommendations.⁹¹

Firstly, within two months of the issuance of a guideline or recommendation, each national competent authority shall confirm whether it complies or intends to comply with that guideline or recommendation. In the event that a competent authority does not comply or does not intend to comply, it shall inform the relevant ESA, stating its reasons.⁹² If required by that guideline or recommendation, also financial market participants must report, in a clear and detailed way, whether they comply with that guideline or recommendation.⁹³ Although guidelines or recommendations are by definition non-binding, this »comply or explain« mechanism and the fact that the non-compliance with a non-binding measure triggers a legal obligation (to confirm or to report) substantially relativizes the soft character of the ESAs' guidelines and recommendations.⁹⁴

Secondly, a disclosure or »naming and shaming« mechanism has been foreseen. The ESAs shall publish the fact that a competent authority does not comply or does not intend to comply with a guideline or recommendation and may decide, on a case by case basis, to publish the reasons provided by the competent authority for not complying with that guideline or recommendation.⁹⁵ Next to this, the ESAs shall also inform the European Parliament, the Council and the Commission in their annual reports of the guidelines and recommendations that have been issued, stating which competent authority has not complied with them, and outlining how they intend to ensure that the competent authorities concerned follow the recommendations and guidelines in the future.⁹⁶

This »naming and shaming« mechanism, in combination with the factual authority of the ESAs and the »comply or explain« mechanism, makes sure that there is a high degree of willingness among the addressees to follow the ESAs' guidelines and recommendations.⁹⁷ Hence, these soft law measures do not seem to be that »soft« after all.⁹⁸

The ESAs' power to issue guidelines and recommendations pursuant to Article 16 of the ESAs founding regulations should thus similarly not be underestimated. Although guidelines and recommendations are non-binding in nature, they nevertheless are likely to have a real impact on the behaviour of competent authorities and financial institutions.⁹⁹ This is also why, according to the Commission, the power to develop guidelines and recommendations has proven an important and successful tool of supervisory convergence.¹⁰⁰

4. Take Binding Decisions

a. Introduction

Apart from the power to develop draft RTS and ITS and the power to issue guidelines and recommendations, the ESAs also have important »interventional« powers to take individual decisions¹⁰¹ as legally binding admi-

85 See <<http://www.esa.europa.eu/about-us/legal-framework/compliance-with-eba-regulatory-products>> (Date 20.30.2018).

86 See <<https://eiopa.europa.eu/publications/eiopa-guidelines>> (Date 20.03.2018).

87 See <https://www.esma.europa.eu/sites/default/files/library/esma_guidelines.pdf> (Date 05.03.2018).

88 Ibid 81, 152.

89 ESAs founding Regulations, Article 16(2).

90 ESAs founding Regulations, Article 16(3) 1.

91 Walla, Fabian, § 6 Kapitalmarktaufsicht, in Veil, Rüdiger, Europäisches Kapitalmarktrecht (2011), Mohr Siebeck, 108.

92 ESAs founding Regulations, Article 16(3) 2.

93 ESAs founding Regulations, Article 16(3) 4.

94 Ibid 16, 147.

95 ESAs founding Regulations, Article 16(3) 3.

96 ESAs founding Regulations, Article 16(4).

97 Ibid 16, 148.

98 Van Rijsbergen, Marloes, On the Enforceability of EU Agencies' Soft Law at the National level: The Case of the European Securities and Markets Authority, *Utrecht Law Review* (2014) 10(5), 120, electronic copy available at: <<https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.304/>>.

99 Tsagas, Georgina, The Regulatory Powers of the European Supervisory Authorities: Constitutional, Political and Functional Considerations, in Andenas, Mads & Deipenbrock, Gudula (Eds.), *Regulating and Supervising European Financial Markets, More Risks than Achievements* (2016), Springer, 131.

100 Ibid 8, 19.

101 ESAs founding Regulations, Article 8(2) lit.e and f.

nistrative acts addressing the competent authorities and financial market actors in specific cases.¹⁰²

These powers of the ESAs to adopt individual binding decisions arise in three exceptional cases, namely breach of Union Law (Article 17 of the ESAs founding Regulations), action in emergency situations (Article 18 of the ESAs founding Regulations) and settlement of disagreements between competent authorities in cross-border situations (Article 19 of the ESAs founding Regulations).

In the following paragraphs, the focus lays on the decision-making powers provided for in these three articles of the ESAs founding Regulations. Nevertheless, the power provided for by Article 9(5) of the ESAs founding Regulations, to temporarily prohibit or restrict certain financial activities that threaten the financial markets or the stability of the financial system in the Union is also briefly covered.

Before addressing the procedures under Articles 17, 18 and 19 of the ESAs founding Regulations separately, the elements they have in common are worth mentioning.

Firstly, even though these procedures are subject to strict conditionality¹⁰³ and hardly ever initiated¹⁰⁴, the ESAs' power to adopt such binding decisions is highly controversial and much disputed as this power enables the ESAs to make potentially serious incursions into Member States and national competent authorities' sovereignty.¹⁰⁵

It therefore should come as no surprise that as regards the use by the ESAs of the powers in relation to breach of Union law, action in emergency situations and settlement of disagreement between competent authorities, there seems to have been little (if any) noticeable use.¹⁰⁶ The ESAs may have investigated a large number of potential breaches of Union law in recent years¹⁰⁷, but so far EBA has issued only one warning in 2014 for a manifest breach of Union law, ESMA has issued one recommendation to adopt a warning on a manifest breach of Union law (which however was not adopted by the ESMA Board of Supervisors) and EIOPA has never issued a warning on a manifest breach of Union law. The ESAs have also only been involved in a handful of conciliation cases so far.¹⁰⁸ As regards action in emergency situations,

until the end of 2016 such situation had not arisen and the ESAs had not been able to use their power in this regard.¹⁰⁹ To my knowledge since then also no emergency situation has occurred.

Secondly, Article 39 of the ESAs founding Regulations sets out the general decision-making procedure the ESAs have to follow in these cases and reflects what is known as »good administration«. It is therefore explicitly foreseen that the addressees of such a decision may express its views on the matter, before the ESAs have taken the decision, that the decisions of the ESAs shall state the reasons on which they are based and that the addressees of such a decision shall be informed of the legal remedies available.¹¹⁰ Furthermore, it is foreseen that where the ESAs have taken a decision regarding an action in emergency situations pursuant to Article 18(3) or (4), they must also review that decision at appropriate intervals.¹¹¹

Finally, the decisions that the ESAs take pursuant to Articles 17, 18 or 19 of the ESAs founding Regulations shall in principle also be made public and shall state the identity of the competent authority or financial market participant concerned and the main content of the decision. However, in case such publication is in conflict with the legitimate interests of financial market participants in the protection of their business secrets or could seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system of the Union, these decisions shall not be made public.¹¹²

b. Breach of Union Law (Article 17)

Where a national competent authority has not applied the acts referred to in Article 1(2) of the ESAs founding Regulations, or has applied them in a way which appears to be a breach of Union law, including the RTS and ITS, in particular by failing to ensure that a financial institution or market participant satisfies the requirements laid down in those acts¹¹³, the ESAs are provided with special powers. These special powers are to undertake investigations, make recommendations and adopt individual decisions addressed to a financial institutions and financial market participants. This »three-step-mechanism«¹¹⁴ of Article 17 of the ESAs founding Regulations makes clear that the power to adopt individual decisions in such cases functions as a last-resort power.

102 Deipenbrock, Gudula, The European Securities and markets Authority and Its Regulatory Mission: A Plea for Steering a Middle Course, in Andenas, Mads & Deipenbrock, Gudula (Eds.), *Regulating and Supervising European Financial Markets, More Risks than Achievements* (2016), Springer, 23.

103 Ibid 13, 979.

104 Ibid 16, 133.

105 Ibid 13, 979.

106 Ibid 81, 153.

107 Ibid 69.

108 Ibid 81, 153 and 154.

109 Ibid 69.

110 ESAs founding Regulations, Article 39(1), (2) and (3).

111 ESAs founding Regulations, Article 39(4).

112 ESAs founding Regulations, Article 39(5).

113 ESAs founding Regulations, Article 17(1).

114 Ibid 16, 138.

The ESAs may first investigate the alleged breach or non-application of Union law (step 1). They can only do so after having informed the competent authority concerned and the competent authority is obliged to provide the ESAs, without delay, with all information the ESAs consider necessary for the investigation.¹¹⁵ The ESAs may investigate this alleged breach or non-application of Union law, not only upon request from one or more competent authorities, the European Parliament, the Council, the Commission or the relevant stakeholder groups, but also on their own initiative.

The ESAs may then, not later than two months from initiating the investigation, address a recommendation to the competent authority concerned setting out the action necessary to comply with Union law (step 2). The competent authority must then inform the relevant ESA within ten working days of the steps it has taken or intends to take to ensure compliance with Union law.¹¹⁶

Where the competent authority has not complied with Union law within one month from receipt of the ESAs' recommendation, the Commission may issue a formal opinion requiring the competent authority to take the action necessary to comply with Union law. The competent authority in turn must inform, again within ten working days, the Commission and the relevant ESA of the steps it has taken or intends to take to comply with that formal opinion.¹¹⁷

Where a competent authority does still not comply with this formal opinion and where it is necessary to remedy in a timely manner such non-compliance in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system, the ESAs may finally adopt an individual decision directly addressed to a financial institution or market participant. In this decision, the ESAs may require the financial institution or market participant to take the necessary action to comply with its obligations under Union law (including the cessation of any practice) (step 3).¹¹⁸

It is clear from the conditionality introduced in this decision-making procedure that the ESAs' power to adopt individual decisions under Article 17 of the ESAs founding Regulations functions as an *ultima ratio* measure.¹¹⁹ As mentioned above (see I.I.C.4.a), so far no such decision has been taken by any of the ESAs. Nevertheless, this article represents a significant enhancement of the previous weak peer review mechanism to support national competent authorities' compliance with

EU law¹²⁰ due to the, amongst other reasons, dissuasive effect of the relevant powers.¹²¹

c. *Action in Emergency Situations (Article 18)*

Article 18 of the ESAs founding Regulations provides two different regimes that both apply where extraordinary economic circumstances occur.

A first regime can be found in Article 18(1) of the ESAs founding Regulations. This paragraph stipulates that in the case of adverse developments, which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union, the ESAs shall actively facilitate and, where deemed necessary, coordinate any actions undertaken by the relevant national competent supervisory authorities. In order to be able to do so, the ESAs shall be fully informed of any relevant developments, and shall be invited to participate as an observer in any relevant gathering by the relevant national competent supervisory authorities. Article 18(1) therefore does not really mention any concrete emergency powers for the ESAs and requires the ESAs to support as much as possible the national competent supervisory authorities.

The remaining paragraphs of Article 18 build up a different regime explicitly conferring certain emergency powers upon the ESAs.¹²²

Prerequisite for this regime is that the Council adopts a decision, determining the existence of an emergency situation. The Council can only adopt such a decision at the request of the ESAs, the Commission or the ESRB. Where the ESRB or the ESAs consider that an emergency situation may arise, they shall issue a confidential recommendation addressed to the Council and provide it with an assessment of the situation.¹²³

Where the Council has adopted a decision determining the existence of an emergency situation and where coordinated action by national authorities is necessary to respond to adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union, the ESAs may adopt individual decisions addressed to competent authorities. In such decisions, the ESAs may require these competent authorities to take the necessary action to address any such adverse developments by ensuring that financial market participants and competent authorities satisfy the requirements laid down in the leg-

115 ESAs founding Regulations, Article 17(2).

116 ESAs founding Regulations, Article 17(3).

117 ESAs founding Regulations, Article 17(4) and (5).

118 ESAs founding Regulations, Article 17(6).

119 Ibid 16, 135.

120 Ibid 13, 976.

121 Ibid 1, 7.

122 Ibid 16, 139.

123 ESAs founding Regulations, Article 18(2).

islation referred to in Article 1(2) of the ESAs founding Regulations.

Only where a competent authority does not comply with this decision of the ESAs, the ESAs may adopt an individual decision directly addressed to a financial institution or market participant requiring the necessary action to comply with its obligations (including the cessation of any practice). This applies only in situations in which a competent authority does not apply the legislative acts referred to in Article 1(2) of the ESAs founding Regulations, including RTS and ITS, or applies them in a way which appears to be a manifest breach of those acts. Furthermore, the ESAs may only adopt such individual decision directly addressed to a financial institution or market participant when urgent remedying is necessary to restore the orderly functioning and integrity of financial markets or the stability of the financial system in the Union.

It is clear that the wording of Article 18 reflects the significance resistance from the Member States as to the conferral of powers of this nature to the ESAs.¹²⁴ Until now, these emergency powers have also not been used by the ESAs (see above ILC.4.a) and the strict conditionality Article 18 is subject to makes it unlikely that these emergency powers will feature heavily.¹²⁵

d. Settlement of Disagreements between Competent Authorities in Cross-Border Situations (Article 19) and across Sectors (Article 20)

Competent authorities can disagree about an action or inaction of a competent authority of another Member State. Article 19 of the ESAs founding Regulations provides for a procedure of binding mediation to settle such disagreements between competent authorities from different Member States in which the ESAs may adopt a decision addressed to the competent authorities concerned and ultimately even an individual decision addressed to a financial institution or market participant.

Where a competent authority disagrees about the procedure or content of an action or inaction of a competent authority of another Member State, the ESAs, at the request of one or more of the competent authorities concerned or on their own initiative may assist the authorities in reaching an agreement.¹²⁶ At this stage of the procedure the ESAs thus act as a mediator.

However, if the competent authorities concerned fail to reach an agreement, the ESAs may take a decision requiring them to take specific action or to refrain from

action in order to settle the matter, with binding effects for the competent authorities concerned, in order to ensure compliance with Union law.¹²⁷

Only where a competent authority does still not comply with the decision of the ESAs, and thereby fails to ensure that a financial market participant complies with requirements directly applicable to it by virtue of the acts referred to in Article 1(2) of the ESAs founding Regulations, the ESAs may adopt an individual decision addressed directly to a financial institution or market participant. In this decision, the ESAs may require the financial institution or market participant to take the necessary action to comply with its obligations under Union law (including the cessation of any practice). Important to notice in this respect is that such decision addressed to a financial institution or market participant shall prevail over any previous decision adopted by the competent authorities on the same matter.¹²⁸

Between competent authorities, not only cross-border disagreements may arise, also cross-sectoral disagreements may arise. According to Article 20 of the ESAs founding Regulations, such cross-sectoral disagreements shall be settled, not by one of the ESAs, but by the Joint Committee of the ESAs. This Joint Committee is composed of the Chairpersons of the ESAs¹²⁹ and serves as a forum in which the ESAs cooperate regularly and closely and ensure cross-sectoral consistency.¹³⁰

When settling cross-sectoral disagreements that may arise between competent authorities, the Joint Committee of the ESAs, shall act in accordance with the procedure laid down in Article 19. Therefore, the Joint Committee may take a decision requiring the competent authorities to take specific action or to refrain from action in order to settle the matter, with binding effects for the competent authorities concerned. Ultimately, where a competent authority does not comply with the decision of the ESAs, the ESAs may again adopt an individual decision directly addressed to a financial institution or market participant.

e. Temporary Prohibition or Restriction (Article 9(5))

According to Article 9(5) of the ESAs founding Regulations, the ESAs also have the task to protect the functioning and integrity of financial markets or the stability of the financial system in the Union. In order to do so, they have been vested with the power to temporarily prohibit or restrict certain financial activities that threaten

¹²⁴ Ibid 13, 977.

¹²⁵ Ibid 13, 979.

¹²⁶ ESAs founding Regulations, Article 19(1) and (2).

¹²⁷ ESAs founding Regulations, Article 19(3).

¹²⁸ ESAs founding Regulations, Article 19(4) and (5).

¹²⁹ ESAs founding Regulations, Article 55(1).

¹³⁰ ESAs founding Regulations, Article 54(2).

the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union, in the cases specified in the legislative acts referred to in Article 1(2) or in the case of an emergency situation in accordance with Article 18 of the ESAs founding Regulations.¹³¹

As an example, with regard to ESMA, the Short Selling Regulation¹³² can be mentioned. According to Article 28 of this regulation, ESMA is, in accordance with Article 9(5) of the ESMA founding Regulation, empowered to impose conditions on short sales, even prohibit short sales. A further example is the Regulation on markets in financial instruments (commonly referred to as MiFIR¹³³). According to Article 40 of MiFIR, ESMA is, in accordance with Article 9(5) of the ESMA founding Regulation, empowered to temporarily prohibit or restrict in the Union the marketing, distribution or sale of certain financial instruments or a type of financial activity.

These ESMA intervention powers in exceptional circumstances are of a similar order to the powers of ESMA in an emergency situation under Article 18 of the ESMA founding Regulation (see above II.C.4.c) and can be expected to be used but rarely. They however provide the EU with an important reserve supervisory capacity for emergency situations¹³⁴ and practice shows that ESMA is willing to use this power. At the time of writing this contribution (April 2018) ESMA had indeed adopted its first (and so far only) product intervention decision pursuant to Article 40 of MiFIR, prohibiting the marketing, distribution or sale of binary options to retail investors and restricting the marketing, distribution or sale of Contracts for Differences to retail investors. This ESMA decision was based on the conclusion that there exists a significant investor protection concern regarding these financial products.¹³⁵

5. Other Powers

The ESAs do not only have the powers described above. Article 8(2) of the ESAs founding Regulations explicitly lists certain other powers and according to Article 8(1) of the ESAs founding Regulations, the ESAs have the task

to fulfil any other specific task set out in the ESAs founding regulations or in other legislative acts.¹³⁶

According to article 8(2) of the ESAs founding Regulations, the ESAs also have the power to issue opinions to the European Parliament, the Council or the Commission, to collect the necessary information concerning financial institutions, to develop common methodologies for assessing the effect of product characteristics and distribution processes on the financial position of institutions and on consumer protection and to provide a centrally accessible database of registered financial institutions.¹³⁷ Describing these powers is outside the scope of the present contribution, which only covers the major powers of the ESAs. However, I would like to specifically mention the power to issue opinions to the EU Institutions.

The power to issue opinions to the European Parliament, the Council or the Commission allows the ESAs to provide input to these institutions on all issues related to their area of competence.¹³⁸ It goes without saying that this allows for the ESAs to influence greatly the European legislative process, as these institutions will in practice rely heavily on the ESAs expert opinions.

As an example, the EIOPA Opinion to EU Institutions on a Common Framework for Risk Assessment and Transparency for Institutions for Occupational Retirement Provision (IORPs) can be mentioned.¹³⁹ In this Opinion, EIOPA advised the EU Institutions regarding possible amendments to Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision (IORP Directive).¹⁴⁰ EIOPA even explicitly mentions that, although it's opinion is not meant to interfere with the Commission's proposal for the revision of the IORP Directive¹⁴¹, it stands ready to work with the EU institutions to implement the advice contained in this opinion into EU legislation.¹⁴²

Finally, according to Article 8(1) of the ESAs founding Regulations, the ESAs also have the task to fulfil any other specific task set out in the ESAs founding regulations or in other legislative acts. Based on Arti-

¹³¹ ESAs founding Regulations, Article 9(5).

¹³² Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, OJ L 86, 24.3.2012, p. 1–24.

¹³³ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, OJ L 173, 12.6.2014, p. 84–148.

¹³⁴ Ibid 13, 985.

¹³⁵ <<https://www.esma.europa.eu/press-news/esma-news/esma-agrees-prohibit-binary-options-and-restrict-cfds-protect-retail-investors>>

¹³⁶ ESAs founding Regulations, Article 8(1) lit j.

¹³⁷ ESAs founding Regulations, Article 8(2) lit g to j.

¹³⁸ ESAs founding Regulations, Article 34(1).

¹³⁹ EIOPA BoS 16/075 of 14 April 2016, available at https://eiopa.europa.eu/Publications/Opinions/EIOPA-BoS-16-075-Opinion_to_EU_Institutions_Common_Framework_IORPs.pdf.

¹⁴⁰ Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision, OJ L 235, 23.9.2003, p. 10–21.

¹⁴¹ Meanwhile Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (OJ L 354, 23.12.2016, p. 37–85) has been adopted, repealing the IORP Directive with effect from 13 January 2019.

¹⁴² Ibid 139.

cle 8(1) lit j, direct and exclusive day-to-day supervisory powers were conferred on ESMA over particular financial market participants.¹⁴³ ESMA, as sole ESA, has been granted exclusive direct supervisory powers over credit rating agencies under Regulation (EU) No 462/2013¹⁴⁴ and trade repositories under Regulation (EU) No 648/2012.^{145, 146} These far-reaching supervisory powers include, amongst others, authorisation, ongoing supervision and on-site inspections, withdrawal of registration and imposing fines.¹⁴⁷

III. The EFTA Surveillance Authority

A. The Agreement on the European Economic Area

1. Introduction

The Agreement on the European Economic Area (EEA Agreement) was signed in Porto (Portugal) on 2 May 1992 and entered into force on 1 January 1994. For Liechtenstein it entered into force on 1 May 1995. This was due to the negotiations regarding adjustments of the Customs Union between Switzerland and Liechtenstein, which became necessary after the Swiss had rejected ratification of the EEA Agreement in a referendum, while the Liechtenstein citizens had accepted it.

The 28 EU Member States, together with the three EEA EFTA States Iceland, Norway and Liechtenstein, make up the Contracting Parties of the EEA Agreement. The basic aim of the EEA Agreement is to establish a dynamic and homogeneous European Economic Area (EEA), based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level.¹⁴⁸

The EEA Agreement thus enables the EEA EFTA States to participate fully in the Internal Market and covers the four freedoms, i.e. the free movement of goods, capital, services and persons, plus competition and state aid rules and horizontal areas related to the four freedoms (such as consumer protection, company law, environment, social policy and statistics). In addition, the EEA Agreement provides for cooperation in several flanking policies such as research and technological development, education, training and youth, employment,

tourism, culture, civil protection, enterprise, entrepreneurship and small and medium-sized enterprises.¹⁴⁹

In order to ensure this homogeneous EEA, all relevant EU legislation in the field of the Internal Market is continuously incorporated into one of the annexes of the EEA Agreement, without the main part of the EEA Agreement being amended, so that it applies throughout the whole of the EEA. This is why the EEA Agreement is often said to be »static in form but dynamic in content«.¹⁵⁰

Article 102 of the EEA Agreement is the central provision that deals with the procedure for the incorporation of new Union law into the EEA Agreement.¹⁵¹ According to this article, the EEA Joint Committee shall take a decision concerning an amendment of an Annex to the EEA Agreement as closely as possible to the adoption by the EU of the corresponding new EU legislation with a view to permitting a simultaneous application of the latter as well as of the amendments of the Annexes to the Agreement.

In recent years however, this »simultaneous application« proved to be ever more challenging. The incorporation into the EEA Agreement of the ESAs founding Regulations serves as a good example of this challenge to incorporate new Union law as closely as possible to its adoption in the EU. As the set-up of the ESAs is very difficult to reconcile with a basic feature of the EEA Agreement, namely with the two-pillar-structure (see below III.A.2), incorporating the ESAs founding Regulations into the EEA Agreement took around 6 years (see below III.A.3).

2. Two-Pillar Structure

At the time of negotiating the EEA Agreement, the EEA Contracting Parties had in fact contradictory objectives: the EEA EFTA States wanted to participate fully in the development of EEA law without ceding any legislative powers, whereas the organs of the (then) European Community wanted to safeguard the autonomy of Commission decision making.¹⁵²

A solution had to be found for the fact that the EEA EFTA States have not transferred any legislative competences to the EU or to the joint EEA bodies and are, as a main rule, constitutionally unable to accept binding decisions made by the EU institutions directly¹⁵³ and

¹⁴³ Ibid 13, 983.

¹⁴⁴ Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies, OJ L 146, 31.5.2013, p. 1–33.

¹⁴⁵ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201, 27.7.2012, p. 1–59.

¹⁴⁶ Ibid 81, 24.

¹⁴⁷ Ibid 91, 107.

¹⁴⁸ EEA Agreement, recital 4.

¹⁴⁹ Note by Subcommittee V on Legal and Institutional Questions, The Basic Features of the EEA Agreement, available at <<http://www.efta.int/eea/eea-agreement/eea-basic-features>>

¹⁵⁰ Baur, Georges, Decision-Making Procedure and Implementation of New Law, in Baudenbacher, Carl (Ed.), The Handbook of EEA Law (2016), Springer, 46.

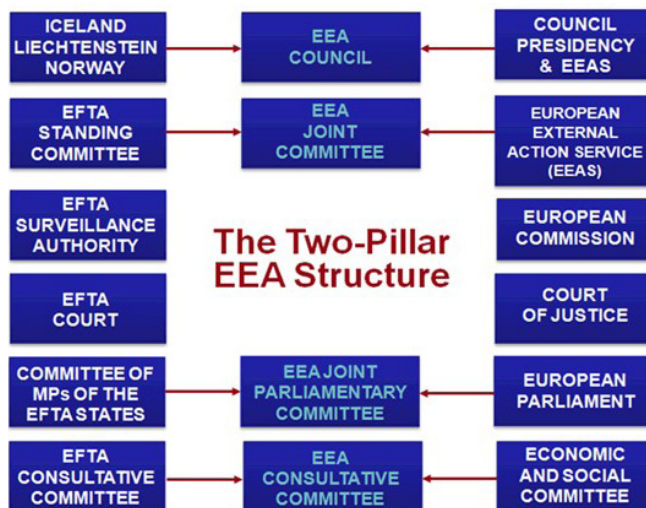
¹⁵¹ Ibid 150, 46.

¹⁵² Ibid 150, 45.

¹⁵³ Note by Subcommittee V on Legal and Institutional Questions, The two-pillar structure of the EEA Agreement – Incorpora-

that the (then) European Community could not accept the participation of non-Member States in their institutions. The solution found is the so-called two-pillar structure.

As the diagram below shows, this two-pillar structure consists of an EU pillar (the EU and its institutions on the right), an EFTA pillar (the EEA EFTA States and their institutions on the left) and a number of joint EEA bodies situated in-between.¹⁵⁴ Through these joint EEA bodies the EEA Contracting Parties jointly implement and develop the EEA Agreement.¹⁵⁵



In order to extend the applicability of an EU act to the EEA EFTA States, one of these joint EEA bodies, namely the EEA Joint Committee¹⁵⁶, adopts Joint Committee Decisions (JCD) by which EU acts are incorporated into the EEA Agreement (see below III.A.3).

Due to the particular features or the scope of the EEA Agreement or the particular situation of an EEA EFTA State, there is however sometimes a need to adapt the EU acts upon incorporation into (one of the annexes of) the EEA Agreement.¹⁵⁷ Needless to say that negotiating such amendments may take time. During the process of incorporation of the three ESAs founding Regulations, it soon became clear that formulating the necessary adaptations to these three regulations would need intensive and technically complex negotiations.¹⁵⁸ This is why

tion of new EU acts, available at <<http://old.efta.int/sites/default/files/documents/eea/16-532-the-two-pillar-structure-in-corporation-of-new-eu-acts.pdf>>

¹⁵⁴ Ibid 149.

¹⁵⁵ Ibid 153.

¹⁵⁶ The EEA Joint Committee is composed of the Commission (represented by the External Action Service), the three EEA EFTA States (at ambassadorial level) and an observer from ESA.

¹⁵⁷ Note by Subcommittee V on Legal and Institutional Questions, How EU acts become EEA acts and the need for adaptations, available at <<http://www.efta.int/media/documents/eea/1113623-How-EU-acts-become-EEA-acts.pdf>>

¹⁵⁸ Ibid 2.

the three ESAs founding Regulations were only incorporated into the EEA Agreement on 1 October 2016, approximately six years after their adoption in the EU (see below III.A.3).

The two-pillar structure does not only cover the decision-making process, it also encompasses supervision and judicial control. Parallel to the Commission and the Court of Justice of the European Union (CJEU), a surveillance authority (the EFTA Surveillance Authority; ESA) and a court (the EFTA Court) were therefore established by the EEA Agreement to ensure the monitoring of implementation and application of EEA law in the EEA EFTA States (see below III.B and III.C).¹⁵⁹

3. Incorporation into the EEA Agreement of the ESAs Founding Regulations

In order to secure a homogeneous finance market throughout the whole of the EEA, the ESAs founding Regulations were incorporated into the EEA Agreement. This process of incorporation proved to be a very cumbersome process. It took the EU and EEA EFTA Ministers of Finance and Economy until 14 October 2014 to approve at their annual meeting Council Conclusions on the principles of incorporation of the ESAs founding Regulations into the EEA Agreement and to express their will to swiftly conclude the technical work necessary for the incorporation.¹⁶⁰

Due to constitutional constraints on the part of the EEA EFTA States, more precisely the fact that EEA EFTA States are, as a main rule, constitutionally unable to accept binding decisions made by the EU institutions directly, one of the most difficult issues to solve was the question who was going to be competent to take binding decisions addressed to national supervisory authorities or market operators in Norway, Iceland and Liechtenstein. Surely not the ESAs. However, who else? ESA?

In their Council Conclusions of 14 October 2014 the EU and EEA EFTA Ministers of Finance and Economy noted that for this issue a balanced solution had been found, taking into account the structure and objectives of the ESAs founding Regulations and the two-pillar structure of the EEA Agreement, as well as the legal and political constraints of the EU and the EEA EFTA States. This balanced solution consisted of ESA taking decisions addressed to EEA EFTA competent authorities or market operators in the EEA EFTA States, respectively and the ESAs being competent to perform actions of a non-binding nature, such as adoption of recommen-

¹⁵⁹ Ibid 149.

¹⁶⁰ Ibid 6.

dations and non-binding mediation, also vis-à-vis EEA EFTA competent authorities and market operators.

To ensure integration of the ESAs expertise in the process and consistency between the EU and the EFTA pillar, the EU and EEA EFTA Ministers of Finance and Economy also agreed that individual decisions and formal opinions of ESA addressed to one or more individual EEA EFTA competent authorities or market operators will be adopted on the basis of drafts prepared by the relevant ESA (see below III.C.3.a).

The technical work necessary for transforming this political agreement reached by the EU and EEA EFTA Ministers of Finance and Economy into JCDs however required extensive efforts both in the EU and on the EFTA side¹⁶¹ and took approximately another two years. It was therefore not until 30 September 2016 that the EEA Joint Committee adopted three JCDs¹⁶² incorporating the ESAs founding Regulations into the EEA Agreement.¹⁶³ These JCDs entered into force on 1 October 2016, finally extending the EU post-financial crisis institutional/supervisory structure to the EEA EFTA States, in part by granting new powers to ESA (see below III.C.3).¹⁶⁴

B. The Surveillance and Court Agreement

1. Introduction

The EEA Agreement provides in Article 108 that the EFTA States shall establish an independent EFTA Surveillance Authority and a Court of Justice. In fact, the EEA Agreement is the only association agreement ever concluded by the EU, which allows and even obliges the associated states to have their own court.¹⁶⁵ Pursuant to Article 108 of the EEA Agreement, the EEA EFTA States signed on 2 May 1992, together with the EEA Agreement, the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Surveil-

lance and Court Agreement; SCA), establishing ESA and the EFTA Court.¹⁶⁶

ESA ensures that the EEA EFTA States fulfil their obligations under the EEA Agreement. In addition to general surveillance of compliance, ESA has powers in relation to competition, state aid and public procurement, reflecting the extended competences of the Commission in these fields within the EU (see below III.C.2).

The EFTA Court deals with infringement actions brought against an EEA EFTA State with regard to the implementation, application or interpretation of EEA law, gives advisory opinions to courts in the EEA EFTA States on the interpretation of EEA rules, and is competent for the settlement of disputes between two or more EEA EFTA States. It also hears appeals concerning decisions taken by ESA (see below IV.C.1).¹⁶⁷

Whilst ESA has thus been granted competences mirroring those of the Commission, the EFTA Court has been granted competences mirroring those of the CJEU.¹⁶⁸

The incorporation of the ESAs founding Regulations into the EEA Agreement made amendments to the Surveillance and Court Agreement (SCA) necessary, reflecting the fact that ESA has been allocated with specific tasks in supervising the financial sector (see below III.C.3). This is why the EEA EFTA States, after having consulted ESA, agreed on 6 October 2016 to amend the SCA by adding a new Article 25a and a new Protocol 8 to the SCA.¹⁶⁹

2. Article 25a Surveillance and Court Agreement

Article 25a SCA sets out in general terms that ESA shall, in accordance with the acts referred to in Annex IX (Financial Services) of the EEA Agreement providing within the EU for powers of a European Supervisory Authority which, as regards the EEA EFTA States are to be exercised by ESA, as well as subject to the provisions contained in Protocol 8 to the SCA, give effect to the relevant provisions of the EEA Agreement and ensure that those provisions are applied.

Article 25a SCA therefore vests in general terms ESA, as regards the EEA EFTA States, with powers similar to

¹⁶¹ EEA EFTA Comment in connection with the Commission consultation on the future of the European Supervisory Authorities (ESAs) (Ref. 17-1542), available at <<http://www.efta.int/eea/eea-efta-comments>>.

¹⁶² Decision of the EEA Joint Committee No 199/2016 of 30 September 2016 amending Annex IX (Financial services) to the EEA Agreement, OJ L 46, 23.2.2017, p. 4–12 (JCD 199/2016); Decision of the EEA Joint Committee No 200/2016 of 30 September 2016 amending Annex IX (Financial services) to the EEA Agreement, OJ L 46, 23.2.2017, p. 13–21 (JCD 200/2016) and Decision of the EEA Joint Committee No 201/2016 of 30 September 2016 amending Annex IX (Financial services) to the EEA Agreement, OJ L 46, 23.2.2017, p. 22–29 (JCD 201/2016).

¹⁶³ EEA Consolidated Versions of the ESAs founding Regulations as adapted for the purposes of the EEA Agreement by these three JCDs can be found on the EFTA website: <<http://www.efta.int/eea-lex>>.

¹⁶⁴ Ibid 5.

¹⁶⁵ Baudenbacher, Carl, *The EFTA Court: Structure and Tasks*, in Baudenbacher, Carl (Ed.), *The Handbook of EEA Law* (2016), Springer, 147.

¹⁶⁶ A Consolidated Version of the SCA can be found on the EFTA website: <<http://www.efta.int/legal-texts/the-surveillance-and-court-agreement/agreement-annexes-and-protocols>>.

¹⁶⁷ Ibid 149.

¹⁶⁸ Note by Subcommittee V on Legal and Institutional Questions, *The two-pillar structure of the EEA Agreement – Surveillance and judicial review*, available at <<http://old.efta.int/sites/default/files/documents/eea/16-531-the-two-pillar-structure-surveillance-and-judicial-control.pdf>>.

¹⁶⁹ Agreement amending the Agreement between the EFTA states on the establishment of a surveillance authority and a Court of Justice by adding a new Article 25a and a new Protocol 8 to the Agreement of 6 October 2016 (entry into force 25 November 2016).

those the ESAs have within the EU within the field of financial services.¹⁷⁰

3. Protocol 8 to the Surveillance and Court Agreement

Protocol 8 to the SCA on the Functions and Powers of the EFTA Surveillance Authority in the Field of Financial Supervision sets out in more detail the procedural requirements to be followed by ESA within the field of financial services where ESA, in accordance with Article 25a SCA, acts pursuant to the specific supervisory powers conferred to it by acts in Annex IX (Financial Services) of the EEA Agreement.¹⁷¹

When carrying out these tasks, ESA must firstly consult and cooperate with the relevant ESA and the other relevant EU institutions and the relevant ESA shall, but for the right to vote, have the right to participate in the work of ESA.¹⁷²

Article 3 of Protocol 8 SCA prescribes that ESA's decisions within the scope of Protocol 8 SCA (see below III.C.3) shall be adopted by its College on the basis of drafts prepared by the relevant ESA and that ESA may request this relevant ESA to prepare a draft. Furthermore, when taking such decisions, ESA must act in full independence and a representative from the relevant ESA shall have the right to be present, without the right to vote, at the ESA College meetings where such decisions are taken.

Before taking such a decision however, ESA must invite the competent authorities of the EEA EFTA States to provide technical expertise¹⁷³, must inform any named addressee of its intention to adopt the decision and set a time limit within which the addressee may express its views on the matter.¹⁷⁴

Article 6 of Protocol 8 SCA finally describes the judicial review mechanisms available for contesting such decisions taken by ESA (see below IV.C). According to this article, EEA EFTA States or any natural or legal person may bring proceedings before the EFTA Court, in accordance with Article 36 SCA¹⁷⁵, contesting a decision taken by ESA. In the event that ESA has an obligation to act and fails to take a decision, proceedings for failure to act may be brought before the EFTA Court in accord-

ance with Article 37 SCA.¹⁷⁶ Where a decision adopted by ESA imposes fines and/or periodic penalty payments, the EFTA Court has furthermore unlimited jurisdiction to review such decisions. The EFTA Court may thus annul, reduce or increase the fine or periodic penalty payment imposed (see below IV.C.1).

C. The EFTA Surveillance Authority's Powers

1. Introduction

As mentioned above (see III.A.2), the two-pillar structure does not only cover the decision-making process, it also encompasses supervision and judicial control and ESA serves a pivotal role in the functioning of the EEA Agreement by ensuring that the EEA EFTA States live up to their obligations under the EEA Agreement.¹⁷⁷

Based on the two-pillar structure, monitoring and enforcement of the obligations arising from the EEA Agreement are therefore vested in separate surveillance bodies with competences for the respective pillar only.¹⁷⁸ The Commission is in charge of ensuring compliance by the EU Member States under the EEA Agreement, and ESA, with powers that correspond to those of the Commission, is in charge of ensuring the fulfilment of the obligations incumbent on the EEA EFTA States. ESA thus mirrors the enforcement competences and procedures of the Commission, from which it differs, however, in that it does not hold any legislative powers or policy functions. ESA is therefore a pure surveillance body.¹⁷⁹

As the two institutions oversee the application of the same laws in different parts of the EEA there is of course close cooperation between the Commission and ESA to ensure uniform surveillance and application of EEA law throughout the EEA.¹⁸⁰

Until the incorporation into the EEA Agreement of the ESAs founding Regulation, the competences of ESA thus extended to the surveillance and enforcement of the rules of the common Internal Market and concerning competition and state aid (see below III.C.2).¹⁸¹ However, the proliferation of independent regulatory agencies in the EU has complicated the surveillance landscape and tests the flexibility of the EEA Agreement, the EEA EFTA States and the EU when it comes to finding acceptable arrangements for the incorporation into the EEA Agreement of EU acts establishing and man-

170 Bericht und Antrag Nr. 39/2016 der Regierung an den Landtag betreffend das Abkommen zur Abänderung des Abkommens zwischen den EFTA-Staaten zur Errichtung einer Überwachungsbehörde und eines Gerichtshofes und zur Annahme des Protokolls 8 über die Aufgaben und Befugnisse der EFTA-Überwachungsbehörde im Bereich der Finanzaufsicht, 10.

171 Ibid 169, recital 5.

172 Protocol 8 SCA, Article 2.

173 Protocol 8 SCA, Article 4.

174 Protocol 8 SCA, Article 5.

175 Article 36 SCA corresponds to Article 263 TFEU.

176 Article 37 SCA corresponds to Article 265 TFEU.

177 Büchel, Frank and Lewis Xavier, The EFTA Surveillance Authority, in Baudenbacher, Carl (Ed.), The Handbook of EEA Law (2016), Springer, 113.

178 EEA Agreement, Article 109(1).

179 Ibid 177, 115.

180 Ibid 168.

181 Ibid 177, 113.

dating such agencies, while at the same time respecting the two-pillar structure.¹⁸² When incorporating the ESAs founding Regulation on 1 October 2016, ESA was therefore allocated with new tasks in supervising financial services (see below III.C.3).

2. The EFTA Surveillance Authority's Powers in General

ESA's main task is to ensure that the EEA EFTA States fulfil their obligations under the EEA Agreement¹⁸³ and in doing so ESA protects the rights of individuals and market participants who find their rights infringed by rules or practices of the EEA EFTA States.

ESA also enforces the state aid rules¹⁸⁴, assessing the compatibility of state aid with the functioning of the Internal Market, and if necessary ordering unlawful state aid to be repaid.¹⁸⁵

Finally, ESA ensures that companies abide by the competition rules laid down in the EEA Agreement.¹⁸⁶ These rules largely mirror the competition rules laid down in the Treaty on the Functioning of the European Union (TFEU). With regard to competition rules, ESA thus investigates possible infringements of these rules and can impose fines on individual undertakings.¹⁸⁷

In the fulfilment of its tasks, ESA acts independently from any other institution or state¹⁸⁸ and may, in carrying out the duties assigned to it, request all the necessary information from the governments and competent authorities of the EEA EFTA States and from undertakings and associations of undertakings in the EEA EFTA States.¹⁸⁹

In case ESA is of the opinion that rules or practices of the EEA EFTA States infringe rights of individuals and market participants, it may initiate formal infringement proceedings against the EEA EFTA State and ultimately bring such cases before the EFTA Court.¹⁹⁰

It is clear from the above that ESA's role can in general be described as being similar to that of the Commission as the »guardian of the Treaties«.¹⁹¹

3. The EFTA Surveillance Authority's Powers in Financial Supervision

In order to secure a homogeneous finance market throughout the whole of the EEA, the ESAs founding Regulations were incorporated into the EEA Agreement (see above III.A.3). Due to the fact that the EEA EFTA States are constitutionally unable to accept binding decisions made by the EU institutions directly, a balanced solution was found for the power of the ESAs to adopt decisions that are legally binding on competent authorities and market operators. This balanced solution consists of ESA taking decisions addressed to EEA EFTA competent authorities or market operators in the EEA EFTA States (see below III.C.3.a) and the ESAs being competent to perform actions of a non-binding nature, such as adoption of recommendations and non-binding mediation, also vis-à-vis EEA EFTA competent authorities and market operators (see below III.C. 3.b).

a. Take Binding Decisions

As the ESAs founding Regulations designed the ESAs to the same institutional template, the JCDs by which these regulations were incorporated into the EEA Agreement¹⁹² also follow the same logical structure and foresee, as regards the EEA EFTA States, the same adaptations to these three regulations, entrusting ESA with the competence to adopt binding decisions in the EFTA pillar. This is why below the adaptations foreseen in these three JCDs are also described collectively and not for each of the ESAs founding Regulations separately.

Before addressing in detail the power of ESA to take binding decisions, it is important to point out firstly that any binding decision (and formal opinions) by ESA addressed to EEA EFTA competent authorities or market operators will be adopted based on drafts prepared by the relevant ESA. These drafts will be prepared either on the initiative of ESA or on the initiative of the relevant ESA.¹⁹³ Although one could say that it is obvious ESA is supposed to only »rubber-stamp« the draft decisions it receives from the relevant ESA¹⁹⁴, this mechanism ensures consistency and integration of the ESAs' expertise in the process of adopting binding decisions¹⁹⁵ and preserves key advantages of supervision by a single authority.¹⁹⁶

182 Ibid 177, 115.

183 SCA, Article 5.

184 SCA, Article 24.

185 Protocol 3 to the SCA on the functions and powers of the EFTA Surveillance Authority in the field of state aid.

186 EEA Agreement, Article 53–60.

187 SCA, Article 25 and Protocol 4 to the SCA on the functions and powers of the EFTA Surveillance Authority in the field of competition.

188 Ibid 177, 114.

189 SCA, Article 6.

190 SCA, Article 31.

191 Ibid 177, 127.

192 JCD 199/2016, 200/2016 and 201/2016 of 30 September 2016.

193 JCD 199/2016, 200/2016 and 201/2016, adaptations (g), (i), (j), (k) and (l).

194 Fredriksen, Halvard H., & Franklin, Christian N.K., Of pragmatism and principles: The EEA Agreement 20 years on (2015), *Common Market Law Review* 52: 629–684, Kluwer Law International, 679.

195 <<http://www.eftasurv.int/internal-market-affairs/areas-of-competence/services/financial-services/>>

196 Ibid 6.

Secondly, it is important to point out that ESA is under no legal obligation to follow the drafts it receives from the relevant ESA or even to adopt a binding decision (or formal opinion). Just as the Commission *may* issue a formal opinion and the relevant ESA may adopt an individual decision as regards the EU, as regards the EEA EFTA States ESA *may* issue a formal opinion and *may* adopt an individual decision.¹⁹⁷ However, when ESA does adopt a binding decision (or formal opinion), it must do so based on a draft received from the relevant ESA.

In case of disagreements between the relevant ESA and ESA regarding the course of action, a cooperation clause has been foreseen to solve these disagreements by consensus. In case of disagreement, the Chairperson of the relevant ESA and the College of ESA shall meet and endeavour to reach consensus. Where they fail to reach consensus, the Chairperson of the relevant ESA or the College of ESA has the possibility to request the Contracting Parties of the EEA Agreement to refer the matter for settlement in the EEA Joint Committee.¹⁹⁸ Finally, the contracting Parties to the EEA Agreement may also agree to request the CJEU to give a ruling on the dispute.¹⁹⁹

As mentioned above (see II.C.4.a) the power to adopt binding decisions is subject to strict conditionality and therefore the procedure is hardly ever initiated by the ESAs. This is no different regarding ESA. At the time of writing this contribution (April 2018), ESA has not adopted any such binding decision yet. Nevertheless, ESA will apparently very soon have to take a decision to register (or refuse) an EEA EFTA based company as credit rating agency (see below III.C.3.c).²⁰⁰

(i) Breach of Union Law (Article 17)

Firstly, the JCDs by which the ESAs founding Regulations were incorporated into the EEA Agreement entrust ESA, as regards the EEA EFTA States, with the powers of the Commission or the relevant ESA to issue formal opinions or decisions, respectively under Article 17(4) and (6) of the ESAs founding Regulations.²⁰¹ These powers of the Commission or the relevant ESA thus only apply within the EU, while the same powers are conferred to ESA as regards the EEA EFTA States.²⁰²

However, important to note is that the ESAs remain competent to initiate investigations of alleged breaches and to address non-binding recommendations in this procedure to the competent authorities of the EEA EFTA States (see below III.C.3.b).²⁰³ The only role foreseen for ESA at this stage of the decision-making procedure is that ESA may request the relevant ESA to investigate the alleged breach and must be kept informed of the nature and purpose of the investigation.²⁰⁴

Where the competent authority of an EEA EFTA State does not comply with the recommendation of the relevant ESA setting out the action necessary to comply with the EEA Agreement, ESA may issue a formal opinion requiring the competent authority to take the action necessary to comply. This formal opinion takes into account the recommendation of the relevant ESA and is adopted based on a draft prepared by the relevant ESA at its own initiative or at the request of ESA.

Where a competent authority of an EEA EFTA State then does not comply with ESA's formal opinion, ESA may adopt an individual decision directly addressed to a financial market participant based in an EEA EFTA State requiring the necessary action to comply with its obligations (including the cessation of any practice).

Where ESA adopts such an individual decision directly addressed to a financial market participant based in an EEA EFTA State, it again does so on the basis of a draft prepared by the relevant ESA for that purpose, either at the request of ESA or on the initiative of the relevant ESA.²⁰⁵

(ii) Action in Emergency Situations (Article 18)

Through the incorporation of the ESAs founding Regulations into the EEA Agreement, the scope of application of Article 18 of these regulations is extended to include adverse developments occurring in or affecting the EEA EFTA States and the relevant ESA will accordingly be informed of any relevant development by the competent authorities of the EEA EFTA States. However, where the Council has determined the existence of an emergency situation, thereby authorising action by the relevant ESA in order to respond to the adverse developments, such powers only apply within the EU. Therefore the same powers are conferred to ESA as regards the EEA EFTA States.²⁰⁶

Where the Council has adopted a decision determining the existence of an emergency situation, and in exceptional circumstances where coordinated action by

197 JCD 199/2016, 200/2016 and 201/2016, adaptations (g), (i), (j), (k) and (l).

198 JCD 199/2016, 200/2016 and 201/2016, adaptation (d).

199 EEA Agreement, Article 111(3).

200 »2017 war ein Jahr mit Licht und Schatten«, Interview with Büchel Frank, ESA College Member, Liechtensteiner Vaterland, 29.12.2017.

201 JCD 199/2016, 200/2016 and 201/2016, adaptation (i).

202 Explanatory Notes of 4 March 2016 to JCDs 199/2016, 200/2016 and 201/2016, 3.

203 ESAs founding Regulations, Article 17(2) and (3).

204 JCD 199/2016, 200/2016 and 201/2016, adaptation (i).

205 JCD 199/2016, 200/2016 and 201/2016, adaptation (i).

206 Explanatory Notes of 4 March 2016 to JCDs 199/2016, 200/2016 and 201/2016, 4.

national authorities is necessary to respond to adverse developments which may seriously jeopardise the financial markets or the stability of the financial system in the EU, ESA may adopt individual decisions requiring competent authorities of the EEA EFTA States to take the necessary action.

Where a competent authority of an EEA EFTA State does not comply with the decision of ESA, ESA may then, where the relevant requirements laid down in the legislative acts referred to in Article 1(2) of the ESAs founding Regulations (including in regulatory technical standards and implementing technical standards adopted in accordance with those acts) are directly applicable to financial market participants, adopt an individual decision directly addressed to a financial market participant based in an EEA EFTA State.

In this decision, ESA may require the financial market participant to undertake the necessary action to comply with its obligations under that legislation (including the cessation of any practice). Important to note is that this only applies in situations in which a competent authority of an EEA EFTA State does not apply the legislative acts referred to in Article 1(2) of the ESAs founding Regulations (including regulatory technical standards and implementing technical standards adopted in accordance with those acts), or applies them in a way which appears to be a manifest breach of those acts, and where urgent remedying is necessary to restore the orderly functioning and integrity of financial markets or the stability of the financial system in the EU.

To ensure integration of the relevant ESA's expertise in this process, the relevant ESA will prepare a draft for ESA when the application of measures within the EEA EFTA States is deemed necessary. Decisions of ESA, whether requiring competent authorities to take the necessary action or, following non-compliance of a competent authorities, requiring a financial institution to comply with its obligations shall again, without undue delay, be adopted on the basis of drafts prepared by the relevant ESA at its own initiative or at the request of ESA.²⁰⁷

(iii) Settlement of Disagreements
between Competent Authorities
in Cross-Border Situations (Article 19)
and across sectors (Article 20)

As the competence to adopt decisions binding in the EFTA pillar is vested in ESA, the powers of the relevant ESA to adopt decisions under Article 19 of the ESAs founding Regulations also only apply within the EU, and the

same powers are conferred to ESA as regards the EEA EFTA States.²⁰⁸

Therefore, according to Article 19 of the ESAs founding Regulations, where a competent authority disagrees with another competent authority, the relevant ESA or ESA, as the case may be, may assist the competent authorities in reaching an agreement.²⁰⁹

However, only the relevant ESA shall at the initial, non-binding mediation (conciliation) act as a mediator and set a time limit for conciliation between the competent authorities. At this point, no role as mediator for ESA is foreseen (see below III.C.3.b).

If the competent authorities concerned fail to reach an agreement within the conciliation phase, the relevant ESA may take a decision requiring them to take specific action or to refrain from action, with binding effects for the competent authorities concerned in the EU Member States only.²¹⁰

However, where exclusively competent authorities of the EEA EFTA States are concerned, and where such authorities fail to reach an agreement within the conciliation phase, not the relevant ESA, but ESA may take a decision requiring them to take specific action or to refrain from action, with binding effects for the competent authorities concerned.²¹¹

Furthermore, in case of cross-pillar disagreement between competent authorities (i.e. between competent authorities of one or more EU Member States and one or more EEA EFTA States) and where such authorities fail to reach an agreement within the conciliation phase, the relevant ESA and ESA may take a decision requiring the competent authorities of respectively the EU Member States and the EEA EFTA States concerned to take specific action or to refrain from action, with binding effects for the competent authorities concerned.²¹² In the case of cross-pillar disagreements, decisions addressed to the EU competent authorities shall thus be taken by the relevant ESA and decisions addressed to the EEA EFTA competent authorities shall be taken by ESA in parallel.²¹³

Where a competent authority of an EEA EFTA State does then not comply with the decision of ESA, and thereby fails to ensure that a financial institution complies with requirements directly applicable to it by virtue of the acts referred to in Article 1(2) of the ESAs founding Regulations, ESA may adopt an individual decision directly addressed to a financial institution based in an

²⁰⁸ Explanatory Notes of 4 March 2016 to JCDs 199/2016, 200/2016 and 201/2016, 5.

²⁰⁹ JCD 199/2016, 200/2016 and 201/2016, adaptation (k)(i).

²¹⁰ JCD 199/2016, 200/2016 and 201/2016, adaptation (k)(ii).

²¹¹ JCD 199/2016, 200/2016 and 201/2016, adaptation (k)(iii).

²¹² JCD 199/2016, 200/2016 and 201/2016, adaptation (k)(iii).

²¹³ Explanatory Notes of 4 March 2016 to JCDs 199/2016, 200/2016 and 201/2016, 5.

²⁰⁷ JCD 199/2016, 200/2016 and 201/2016, adaptation (j).

EEA EFTA State requiring the necessary action (including the cessation of any practice).²¹⁴

It almost goes without saying that any decision by ESA under Article 19 shall, again, without undue delay, be adopted based on a draft prepared by the relevant ESA at its own initiative or at the request of ESA.²¹⁵

Disagreements do not only occur between competent authorities in cross-border situations (between one or more EU competent authorities) and cross-pillar situations (between one or more EU competent authorities and one or more EEA EFTA competent authorities). In addition, cross-sectoral disagreements may arise between competent authorities.

According to Article 20 of the ESAs founding Regulations, the Joint Committee of the ESAs is competent to settle such cross-sectoral disagreements. It shall do so in accordance with the procedure laid down in Article 19 of the ESAs founding Regulations and the ESAs holding relevant supervisory powers as regards the competent authorities involved adopt parallel decisions in accordance with Article 56 of the ESAs founding Regulations.²¹⁶

As the competence to adopt decisions binding in the EFTA pillar is vested in ESA, also an adaptation to Article 20 of the ESAs founding Regulations was necessary.²¹⁷

According to this adaptation, where exclusively competent authorities of the EEA EFTA States are concerned, ESA may take a decision to settle cross-sectoral disagreements. Where competent authorities of one or more EU Member States and one or more EEA EFTA States are concerned the relevant ESA respectively ESA may adopt parallel decisions in accordance with Article 19(3) and (4) of the ESAs founding Regulations.

Needless to say that also the decisions by ESA in accordance with Article 20 of the ESAs founding Regulations shall, without undue delay, be adopted based on drafts prepared by the relevant ESAs at their own initiative or at the request of ESA. As such consistency within the entire EEA can again be ensured.

(iv) Temporary Prohibition or Restriction (Article 9(5))

Finally, the JCDs by which the ESAs founding Regulations were incorporated into the EEA Agreement entrust ESA, as regards the EEA EFTA States, with the power to temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity

of financial markets or the stability of the whole or part of the financial system in the Union.²¹⁸

Such prohibition or restriction decision by ESA will be adopted based on a draft prepared by the relevant ESA, either at the request of ESA or on the initiative of the relevant ESA. As ESA, just as the ESAs, must review its decision at appropriate intervals (and at least every 3 months), it must inform the relevant ESA of the expiry date. This allows the relevant ESA to assess the necessity of renewing the measure and submit to ESA if necessary a draft for a new decision.²¹⁹

An EEA EFTA State may furthermore request ESA to reconsider its decision. In such cases, ESA shall forward this request to the relevant ESA, which shall consider preparing a new draft for ESA.

Finally, where the relevant ESA amends or revokes any decision parallel to the decision adopted by ESA, the relevant ESA shall, without undue delay, prepare again a draft for ESA.

The solution foreseen to involve the relevant ESA every time ESA may take, review or reconsider a decision according to Article 9(5) of the ESAs founding Regulations thus again ensures consistency within the entire EEA.

As mentioned above (see II.C.4.e), with regard to ESMA, Article 28 of the Short Selling Regulation empowers ESMA to impose conditions on short sales and even to prohibit short sales and Article 40 of MiFIR empowers ESMA to temporarily prohibit or restrict in the Union the marketing, distribution or sale of certain financial instruments or a type of financial activity. ESMA has so far only used this intervention power once and adopted a product intervention decision pursuant to Article 40 of MiFIR.

MiFIR has not yet been incorporated into the EEA Agreement and it remains uncertain if a similar regime, allocating ESA, as regards the EEA EFTA States, with similar intervention powers as ESMA will apply. For the time being however, it is clear that ESA is not competent to adopt product intervention decisions for the EFTA pillar pursuant to Article 40 of MiFIR.

The Short Selling Regulation has been incorporated into the EEA Agreement.²²⁰ This JCD entered into force on 1 February 2017 and foresees adaptations to Article 28 of the Short Selling Regulation allocating ESA, as regards the EEA EFTA States, with similar intervention powers as ESMA.²²¹ However, neither ESMA, nor ESA have so far adopted intervention decisions pursuant to the Short Selling Regulation.

214 JCD 199/2016, 200/2016 and 201/2016, adaptation (k) (iv).

215 JCD 199/2016, 200/2016 and 201/2016, adaptation (k) (iii) and (iv).

216 Explanatory Notes of 4 March 2016 to JCDs 199/2016, 200/2016 and 201/2016, 5.

217 JCD 199/2016, 200/2016 and 201/2016, adaptation (l).

218 JCD 199/2016, 200/2016 and 201/2016, adaptation (g).

219 JCD 199/2016, 200/2016 and 201/2016, adaptation (g).

220 Decision of the EEA Joint Committee No 204/2016 of 30 September 2016 amending Annex IX (Financial services) to the EEA Agreement, OJ L 46, 23.2.2017, p. 44-47.

221 JCD 204/2016, adaptation (d).

b. Take Actions of a Non-Binding Nature

It is clear from the JCDs incorporating the ESAs founding Regulations into the EEA Agreement, more precisely from the lack of adaptations regarding actions of a non-binding nature, that the ESAs remain competent to perform such actions of a non-binding nature in the whole of the EEA, also vis-à-vis competent authorities and market operators in the EEA EFTA States.²²²

Therefore, the ESAs are still competent to issue guidelines and recommendations²²³, also vis-à-vis competent authorities and market operators in the EEA EFTA States. Pursuant to Article 16(4) of the ESAs founding Regulations, the ESAs must report annually on the competent authorities that have not complied with its guidelines or recommendations issued. As the ESAs are competent to address guidelines and recommendations to EEA EFTA competent authorities and market operators, they also have to report on the compliance of the EEA EFTA competent authorities and market operators and distribute their Annual Reports to ESA.²²⁴

Furthermore, the ESAs remain competent to perform non-binding elements of the »interventional« powers to take binding decisions, also vis-à-vis competent authorities and market operators in the EEA EFTA States. As mentioned above (III.C.3.a.i) the ESAs thus remain competent to initiate investigations of alleged breaches of Union law/the EEA Agreement and to address non-binding recommendations in this procedure to the competent authorities of the EEA EFTA States. The ESAs also remain competent at the initial, non-binding mediation (conciliation) to act as a mediator between the competent authorities (see above III.C.3.a.iii).

c. Other Powers

As mentioned above (II.C.5) ESMA, as sole ESA, has been granted exclusive direct supervisory powers (including authorisation, ongoing supervision and on-site inspections) over credit rating agencies under Regulation (EU) No 462/2013 and trade repositories under Regulation (EU) No 648/2012. Both regulations have been incorporated into the EEA Agreement²²⁵ and similar adaptations as the ones for the ESAs founding Regulations regarding the adoption of binding decisions have been foreseen.

²²² Ibid 5.

²²³ ESAs founding Regulations, Article 16.

²²⁴ JCD 199/2016, 200/2016 and 201/2016, adaptation (h).

²²⁵ Decision of the EEA Joint Committee No 203/2016 of 30 September 2016 amending Annex IX (Financial services) to the EEA Agreement, OJ L 46, 23.2.2017, p. 35–43 and Decision of the EEA Joint Committee No 206/2016 of 30 September 2016 amending Annex IX (Financial services) to the EEA Agreement, OJ L 46, 23.2.2017, p. 53–60.

Therefore, ESA is the designated supervisory authority for credit rating agencies and trade repositories established in the EEA EFTA States and these agencies and repositories will need to be registered with ESA. ESMA however will maintain the day-to-day contact with the registered agencies and repositories²²⁶ and will perform the technical work in relation to the supervision if these agencies and repositories.

ESA will thus adopt binding decisions towards credit rating agencies and trade repositories established in the EEA-EFTA States, including the decisions related to registration, calculation and collection of fees and decisions to order investigations and on-site inspections as well as decisions to impose sanctions in case of non-compliance with applicable EEA law. Also these ESA decisions will be based on drafts prepared by ESMA²²⁷ and as mentioned above (III.C.3.a), ESA will apparently soon have to take its first decision to register (or refuse) an EEA EFTA based company as credit rating agency.

IV. Judicial Protection and Review

A. Introduction

In light of the far-reaching powers of the ESAs, especially the power to adopt binding decisions addressing national competent authorities and financial market actors, the question arises what mechanisms of legal protection those concerned may avail themselves of. Such far-reaching powers should go hand in hand with effective judicial protection and review mechanisms.

The EU legislator recognised this need to ensure that the parties affected by decisions adopted by the ESAs have recourse to the necessary remedies²²⁸ and therefore opened new judicial review avenues for market participants and national supervisory authorities against decisions by the ESAs.²²⁹ These judicial review mechanisms aim at ensuring an effective review at EU level, that is, a review that is sensitive to the needs of the regulatory system, but which at the same time gives the aggrieved party confidence that an independent appraisal will be made of the decision in question, and if necessary a remedy given.²³⁰

²²⁶ Ibid 195.

²²⁷ Ibid 195.

²²⁸ ESAs founding Regulations, recital 58.

²²⁹ Van Cleynenbreugel, Pieter, Judicial protection against EU financial supervisory authorities in the wake of regulatory reform, ELSA Malta Law Review (Vol. II, 2012), electronic copy available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2194172>, 232.

²³⁰ Blair, William, The role of judicial review in the EU's financial architecture and the development of alternative remedies: the experience of the Board of Appeal of the European Supervisory Authorities, Presentation at the Conference »Judicial review in the Banking Union and in the EU financial architecture« jointly

To protect effectively the rights of parties, and for reasons of procedural economy, where the ESAs have decision-making powers, the EU legislator granted parties a right of appeal to a Board of Appeal, being a joint body of the ESAs, (see below IV.B.1.). Subsequently a right of appeal against the decisions of this Board of Appeal before the CJEU²³¹ is foreseen (see below IV.B.2). Although this two-stage review procedure²³² aims at effectively protecting the rights of the parties affected by the ESAs, it is clear that the system of judicial protection inaugurated by the ESAs founding Regulations presents gaps²³³ and only partly ensures an effective review (see below IV.D).

As mentioned above (see III.A.3), when incorporating the ESAs founding Regulations into the EEA Agreement, ESA was allocated with the power to adopt decisions that are legally binding on competent authorities and market operators in the EEA EFTA States. For those competent authorities and market operators the obvious question thus arises what judicial protection and review mechanisms they can avail themselves to (see below IV.C) and if those mechanisms are effectively protecting their rights or also present gaps (see below IV.D).

B. Judicial Protection against the European Supervisory Authorities

1. The Board of Appeal

Articles 58 and 59 of the ESAs founding Regulations provide for the establishment of an independent and impartial Board of Appeal of the three ESAs. For reasons of efficiency and consistency²³⁴, this Board of Appeal is established as a joint body of the ESAs.²³⁵

The Board of Appeal is composed of six members (and six alternates), all individuals with a proven track record of professional experience in the fields of banking, insurance, occupational pensions and securities markets or other financial services, and with the necessary legal expertise to provide expert legal advice in relation to the activities of the ESAs.²³⁶

The Board of Appeal, which principally must be addressed prior to launching an action before the CJEU²³⁷,

does not provide actual judicial review but may be considered as a lower threshold dispute settlement opportunity²³⁸ and mainly serves the purpose of providing legal protection by a group of experts in the respective field, which a majority of the judges at the CJEU are not.²³⁹

Other potential benefits of a Board of Appeal compared to court proceedings include relative speed, relative procedural informality, lower cost and identification of key issues, meaning that if there is a further appeal to the CJEU, the issues have been clarified, making the task of deciding the case simpler for the CJEU.²⁴⁰

According to Article 60(1) of the ESAs founding Regulations, any natural or legal person, including competent authorities, may appeal against a decision of the ESAs referred to in Articles 17 (breach of Union law), 18 (emergency procedure) and 19 (supervisors' disagreement settlement). In addition, any other decision taken by the ESAs in accordance with the Union acts referred to in Article 1(2) can be subject of an appeal. An appeal may be brought by the person which is addressed in the decision, or is directly and individually concerned by a decision not addressed to him.²⁴¹

The appeal does in principle not have suspensive effect and is only admissible if goes together with a statement of grounds and is filed in writing within two months of the date of notification or publication of the decision.²⁴²

If the appeal is admissible, the Board of Appeal examines whether it is well-founded. It invites the parties to the appeal proceedings to file observations on its own notifications or on communications from the other parties to the appeal proceedings, within specified time limits. Parties to the appeal proceedings are also entitled to make oral representations.²⁴³

The Board of Appeal may confirm the decision taken by the relevant ESA, or remit the case to the relevant ESA. The relevant ESA is bound by the decision of the Board of Appeal and must adopt an amended decision regarding the case concerned.²⁴⁴

organized by Banca d'Italia and the European Banking Institute, 21 November 2017, available at <https://www.bancaditalia.it/media/notizie/2018/William_Blair_The_role_of_judicial_review.pdf>

231 In this contribution, I will only use the term Court of Justice of the European Union (CJEU) to indicate the general Union institution and not specify between the two courts it consists of, the Court of Justice and the General Court.

232 Ibid 229, 240.

233 Ibid 229, 250.

234 ESAs founding Regulations, recital 58.

235 ESAs founding Regulations, Article 58(1).

236 ESAs founding Regulations, Article 58(2) and <<https://www.esma.europa.eu/about-esma/governance/board-appeal>>

237 Ibid 16, 149.

238 Heidemann, Maren and Thomas, Dania, *Judicial Review in the Eurozone: The Court System as Regulator? The Case of the Sovereign Debt Crisis*, in Andenas, Mads & Deipenbrock, Gudula (Eds.), *Regulating and Supervising European Financial Markets, More Risks than Achievements* (2016), Springer, 342.

239 Ibid 16, 149.

240 Blair, William, *The experience and case law of the Board of Appeal of the European Supervisory Authorities*, Presentation at the Seminar 'Reflections on the design and implementation of the European Banking Union', organized by the European Banking Institute (EBI), 17 September 2016, available at <www.ebi-edu.eu>

241 Ibid 229, 242 for an analysis of the extent to which these standing conditions apply to ESAs decisions.

242 ESAs founding Regulations, Article 60(2) and (3).

243 ESAs founding Regulations, Article 60(4).

244 ESAs founding Regulations, Article 60(5).

In case of disagreement between competent authorities, one of which is a competent authority of an EEA EFTA State, a solution had to be found in order to ensure the respect of the right of the EEA EFTA competent authority to be heard in an appeal procedure before the Board of Appeal. Therefore, the JCDs by which the ESAs founding Regulations have been incorporated into the EEA Agreement foresee a special intervention possibility for the competent authorities of the EEA EFTA States.

If the appeal to the Board of Appeal concerns a decision of the relevant ESA adopted under Article 19 of the ESAs founding Regulations, in combination with Article 20 as the case may be, in a case where the disagreement also involves the competent authorities of one or more EEA EFTA States, the Board of Appeal shall invite the EEA EFTA competent authority involved to file observations on communications from the parties to the appeal proceedings. The EEA EFTA competent authority involved is furthermore entitled to make oral representations²⁴⁵ (see below IV.D.5).

Although a Board of Appeal offers important potential benefits, it should be pointed out that, in terms of decisions which are potentially the subject of appeals, the decision-making activity of the ESAs is limited. Apart from interventions when national competent authorities are not fulfilling their duties and certain emergency powers, it is at present only ESMA which has front line supervisory duties, namely over credit rating agencies and trade repositories.²⁴⁶ Therefore, the jurisdiction of the Board of Appeal is quite narrow: there have been only seven decisions²⁴⁷ handed down so far.²⁴⁸ This low number however only shows that the Board of Appeal is at an early stage of its development and actually says nothing about the potential the Board of Appeal has to provide a means of dispute resolution which combines legal expertise, relative speed and procedural informality at a lower cost than court proceedings.²⁴⁹ In other words, about the potential to contribute positively to the resolution of regulatory disputes within the field of its competence.²⁵⁰

2. The Court of Justice of the European Union

According to Article 61(1) of the ESAs founding Regulations, decisions taken by the Board of Appeal may be brought before the CJEU, in accordance with Article 263

TFEU. In cases where there is no right of appeal before the Board of Appeal, decisions taken by the ESAs may directly be brought before the CJEU, in accordance with Article 263 TFEU.

The number of decisions taken by the ESAs not amenable to Board of Appeal review and which thus can be directly appealed to the CJEU is limited²⁵¹: a decision to publish reasons for non-compliance with guidelines,²⁵² dispute settlement in relation to colleges of supervisors²⁵³, decisions appointing members of the Stakeholders Group²⁵⁴, decisions removing the Executive Director and decisions on the appointment and removal of members of the Board of Appeal.²⁵⁵ However, doubts as to which decisions exactly are the subject of an appeal will need to be resolved in the jurisprudence of the CJEU over time.²⁵⁶

Exceptionally, the ESAs may also be allowed to render binding acts of general application. The most prominent example is ESMA's power to prohibit the short-selling of financial products according to Article 28 of the Short Selling Regulation (see above II.B.5). Natural or legal persons may institute proceedings against these regulatory acts within the meaning of Article 263 TFEU only before the CJEU where they are of direct concern to them and do not entail implementing measures. Since Article 60(1) of the ESAs founding Regulations only refers to decisions of direct and individual concern to the applicant, these regulatory acts cannot be brought before the Board of Appeal.²⁵⁷

Proceedings before the CJEU against decisions of the ESAs may be instituted by the Member States and the Union institutions, as well as any natural or legal person to whom the decision was addressed or who is directly and individually concerned by the decision taken by the ESAs.²⁵⁸

In the event that the ESAs have an obligation to act and fail to take a decision, proceedings for failure to act can be initiated. These proceedings can exclusively be brought before the CJEU in accordance with Article 265 TFEU.²⁵⁹

Regardless of whether the CJEU judgement was issued according to Article 263 or Article 265 TFEU, the relevant ESA shall be required to take the necessary measures to comply with the judgment of the CJEU.²⁶⁰

245 JCD 199/2016, adaptation (y) and JCD 200/2016 and 201/2016, adaptation (v).

246 Ibid 240.

247 <https://eiopa.europa.eu/about-eiopa/organisation/board-of-appeal/decisions>.

248 Ibid 240 and 230.

249 Ibid 230.

250 Ibid 240.

251 Ibid 229, 248.

252 ESAs founding Regulations, Article 16.

253 ESAs founding Regulations, Article 21.

254 ESAs founding Regulations, Article 37.

255 ESAs founding Regulations, Article 58.

256 Ibid 230.

257 Ibid 16, 152.

258 ESAs founding Regulations, Article 61(2) and Article 263 TFEU.

259 ESAs founding Regulations, Article 61(3).

260 ESAs founding Regulations, Article 61(3) and (4).

For the sake of completeness, the role of the CJEU in the case of non-contractual liability of the ESAs should be mentioned briefly. According to Article 69 of the ESAs founding regulations, in the case of non-contractual liability, the ESAs shall make good any damage caused by them or by their staff in the performance of their duties and the CJEU has jurisdiction in any dispute over the remedying of such damage.

As mentioned above (see IV.B.1), the Board of Appeal has so far only handed down seven decisions. Needless to say that actions before the CJEU contesting decisions taken by the Board of Appeal are rare as well. Nevertheless, some decisions taken by the Board of Appeal have been subject to actions before the CJEU²⁶¹, showing a certain willingness by the market participants to initiate proceedings against decisions of the Board of Appeal and to fully explore the judicial review mechanisms available to them. By initiating such proceedings, the market participants also play an important role in determining the competence of the Board of Appeal to consider an appeal and the relationship between the jurisdiction of the Board of Appeal and the CJEU where both have jurisdiction.²⁶²

C. Judicial Protection against the EFTA Surveillance Authority

As mentioned above (see III.A.3), in the field of financial services, ESA was allocated with the power to adopt decisions that are legally binding on competent authorities and market operators in the EEA EFTA States.

For those competent authorities and market operators the obvious question thus arises what judicial protection and review mechanisms they can avail themselves to (see below IV.C.1) and if those mechanisms are effectively protecting their rights or also presents gaps (see below IV.D).

1. The EFTA Court

Thanks to the powers vested in it, ESA may take measures directly affecting the national supervisory authorities of the EEA EFTA States and, in certain cases such as extreme crisis situations, even directly affecting the financial intermediaries domiciled in an EEA EFTA State.²⁶³ Due to the two-pillar structure, which also encompasses judicial control (see above III.A.2 and III.C.1), legal

recourse against such ESA decisions is available not through the CJEU, but rather through the EFTA Court.²⁶⁴

To reflect the enhanced role of ESA and the EFTA Court, a new Protocol 8 to the SCA on the Functions and Powers of the EFTA Surveillance Authority in the Field of Financial Supervision was added to the SCA (see above III.B.3).²⁶⁵ Article 6 of this Protocol describes the judicial review mechanisms available for contesting a decision taken by ESA within the scope of this Protocol.

According to Article 6(1) of Protocol 8 to the SCA, proceedings may be brought before the EFTA Court by the EEA EFTA States or any natural or legal person, in accordance with Article 36 SCA, contesting a decision taken by ESA.

Article 36 SCA (the nullity procedure) essentially corresponds to Article 263 TFEU²⁶⁶ and provides that the EFTA Court has jurisdiction in actions brought by an EEA EFTA State against a decision of ESA on grounds of lack of competence, infringement of an essential procedural requirement, or infringement of the SCA, of the EEA Agreement or of any rule of law relating to their application, or misuse of powers. Any natural or legal person may, under the same conditions, institute proceedings before the EFTA Court against a decision of ESA addressed to that person or against a decision addressed to another person, if it is of direct and individual concern to the former.

If the action is well founded the EFTA Court declares the decision of ESA void and ESA must take the necessary measures to comply with the EFTA Court's judgment.²⁶⁷

Furthermore, in the event that ESA has an obligation to act and fails to take a decision, proceedings for failure to act may be brought before the EFTA Court in accordance with Article 37 SCA.²⁶⁸

Article 37 SCA (the action for failure to act) essentially corresponds to Article 265 TFEU²⁶⁹ and provides that, should ESA, in infringement of the SCA or the provisions of the EEA Agreement, fail to act, an EEA EFTA State may bring an action before the EFTA Court²⁷⁰ to

²⁶⁴ <<https://www.fma-li.li/en/international-affairs/europe.html>.>

²⁶⁵ Protocol 8 is without prejudice to the powers of ESA, in particular under Article 31 SCA, to ensure compliance with the EEA Agreement and the SCA (Protocol 8 SCA, Article 1). Article 31 SCA, the infringement procedure, provides that if ESA considers that an EEA EFTA State has failed to fulfil an obligation under the EEA Agreement or the SCA, ESA may ultimately bring the matter before the EFTA Court.

²⁶⁶ Ibid 165, 165.

²⁶⁷ SCA, Article 38.

²⁶⁸ Protocol 8 SCA, Article 6(2).

²⁶⁹ Ibid 165, 168.

²⁷⁰ The action shall be admissible only if ESA has first been called upon to act. If, within two months of being so called upon, ESA has not defined its position, the action may be brought within a further period of two months (Article 37 SCA).

²⁶¹ Judgment of 9 September 2015, *SV Capital OÜ v European Banking Authority (EBA)*, T-660/14, EU:T:2015:608 and Order of 24 June 2016, *Onix Asigurări SA v European Insurance and Occupational Pensions Authority (EIOPA)*, T-590/15, EU:T:2016:374.

²⁶² Ibid 230.

²⁶³ Ibid 170, 7.

have the infringement established. Any natural or legal person may also complain to the EFTA Court that ESA has failed to address to that person any decision.

The remedy provided for in Article 37 SCA is declaratory, requiring ESA to take the necessary measures to comply with the EFTA Court's judgment, pursuant to Article 38 SCA, without prejudice to any actions to establish non-contractual liability to which that declaration may give rise.²⁷¹ Indeed, just like the ESAs (see above IV.B.2), also ESA, in the case of non-contractual liability, must make good any damage caused by it, or by its servants, in the performance of its duties²⁷², and the EFTA Court has jurisdiction in such actions against ESA relating to compensation for damage.²⁷³

Finally, it should also be pointed out that, where the acts incorporated into Annex IX (Financial services) to the EEA Agreement foresee that fines and/or periodic penalty payments may be imposed by a decision adopted by ESA, the EFTA Court has, in accordance with Article 35 SCA, unlimited jurisdiction to review such decisions. The EFTA Court may thus annul, reduce or increase the fine or periodic penalty payment imposed by ESA.²⁷⁴

D. Gaps in Judicial Protection and Possible Solutions

Although the above described (see IV.B) two-stages judicial review mechanism²⁷⁵ makes, at first sight, a comprehensive and effective judicial review of decisions taken by the ESAs and their joint Board of Appeal possible, the system of judicial protection inaugurated by the ESAs founding Regulations nevertheless presents serious gaps.²⁷⁶ The same holds true for the system of judicial protection against ESA decisions, which does not even foresee a Board of Appeal, and thus does not provide legal protection by a group of experts in the field of financial services.

1. Suspension and Interim Measures by the Board of Appeal

Against a decision of the ESAs referred to in Articles 17, 18 and 19 of the ESAs founding Regulations and any other decision taken by the ESAs in accordance with the Union acts referred to in Article 1(2) of the ESAs founding Regulations, an appeal may be lodged with the Board of Ap-

peal (see above IV.B.1). Such an appeal does in principle not have suspensive effect. The Board of Appeal however may, if it considers that circumstances so require, suspend the application of the contested decision.²⁷⁷

In light of the far-reaching consequences such ESAs decisions may have for national competent authorities, financial institutions and financial market participants, it is questionable if the possibility for the Board of Appeal to suspend the application of the contested decision is an appropriate alternative for interim measures. Not only is this possibility limited to suspending the application of the contested decision, this suspension also depends on the view of the Board of Appeal and the appellant has no further means of redress in case the Board of Appeal does not want to suspend the application of the contested decision.²⁷⁸

Analysing the conditions under which such interim measures should be possible, the procedure to follow and if it should be for the Board of Appeal or perhaps the CJEU in the framework of the preliminary ruling procedure to take interim measures²⁷⁹, falls outside the scope of this contribution. It is however clear that, especially in the field of financial services, where time is of the utmost essence, one can well argue that the EU legislator should explicitly foresee a possibility to take interim measures, other than only suspending the application of the contested decision. Without the possibility for such interim measures, there is surely no complete effective judicial protection against ESAs decisions.

2. Non-Binding Guidelines and Recommendations

Guidelines and recommendations adopted by the ESAs pursuant to Article 16 of the ESAs founding Regulations are of non-binding nature (see above II.C.3) and the appeal possibility with the board of Appeal according to Article 60 of the ESAs founding Regulations is limited to decisions of the ESAs. Article 60 of the ESAs founding Regulations does therefore not provide a legal basis for challenging these guidelines and recommendations.²⁸⁰

Furthermore, the possibility foreseen in Article 61 of the ESAs founding Regulations to bring proceedings before the CJEU in accordance with Article 263 TFEU, is not completely satisfactory. Under Article 263(1) TFEU the judicial review includes the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. In numerous cases, the CJEU²⁸¹ held however that guidelines do not produce le-

²⁷¹ Ibid 165, 169.

²⁷² SCA, Article 46.

²⁷³ SCA, Article 39.

²⁷⁴ Protocol 8 SCA, Article 6(3).

²⁷⁵ Sonder, Nicolas, Rechtsschutz gegen Massnahmen der neuen europäischen Finanzaufsichtsagenturen, *Zeitschrift für Bank- und Finanzmarktrecht* (BKR) 2012, 10.

²⁷⁶ Ibid 229, 250.

²⁷⁷ ESAs founding Regulations, Article 60(3).

²⁷⁸ Ibid 275, 12.

²⁷⁹ Ibid 275, 12 for more information on this.

²⁸⁰ Ibid 1, 5.

²⁸¹ Judgment of 16 October 2003, *AstraZeneca A/S v Lægemeddelstrelsen*, C-223/01, EU:C:2003:546, paragraph 28.

gal effects vis-à-vis third parties and can only provide a helpful reference point for a judicial assessment.²⁸² Serious arguments might thus be brought against an admissibility of an action under Article 263(1) TFEU²⁸³ as the (negative) legal effects of guidelines and recommendations only indirectly occur once the national supervisory authorities apply these guidelines and recommendations²⁸⁴ and do not directly stem from the guidelines and recommendations themselves.

At first sight, guidelines and recommendations are thus mere soft law standards not amenable to judicial review²⁸⁵, neither before the Board of Appeal nor before the CJEU.²⁸⁶

Nevertheless, where exceptionally – and unlawfully – they do have binding effects, in legal scholarship the admissibility of an action before the CJEU according to Article 263(1) TFEU is sometimes affirmed.²⁸⁷ In addition, the Commission is also of the opinion that they should be subject to review under Article 263(1) TFEU, to the extent that guidelines and recommendations are intended to produce legal effects vis-à-vis third parties.²⁸⁸ Even the CJEU held in some cases²⁸⁹ that guidelines set forth « a rule of conduct indicating the practice to be followed, from which the administration may not depart without giving the reasons which have led it to do so » and therefore can be challenged.²⁹⁰

As mentioned above (see II.C.3), guidelines and recommendations of the ESAs can have a great influence on competent authorities, financial institutions or financial market participants because of the «comply or explain» and the «naming and shaming» mechanisms that are foreseen. Therefore, one could well argue that the ESAs founding Regulations »proceduralised« familiar soft law characteristics to an extent that would allow judicial review in particular instances, as these mechanisms turn these guidelines and recommendations into *de facto* binding supranational legal standards²⁹¹ and may actually give rise to noticeable *de facto* disadvantages for competent authorities, financial institutions or financial market participants.²⁹² It is therefore diffi-

cult to maintain, that these guidelines and recommendations do not produce legal effects vis-à-vis third parties and as such are not challengeable before the CJEU.

Only the EU legislator is however capable of foreseeing the legal basis to remedy the concerns about the appeal possibility according to Article 60 of the ESAs founding Regulations and the admissibility of an action before the CJEU according to Article 263(1) TFEU as foreseen by Article 61 of the ESAs founding Regulations. It should not be left to the CJEU or the national courts²⁹³ to enhance the judicial protection against guidelines and recommendations by means of judicial interpretation.

In order to provide a full and effective judicial protection at EU level, the EU legislator should thus explicitly foresee the possibility to lodge an appeal with the Board of Appeal according to Article 60 of the ESAs founding Regulations and to bring proceedings before the CJEU, in accordance with Article 263 TFEU, against guidelines and recommendations issued by the ESAs.

3. Technical Standards

As mentioned above (II.C.1 and II.C.2), the ESAs powers to develop draft RTS and draft ITS provided in Articles 10 and 15 of the ESAs founding Regulations cannot be underestimated. The technical standards review mechanisms foreseen by the EU legislator should therefore be complete and effective.

The Board of Appeal can however not be called upon to review these draft RTS and ITS. As these drafts only prepare the regulation or decision of the Commission and have no legal effect²⁹⁴ they do not qualify as decisions of the ESAs against which an appeal may be lodged.²⁹⁵

As RTS and ITS are formally adopted by the Commission by means of regulations or decisions²⁹⁶, and not by decision of the ESAs, the Board of Appeal of the ESAs can also not be called upon to review the adopted RTS and ITS.

Draft RTS and ITS can in principle also not be challenged before the CJEU under Article 263 TFEU because they are only preparatory acts, which do not constitute challengeable acts. However, it should be pointed out that the CJEU²⁹⁷ has been willing to review the legality of preparatory opinions to the extent that the Commission had little choice but to rely on it.²⁹⁸

282 Ibid 24, 150.

283 Ibid 102, 35.

284 For more information on this, see Hitzer, Martin & Hauser, Patrick, ESMA – Ein Statusbericht, Zeitschrift für Bank- und Kapitalmarktrecht (BKR) (2015), 59.

285 Ibid 229, 250.

286 Ibid 229, 252 for more information on the review options from a national law perspective.

287 Ibid 16, 152.

288 Ibid 1, 5.

289 Judgment of 30 January 1974, *Raymond Louwage and Marie-Thérèse Louwage, née Moriame, v Commission of the European Communities*, C-148/73, EU:C:1974:7, paragraph 12.

290 Ibid 24, 151.

291 Ibid 229 250.

292 Ibid 275, 11.

293 Ibid 229, 252 for more information on the review options from a national law perspective.

294 Ibid 284, 59.

295 ESAs founding Regulations, Article 60(1).

296 ESAs founding Regulations, Articles 10(4) and 15(4).

297 Judgment of 18 December 2003, *Olivieri*, T-326/99, EU:T:2003:351, paragraph 55 and Judgment of 11 November 1981, *IBM v Commission*, C-60/81, EU:C:1981:264, paragraph 12.

298 Ibid 229, 255.

The CJEU should extend this case law to review draft RTS and ITS developed by the ESAs upon review of Commission regulations or decisions incorporating them. As the Commission may not change the content of a draft technical standard prepared by the ESAs without prior coordination with the ESAs²⁹⁹, it is clear that the Commission has little choice but to rely on it. Therefore, it can well be argued that draft RTS and ITS should be challengeable in the course of actions for annulment against the final Commission regulation or decision incorporating them.

As technical standards incorporated in Commission regulations and decisions present legal acts that can be challenged following Article 263 TFEU, competent authorities, financial institutions or financial market players can of course challenge RTS and ITS by way of an action for annulment pursuant to Article 263 TFEU. In such actions for annulment, the ESAs' drafting role should not be neglected because the Commission is highly dependent on the ESAs' expertise and the ESAs have more knowledge of the scope, content and meaning of acts adopting technical standards than the Commission.³⁰⁰

However, no such formal role for the ESAs is foreseen, and this lack of mandatory involvement of the ESAs in Article 263 TFEU proceedings against technical standards presents a potentially significant enforcement gap³⁰¹, even when at the time of writing this contribution (April 2018), no action for annulment had been brought so far against RTS or ITS.

Therefore, a mandatory procedural intervention, either as defendant in conjunction to the Commission or as an intervening party should be foreseen. The CJEU has until now not firmly addressed the possibility for agencies, let alone the ESAs, to act as co-defendants with the Commission in actions for annulment. The CJEU should however find no problem to recognise their status as interveners.³⁰² As the ESAs bear particular responsibility in drafting or editing technical standards, they can establish an interest in the case at stake and should thus be allowed to intervene based on Article 40 of the CJEU Statute.³⁰³ Even though an intervener may only support the form of order sought by one of the parties, intervention would at least provide an opportunity for those affected by the decision to develop one's own argument in support of one of the parties.³⁰⁴

4. Participatory Rights

The ESAs founding Regulations embrace wide consultation of market participants and interested parties before adopting technical standards, guidelines or recommendations. 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.³⁰⁵

To help facilitate consultation with stakeholders in areas relevant to the ESAs' tasks, each ESA must firstly establish a Stakeholder Group. In providing opinions and advice, the Group has a right to have its opinion heard³⁰⁶ and it can be argued that refusal to grant that right to the Stakeholder Group in a particular situation infringes an essential procedural requirement of consultation. The CJEU has acknowledged already in other fields that this can result in annulment of the particular regulatory measure adopted.³⁰⁷ Judicial clarification by the CJEU about the applicability of this case-law within the ESAs judicial protection and review mechanisms is however necessary.

Secondly, 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.³⁰⁸ According to Articles 10(1), 15(1) and 16(2) of the ESAs founding Regulations, the ESAs must in these situations in principle conduct open public consultations³⁰⁹. However, the ESAs entertain significant discretion to organise or to omit these public consultations and also in this case the CJEU 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 regarding conducting public consultations.³¹⁰

5. Board of Appeal in the EFTA-Pillar

As mentioned above (see IV.B.1), the ESAs founding Regulations³¹¹ provide for an independent and impartial Board of Appeal of the three ESAs, composed of individuals with a proven track record of professional experience in the fields of banking, insurance, occupational pensions and securities markets or other financial services, and with the necessary legal expertise to

299 ESAs founding Regulations, Articles 10(1) and 15(1).

300 Ibid 229, 254.

301 Ibid 229, 253.

302 Ibid 229, 256.

303 According to Article 40 Statute of the CJEU Member States and institutions of the Union may intervene in cases before the Court of Justice. The same right shall be open to the bodies, offices and agencies of the Union and to any other person which can establish an interest in the result of a case submitted to the Court.

304 Ibid 229, 256.

305 Ibid 229, 258.

306 ESAs founding Regulations, Article 37.

307 Judgment of 17 February 2011, *Zhejiang Xinshiji Foods and Hubei Xinshiji Foods v Council*, T-122/09, EU:T:2011:46, paragraph 104.

308 Ibid 229, 258.

309 See also above II.C.1, II.C.2 and II.C.3.

310 Ibid 229, 258.

311 ESAs founding Regulations, Article 58 and 59.

provide expert legal advice in relation to the activities of the ESAs.

According to Article 60(1) of the ESAs founding Regulations, any natural or legal person, including competent authorities, may appeal against a decision of the ESAs referred to in Articles 17 (breach of Union law), 18 (emergency procedure) and 19 (supervisors' disagreement settlement). In addition, any other decision taken by the ESAs in accordance with the Union acts referred to in Article 1(2) of the ESAs founding Regulations can be subject of an appeal.

This Board of Appeal thus mainly serves the purpose of providing legal protection against decisions of the ESAs by a group of experts in the respective field, which a majority of the judges at the CJEU are not.³¹²

For competent authorities and market operators in the EEA EFTA States however, no such legal protection by a group of experts in the respective field against similar decisions of ESA is available, as the JCDs by which these regulations were incorporated into the EEA Agreement³¹³ do not foresee any adaptation setting up a Board of Appeal in the EFTA pillar. Unfortunately, these JCDs and the Explanatory Notes accompanying these JCDs³¹⁴ do not shed light on the reasons why no Board of Appeal has been foreseen in the EFTA pillar. Apparently, the EEA EFTA States did propose to have an EFTA Board of Appeal, composed of the same six members as the Board of Appeal of the ESAs. This was however, for whatever reasons, not accepted by the EU. Certain is only that for those competent authorities and market operators legal recourse against decisions of ESA is only available in the form of proceedings before the EFTA Court.³¹⁵

However, it must be pointed out that, a special intervention possibility for the competent authorities of the EEA EFTA States before the Board of Appeal has been foreseen in case of disagreement between competent authorities, one of which is a competent authority of an EEA EFTA State.

In order to ensure the respect of the right of the EEA EFTA competent authority to be heard in an appeal procedure before the Board of Appeal, the JCDs by which the ESAs founding Regulations have been incorporated into the EEA Agreement foresee the Board of Appeal shall invite the EEA EFTA competent authority involved to file observations on communications from the parties to the appeal proceedings. The EEA EFTA compe-

tent authority involved is furthermore entitled to make oral representations³¹⁶ (see above IV.B.1).

The fact that EEA EFTA competent authorities are entitled to file observations and make oral representations in an appeal before the Board of Appeal of the ESAs does however not change the fact that for those competent authorities and market operators in the EEA EFTA States no two-stage review procedure is available. They are thus deprived from legal protection by a group of experts in the respective field, as also the majority of the judges at the EFTA Court cannot be said to have this expertise.

One could argue that anyway there will be not many ESA decisions against which an appeal could be lodged, and that therefore the need for a Board of Appeal in the EFTA pillar is rather small. After all, the Board of Appeal of the ESAs has also handed down only seven decisions so far (see above IV.B.1).

This argument however, does not hold water. Even if there will only be a few ESA decisions against which an appeal could be lodged, what holds true for the parties affected by decisions adopted by the ESAs, holds true for the parties affected by decisions adopted by ESA. To protect effectively their rights³¹⁷, parties should be granted a right of appeal to a Board of Appeal in case ESA has decision-making powers.

Furthermore, an EFTA Board of Appeal for appeals against decisions adopted by ESA would offer the same benefits, the Board of Appeal offers: relative speed, relative procedural informality, lower cost and identification of key issues. The latter, meaning that if there is a further appeal to the EFTA Court, the issues have been clarified, making the task of deciding the case simpler for the EFTA Court.³¹⁸

In light of these benefits and the far-reaching powers of ESA to adopt binding decisions addressing national competent authorities and financial market actors, a judicial review mechanism without a Board of Appeal in the EFTA pillar does not constitute a comprehensive and effective judicial protection. The lack of such a Board of Appeal puts competent authorities and market operators in the EEA EFTA States at a disadvantage compared to their counterparts in the EU. Therefore, the EEA EFTA States, when negotiating the incorporation into the EEA Agreement of future amendments to the ESAs founding Regulations, should be prepared to discuss again with the EU the setting up of a Board of Appeal in the EFTA pillar.

³¹² Ibid 16, 149.

³¹³ JCD 199/2016, 200/2016 and 201/2016 of 30 September 2016.

³¹⁴ Access to the Explanatory Notes accompanying the JCDs by which the ESAs founding Regulations have been incorporated into the EEA Agreement can be applied for at the EFTA Secretariat. For more information on this: <<http://register.efta.int/>>

³¹⁵ Ibid 170, 7.

³¹⁶ JCD 199/2016, adaptation (y) and JCD 200/2016 and 201/2016, adaptation (v).

³¹⁷ ESAs founding Regulations, recital 58.

³¹⁸ Ibid 240 as regards the CJEU.

V. Conclusion

The financial crisis of 2007/2008 revealed important weaknesses in the EU supervisory regime. To tackle the shortcomings of nationally based supervisory models with insufficient cooperation between the national supervisory Authorities, the EU responded by overhauling its financial supervisory regime and created the ESAs.

These ESAs have been assigned with far-reaching powers, such as the power to develop draft RTS and ITS, to issue guidelines and recommendations and to take (individual) binding decisions.

In practice, the ESAs have not used all of the powers assigned to them as extensively. As for the power to take (individual) binding decisions, it is safe to say that they have so far not made noticeable use of it. However, the ESAs have used extensively the powers to develop draft RTS and ITS and to issue guidelines and recommendations. In doing so they have contributed to a stronger and more stable Single Market for financial services.

The sheer number of RTS and ITS the ESAs have drafted and the Commission has endorsed so far (mostly without changes) clearly illustrates that the ESAs' powers to develop such technical standards cannot be underestimated. And although formally not legally binding, guidelines and recommendations can have a great influence on competent authorities or financial market participants because of the »comply or explain« and the »naming and shaming« mechanisms that have been foreseen, making ESAs' guidelines or recommendations almost binding in nature.

In order to secure a homogeneous finance market throughout the whole of the EEA, the ESAs founding Regulations were incorporated into the EEA Agreement and ESA was allocated with specific tasks in supervising financial services. While the ESAs remain competent to perform actions of a non-binding nature, also vis-à-vis EEA EFTA competent authorities and market operators, ESA has the power to adopt decisions that are legally binding on EEA EFTA competent authorities and market operators established in the EEA EFTA States. One can criticise the fact that ESA will adopt such binding decisions based on drafts prepared by the relevant ESA by saying that ESA will only »rubber-stamp« the draft decisions it receives. However, this of course ensures integration of the ESAs expertise in the process and preserves the advantage of supervision by a single authority.

In light of the far-reaching powers of the three ESAs and of ESA, the question arises what mechanisms of legal protection those concerned may avail themselves of and if these mechanisms effectively protect the rights of parties. It is safe to say that the system of judicial protection against the ESAs and ESA only partly ensures an effective review and protection. Especially the

legal protection against guidelines and recommendations should be enhanced, as these guidelines and recommendations are *de facto* binding for competent authorities and market operators. Furthermore, the lack of a Board of Appeal against ESA decisions puts competent authorities and market operators in the EEA EFTA States at a disadvantage compared to their counterparts in the EU. Therefore, the EEA EFTA States, when negotiating the incorporation into the EEA Agreement of future amendments to the ESAs founding Regulations, should be prepared to discuss again with the EU the setting up of a Board of Appeal in the EFTA pillar.

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