Universität Konstanz

Towards optimal accountability and independence for financial market governance in the European Union

The European Securities and Markets Authority

Niamh Saunders

First Supervisor: Dr Matteo Gargantini

Second Supervisor: Dr Dirk Leuffen

Abstract

The purpose of this thesis project is to examine the relationship between accountability and independence for the European Securities and Markets Authority (ESMA). Normative in nature, this research works towards a new framework for optimising this relationship. In the wake of the financial crisis, as is often the case for crises, the case for institutional reform and the conferring of regulatory and supervisory powers on a central EU authority became compelling. Since its establishment in 2011, the ESMA's powers have developed significantly, cementing its status as an influential and central actor in European financial supervision. This project highlights the role of horizontal accountability mechanisms through a series of expert interviews with members of the Securities and Markets Stakeholder Group. Additionally, broader notions of accountability and independence are examined in a case study analysis of the ESMA's governance and legal frameworks against the Single Supervisory Mechanism of the European Central Bank. The research makes an argument for an increased role for the ESMA, however, indicates the necessity of a complimentary shift in the supervisory architecture.

Acknowledgements

Throughout the writing of this Masters thesis I have received a great deal of support and assistance. I would like to thank my supervisors, Dr Matteo Gargantini and Dr Dirk Leuffen, for their guidance and support. I would also like to thank the Securities and Markets Stakeholder Group members who took the time to speak with me, their insights were invaluable. Finally, I would like to thank my family and friends, particularly Ben Rissler, Rian Hesdahl and Paula Heckenberger who were a constant support and sounding board.

List of Figures and Tables

Table of Contents

1. **Introduction**

Delegation is at the very heart of the European integration process. Since the 1950s, national governments have increasingly delegated to the supranational level and, from there, to a variety of agencies and authorities. In doing so, the European Union (EU) has been moulded and strengthened in an effort to solve collective action problems (Delreux and Adriaensen, 2017). Simultaneous to further integration and delegation, a long-standing perception exists, expressing concerns that decision-making and delegation in the EU is not matched by equally effective and corresponding accountability mechanisms (Schmitter, 2000). In areas where a high degree of technical knowledge is needed, and/or of high level of political salience exists, is this concern exacerbated. Of particular significance, and the subject of this research project, is the challenge of striking an *optimal balance* between *accountability* and *independence* within the governance of financial and banking sectors in the EU.

As agency power is persistently advanced, so ought the relationship between those agencies and the European citizens they are answerable to. Accountability can be defined here as "the means by which public agencies and their workers manage the diverse expectations generated within and outside the organisation" (Romzek and Dubnick, 1998, 228). Created at an arm's length from national and EU authorities and often disproportionally overlooked by the public, agencies often face considerable challenges establishing a trust-based relationship with their citizens. What can this relationship really look like, however, when the agency's mandate requires technical expertise and autonomy for it to be effective? Such is the case for the European Supervisory Authorities (ESAs), particularly the European Securities and Markets Authority (ESMA), who has been granted increasingly broad and direct supervisory powers. Most recently, Commission proposals have pushed for further expansions to the competences of the ESAs, demonstrating a tangible, albeit incremental, step towards a centralised system of financial supervision. This idea is established in the *ESAs Review: Proposal COM(2017) 536 Final (2017); Proposal for a Regulation as Regards CCPs and Requirements for the Recognition of Third-Country CCPs COM(2017) 331 (2017)*, and, additionally, *Reinforcing Integrated Supervision to Strengthen CMU and Financial Integration in a Changing Environment COM(2017) 542 (2017) 13.* The salience of these conflicting notions is certainly not disregarded in financial governance literature, yet the issues become ever more pressing when considering ESMA's current powers and the very likely additions to its scope.

ESMA has significantly influenced and developed the scope of supervisory powers held by the EU around financial market supervision since its creation in 2011. Born in the aftermath of the 2007/2008 global financial crisis (GFC), ESMA, together with its counterparts in the new European System of Financial Supervision (ESFS), has transformed the scope of European financial supervision. Jean Monnet's belief that "*Europe would be built through crises, and that it would be a sum of their solutions*" is an enduring sentiment that resonates unmistakeably through the past two decades of crises in the EU and sees no exception in the creation of ESMA (Monnet, 1978)[1]. This year marks the ESMA's first ten years of existence and, as the first steps into the next decade are taken, it seems excellent timing to take stock of its current trajectory and the mechanisms in place to ensure democratic legitimacy. Undoubtedly, ESMA has fundamentally changed financial supervision and pushed the boundaries of agency powers and delegation in the EU. This transformation, and ESMA's unique institutional makeup, necessitate a closer examination of its corresponding accountability and independence relationships. This research project reflects on the considerable supervisory powers of ESMA and the normative question of optimal independence and accountability of financial market supervisors in the EU.

Expanding the context, ESMA sits within the broader EU system of financial governance, supporting the single financial services market as part of the European System of Financial Supervision (ESFS) and, fundamentally, acts in the interest of the EU (ESMA Regulation, Arts 1(5) and 2). As the most ambitious of the European Supervisory Agencies (ESA) and with significant direct supervisory powers, ESMA is ripe for analysis. Despite its simple and formal designation as an agency, ESMA has a complexity and multiplicity of characterisation that shapes its influence. Its many identities and spheres of influence often mask its overall impact on financial supervision in the EU, and as its mandate and authority evolve, so should discussions of its legitimacy. With elements of ESMA baring closer resemblance to aspects of the European Central Bank's (ECB) Single Supervisory Mechanism (SSM) than that of a traditional European agency, the ECB is a useful normative tool in evaluating optimal levels of independence. Grounding this analysis in EU agency literature, the many accountability relationships of ESMA, governance design, and similarities with the Banking Union's SSM will be considered. Through exploring the SSM arrangements, and with due consideration to its own drivers, developments within the ESMA accountability framework can be addressed (Howell, 2019).

1.1. Ripe for analysis: Areas of supervisory convergence and Brexit

Three main areas of supervisory convergence have been identified as opportunities for the ESMA to extend its technocratic influence (Moloney, 2018). These areas are financial

[1] The creation of agencies in the context of crises extends beyond the ESAs following the financial crisis. For example, others have been established as a response to crises like the BSE crisis and the oil tanker Erika disaster.

stability, retail markets and consumer protection, and financial innovation, and alongside Brexit have facilitated the space for the ESMA to expand its scope and impact. The expert interviews conducted provide evidence of these opportunity areas and even expand further, introducing potential growth areas in Chapter 5.

1. At the time of the ESMA's creation in 2011, a mandate of financial stability was relatively new and unique (Anand, 2010). Although the related tasks of the financial stability mandate focus on monitoring, it is also embedded within the ESMA's supervisory convergence agenda, allowing it to extend its influence in supervisory convergence actions (Moloney, 2018). From 2014, the ESMA became increasingly aware of prudential/banking regulators awareness of financial market stability risks and their encroachment onto the remit of financial market regulators. This was illustrated in the ESMA Board of Supervisors discussions from 2014 that hinted towards a greater influence of EU and global financial market stability risks agendas (ESMA/2014/BS/125, ESMA/2016/BS/201, and ESMA/2016/BS/259). There is space here for the ESMA to claim its territory and expand its supervisory convergence activities.
2. The ESMA has a significant mandate in the areas of retail markets and consumer protection, as outlined in Articles 8 and 9 of the ESMA Regulation (1095/2010). An increased enthusiasm is evident in these areas, with consumer protection a priority in recent Supervisory Work Programs (2017, 2018, 2019). Additionally, the ESMA has become more intrusive within the work of national regulators (NCAs), illustrated in the Peer Review of the Wirecard case. Consumer protection issues were prioritised within the expert interviews, and a greater role was advocated for the ESMA by multiple respondents.
3. Article 9 of the ESMA Regulation requires the ESMA to monitor, adopt guidelines and recommendations, and support the coordination of areas of financial innovation regulation. So far, the ESMA has adopted a timid approach. However, with continuing growth in areas of financial technology, innovation, Distributed Ledger Technology (DLT) and the development of Markets in Crypto Assets Regulation proposal released earlier this year, there are significant opportunities for an increased role.
4. Brexit is likely to continue to present opportunities to expand the ESMA's powers, particularly over 'third country actors' and their access arrangements (Moloney, 2018).

The opportunities to expand the ESMA's influence are significant. Therefore, this research project attempts to assess whether the ESMA's accountability arrangements and current governance structure is fit-for-purpose for its developing role.

1.2. Research Question and core concepts

The research question resulting from this goal is: *Considering ESMA's increased powers, are the corresponding accountability measures sufficient? Further, regarding the comparisons drawn between the SSM and ESMA, is the balance between independence and accountability that characterizes the latter optimal?*

Sub-questions

1. What lessons/comparisons can be drawn from the SSM towards the broader discussions of accountability/independence balances in financial governance, particularly the ESMA?
2. Considering the accountability, independence and optimization definitions adopted in the previous chapter, how does the ESMA perform in each of these regards?
3. What role does horizontal accountability play in financial market supervision?

1.3. Chapter Structure

The thesis structure proceeds as follows:

(1) Literature Review and Theory

The literature review discusses the current literature on accountability and independence. Principal Agent theory is the dominant theoretical approach when considering EU agencies and their accountability mechanisms. An initial discussion of optimal accountability/independence relationship will be examined here in light of theoretical considerations. This section is important in determining what can be regarded as an optimal balance of independence and accountability. Literature on ESAs and the ECB's accountability structures will be discussed here, working towards a series of indicator levels found in different mechanisms that can be discussed with experts and tested further.

(2) Case study: the ESMA and SSM - Legal Analysis, Governance Analysis and Judicial Accountability

Here the development of ESMA and the ECB's SSM is explored, establishing the differing historical institutional evolutions as context. Firstly, this section will be an assessment and critical analysis of current powers and accountability requirements. Here the most similar case study between the SSM and ESMA will be explored. This section will make a normative evaluation of the current relationship between accountability and independence using the ECB as a point of reference.

(3) Expert Interviews

The expert interview as a method of qualitative empirical research has been a widely discussed qualitative method in political and social research since the early 1990s. It aims at exploring or collecting data about a specific field of interest. Meuser and Nagel (2009) describe the expert interview as a qualitative interview based on a topical guide, focusing on the knowledge of the expert, which is broadly characterised as specific knowledge in a certain field. Data retrieved from experts was useful in determining the *optimal balance* between independence and accountability, taking into consideration an expected bias by technical focussed experts towards independence. Additionally, it sheds a light on non-traditional and horizontal indicators of accountability – specifically within and towards the Securities and Markets Stakeholder Group (SMSG). Manifestations of accountability tend to be linked to the dominant mechanisms of coordination to which the organisation is subject (Brandsen et al., 2011). Of which, information exchange, assessment of performance, sanctioning power and formal requirements will be examined. This approach explores the relevance and success of vertical and horizontal accountability measures and their relative importance in technical fields will be weighted accordingly.

Since the ESMA's establishment in 2011, it has inserted itself as a decisive actor within the governance of the EU's financial markets. Certainly, the financial market governance can be easily divided between pre- and post-ESMA eras. This thesis explores its many roles, governance structures and accountability/independence relationships, exposing nuances and complexities that are worth consideration.

2. Literature Review and Theoretical Perspective

Literature on accountability and the ESMA is varied and dense for its relatively young age, with scholars adopting a ‘wait and see’ approach (Busuioc, 2010). So far, scholars have concerned themselves with legal and institutional matters, the nature of its influence and ESMA’s design and governance, largely neglecting normative questions of optimal design[2]. This project focuses on the optimal relationship between accountability and independence for financial supervisors. The following chapter discusses the available literature on these themes and its applications to financial governance. EU agency literature provides insights on how agencies like ESMA develop and evolve, the relevant challenges, and highlights ESMA’s unique features within this context. Political economy analyses of EU financial governance shed light on the preferences that shape ESMA’s operating environment (see Quaglia, Howarth and Liebe 2016). Non-traditional forms of accountability, specifically horizontal accountability, will be explored together with the (potential) applications and implications for financial governance. Finally, a discussion of principal agent theory grounds the analysis in subsequent chapters, with the aim of contributing to this theoretical basis with the adoption of non-traditional principals.

2.1. Agencification

Beginning in the 1970s, subsequent decades have seen a considerable increase in delegation to regulatory and supervisory agencies, justified by their superior performance as compared with government departments. Agencies are archetypally independent from their political principals and are granted delegated powers to deliver their mandates, although they are also confined by these mandates and by related constrains on their operation and discretion (Thatcher and Stone Sweet, 2002). Non majoritarian in nature, technocratic and administrative agencies, like ESMA, are not legitimated by representation. Instead, their technical expertise and specialist capacity allows the prioritisation of regulatory and long-term goals that may have otherwise been vulnerable to political influence. This independence has even been put forward as a core argument to justify their creation (Majone, 2000). The need for independence is clear, yet the question

[2] There is a substantial amount of literature that contributes ideas on developing frameworks of accountability for European agencies. Authors like Scholten and van Rijsbergen 2014 use the ESMA-Short Selling case to argue for the necessity of a legal basis for agencies in the treaties yet focus more broadly on agency accountability rather than specifically for ESMA. Niamh Moloney (2011,2019) and Di Noia and Gargantini (2013, 2014), among others, do offer recommendations for ESMA’s accountability arrangements.

remains: how much independence is necessary and what corresponding accountability measures ensure the legitimacy and effectiveness of the agency?

The balance between necessary oversight and accountability, and the efficiency of independent agencies is even more pertinent given the perception that agency creation has taken place in the shadows and without explicit basis in the treaties (Curtin, 2004 and 2006). This perception is not unfounded – like the creation of the CESR and Lamfalussy negotiations, the construction of ESMA was completed in an extraordinarily short time frame[3]. Niamh Moloney (2011a) highlights that despite the complexity and salience of the issues involved, EU institutions are quick to utilise crisis situations and moments of political favourability to embrace institutional reform. Moloney's two-part article series in 2011 makes an important distinction between the rule-making and supervisory powers of ESMA. Here, she indicates the potential risks and differing dynamics between the two sets of powers. On the one hand, a compromise of independence is considered for the rule-making powers, suggesting a flawed institutional design due to Treaty restrictions troublesome regarding Commission control and ESMA independence. And by contrast, when looking at the supervisory powers, she suggests that the line may have been drawn too far on the side of operational centralisation (Moloney, 2011b). At the time of creation, and still today, local supervision of the EU rulebook represented an important safety net for the European financial market. The challenge of dividing powers between NCAs and ESMA, Moloney suggests, may not have been successful.

2.2. Accountability, independence, and the inherent problem of delegation

The importance of the independent management of financial regulation and supervision is recognised by mainstream legal and economic literature. In fact, the reasons suggested by legal doctrine as a basis for requiring independence of agencies and supervisors are similar to those used to support the independence of central banks (Quintyn and Taylor, 2007). One explanation is a need to avoid regulatory capture by industry. For example, supervised credit institutions may try to make the authority sensitive to their needs beyond what is economically beneficial to society.[4] Most common as a justification for entrusting regulatory and supervisory powers with independent bodies, however, is the need for both technical competencies and the time inconsistency in policy choices.[5] The logic runs as

[3] Approximately 20 months for ESMA. The initial Lamfalussy Report was presented in November 2000 and the Commission Decision establishing CESR was adopted in June 2001.
[4] A real-world example of regulatory capture is the crisis of the Savings and Loans Banks in the USA in the 1980s.
[5] Time-inconsistency describes situations where, with the passing of time, policies that were determined to be optimal yesterday are no longer perceived to be optimal today and are not implemented. The time-inconsistency explanation is typically developed for monetary policy by central banks and reasons that without independence

follows: politicians may be inclined to favour short term policies, with the aim of re-election, whereas regulators should be less easily influenced by such incentives (Alesina and Tabellini, 2008 and Quintyn and Taylor, 2003). Yet, this increased independence necessary in financial governance must be met with corresponding accountability arrangements. Delegation involves endowing another party with the discretion to act, representation is about the interests that are at stake, and accountability is meant to ensure that the exercise of discretion is checked (Brandsma and Schillemans, 2012).

Often described in conflicting terms, the challenge seems to be striking a sufficient balance between accountability and independence (Geradin, 2005). Or, as Everson described, "*herein, the dilemma for any lawyer concerned with the institutional design of independent agencies. To satisfy the first criterion, that of the insulation of agencies from petty politics, agencies must be afforded independence. At the same time, however, the second prerequisite of public accountability must also be satisfied*" (Everson, 1995 p.183). This chapter begins to explore the many complexities involved in this relationship, and the particularly relevant mechanisms that are applicable to the case of financial supervision in the EU.

The fraught dynamic between accountability and independence is most easily recognised in the context of an agency like the ESMA. The first aspect of the relationship is the obligation of the agent (in this case agency) to report to its principal (or multiple principals). The control exercised by the principal is also possible as prior authorisation before a decision is implemented. Prior authorisation is of relevance for the ESMA with its array of delegated and direct supervisory powers. These powers are conferred as prior authorisation through a legal framework like the ESMA Regulation. The second part is, naturally, the reaction to this – whether the agent is rewarded or reprimanded for its actions. This seemingly simple and vertical relationship becomes distorted when certain mechanisms of accountability impinge upon the agent's independence. The case of the ESMA's multiple principals complicates the situation further, allowing for greater agency discretion to take place.

The technical demands of ESMA, and other European agencies, require a high degree of independence to carry out their mandates effectively. By definition, an agent is assigned a task because the principal cannot or does not want to carry out the task themselves, and without some level of independence an agent is unable to be accountable for its

---

from politics, they would be tempted to systematically inflate prices to lower unemployment and increase nominal growth output.

actions. The significance of independence is even more noteworthy when agents must utilise their own experience or knowledge to come to an outcome that cannot be defined *ex ante* by a principal, which is most certainly the case for explicitly defining market outcomes resulting from technical decisions implemented by ESMA. Nicolaides and Preziosi (2014) examine the idea of meaningful agency delegation through clearly defined boundaries of what needs to be achieved and how it is possible to reach that outcome. They do so through the Commission's ten-page explanation of how to make "pizza napolitana"; included is the ingredients, how they should be mixed to create the dough, toppings, and baking instructions, followed by a description of the output product[6] (COM Regulation 97/2010). The point being here – very little is left to discretion. To compare, the authors examine Article 28 of Regulation 236/2012 on short selling, which defines the 'exceptional circumstances' in which ESMA has intervention powers.[7] For the ESMA, unlike pizza napolitana, it is not apparently clear what exactly must be prohibited (input), nor is it clear if the resulting effect will be the desired outcome (output). In this case, the desired outcome is outlined in Article 1 of the founding the ESMA's founding regulation:

> *The objective of the Authority shall be 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. The Authority shall, within its respective competences, 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 that the taking of investment and other risks are appropriately regulated and supervised, (f) enhancing customer and investor protection, (g) enhancing supervisory convergence across the internal market.* (Regulation 1095/2010 Art. 1 (5))

However, these objectives are difficult to measure, nor are they based on one single variable, rather it is a composite concept that depends on many conditions.

Another strand of literature that deals with accountability and legitimacy of EU agencies debates the limits of agencification and whether empowering agencies with legally binding powers is in line with the *Meroni-Romano* delegation doctrine. The doctrine has been

---

[6] "a round product baked in the oven with a variable diameter not exceeding 35cm and a raised rim and the central part is garnished. The central part is 0.4cm thick, with a tolerance of plus or minus 10%, and the rim is 1-2cm thick. The overall pizza must be tender, elastic and easily foldable into four."

[7]Short selling can be defined as the sale of shares, of which the seller does not actually own, with the prospect that the share prices will eventually decline so that they can be re-purchased at a lower price.

governing the limits of EU delegation since 1958. With the growing strength of ESMA's powers and absence of treaty provisions defining the scope of powers that can be delegated to agencies, it is of no surprise that the delegation of powers to ESMA has been challenged before the Court (Scholten and van Rijsbergen, 2014).

2.3. Accountability

The concept of accountability has been studied and applied in several scientific disciplines, most prominently by governance scholars and political scientists. The results amount to a distinct lack of consensus on what the concept entails (Bovens, Goodin, and Schillemans, 2014). Firstly, the concept has seen an 'ever-expanding' inclusivity in definition, with many authors using their own specific definitions to aid a normative assessment of accountability within a specific policy area (Brandsma and Schillemans, 2012). Secondly, terms like 'transparency', 'accountability', 'legitimacy', 'power', 'control' and 'delegation' are all used interchangeably. This can have implications for the comparability of studies, with a lack of clarity of the precise subject of observation. Developing conceptual clarity is thus an important aspect of the literature review and theoretical framework developed in this project. The common thread tying most explanations is a reference to a specific social relationship or mechanism that involves an obligation to explain and justify one's past conduct (Day and Klein 1987, Romzek and Dubnick 1998, Strøm 2000, Mulgan 2003, Bovens 2007). Bovens (2007) specifically distinguishes types of accountabilities based on forum (legal, political, social, administrative, and professional), actors (corporate, hierarchical, collective, and individual), conduct (financial, procedural and product) and obligation (vertical, diagonal, and horizontal). In addition to these types, a variety of mechanisms can be identified. The broad definition adopted in this research, which will be further built upon, is from Mark Bovens (2007, 450): "Accountability is a relationship between an actor and a forum, in which the actor has an obligation to explain and justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences." Similar sentiments are observed in the definitions presented by Day and Klein (1987), Strøm (2000), Romzek and Dubnick (1998), and Mulgan (2003).

The modern problem of multiple accountabilities is addressed in Romzek and Dubnick's four-fold typology of accountability (Romzek and Dubnick, 1987). Their popular definition defines accountability as "the means by which public agencies and their workers manage the diverse expectations generated within and outside the organisation" (Romzek and Dubnick, 1998, 228). ESMA, like other ESAs, is accountable to the European Parliament and the Council (Art. 3 Regulation 1095/2010). In addition, specific provisions make ESMA accountable to specific the Commission, as well as the represented Member States (DG Internal Policies, 2013). Here, the persistent need to meet the many accountability requirements and relationships is established, requiring a reformed framework that addresses these complexities and competing demands. In addition to these vertical accountability relationships, this research will highlight the benefits of an increased role for horizontal accountability actors, including investors, market participants, consumers, citizens, and stakeholders in general.

2.4. Defining agency independence

The Oxford English Dictionary defines 'independent' as "not depending on the authority of another, not in a position of subordination or subjection; not subject to external control or rule". By these definitions, is a European agency independent? With the definition relying on a complete absence of any kind of dependence, the answer seems to be no. To simplify the governance structures that will be discussed in detail in later chapters: the ESMA is dependent on the delegation of powers from the Commission to achieve its mandate; the ESMA is subordinate to the Council, Commission and Parliament, and answerable to appeals on its decisions at the European Court of Justice; further, while the ESMA is subject to direct external controls from all previously mentioned actors, it is subject to the legal framework of the EU.

To add some context here, when proposing the establishment of a common framework for regulatory agencies, the Commission commented: "it is particularly important that agencies should have genuine autonomy in their internal organisation and functioning if their contribution is to be effective and credible" (Communication from the Commission on the Operating framework for the European regulatory agencies, COM (2002) 718. p.5). Further, the Commission stated that "the main advantage of using the agencies is that their decisions are based on purely technical evaluations of very high quality and not influenced by political or contingent consideration". While not independent by the dictionary definition, agency independence in the EU is instead ensured through legal personality, budgetary autonomy, collective responsibilities, administrative powers, and independence of governing/managing actors and internal committees (COM (2009) 59 p.6).

2.5. Principal Agent Theory

Political science research often uses dyadic principal-agent models to explore accountability. In these terms, accountability essentially refers to the information that a principal demands from his agent. Although this model generally applies to instances of vertical accountability, it can also be used to understand horizontal accountability relationships. In this model, the basic purpose of accountability is to prevent agency drift and manage the information asymmetry between principal and agent (Strøm 2000; Lehn 2008).

This approach is particularly suitable for the analysis of gaps in systems of accountability where agents seem to be exempted from ordinary hierarchical channels of democratic accountability as they are separated from their superiors. Principal-agent models traditionally distinguish between *ex ante* and *ex post* control instruments, focussing on the extent to which the principal is informed about his agent's decisions and behaviour, and the positive or negative incentives the principal can impose on the agent (Brandsma and Schillemans, 2012). Often referred to as the 'information phase' and the 'consequences phase', these distinctions prioritise the preferences of the principal as determinants of agency loss (or decrease in operational independence), neglecting informal means and discussions. Meier and O'Toole (2006), however, indicate that particularly in settings characterised by agency autonomy, the preferences of the principal are likely to be shaped during interaction with the agent. Thus, most conceptions of accountability agree on three evolving steps, information, discussion, and consequences, that together constitute accountability (Day and Klein 1987, 5; Braitwaite 1997, 31; Romzek and Dubnick 1998, 6; Lerner and Tetlock 1999, 255; Mulgan 2003, 9).

The EU context often presents significant challenges in deciding whether an actor should be treated as a principal or an agent. In this context, the 'chain of delegation' concept offers somewhat of a solution, allowing for simultaneous consideration of multiple dyadic principal-agent relations that are linked to each other in the sense that one actor is at the same time an agent and a principal (of another agent) (Bergman et al. 2000; Nielson and Tierney 2003). Conversely, however, this concept becomes less useful when it comes to the ability to grasp the hybrid nature of actors. In addition to correctly identifying the roles of principal and agent, is the challenge of specifying the object of delegation. For the ESMA, this hybridity is, for example, illustrated in its relationships with NCAs. Both actors are accountable to each other. The ESMA facilitates coordination of NCAs and can produce recommendations or judgements at times of inaction. Yet, it is reliant on Heads of NCAs within its decision-making body, the Board of Supervisors, and is further subject to Member States as principals within the Council.

As alluded to here, the standard principal-agency theory in the case of ESMA presents some significant challenges to delegation. However, it does provide some interesting insights that accountability can have on efficiency. For example, the differing demands of the ESMA's principals, the Commission, Parliament, Council, and Member States, run the risk of becoming a cumbersome strain on efficiency. However, the multiplicity of principals could arguably be of a productive nature, particularly given the potential for the NCA representatives on ESMA's Board of Supervisors to support not just technical efficiency in the delivery of the EU interest, but also a degree of input legitimation by representing notional 'delegations' from the Member States and some form of Member State political oversight.

The need for independent bureaucracy is recognised by Weber as a natural complement to a democratic political system. He argued that while democracy may have increased the power of the people, it would not render equal treatment by the state unless the administration would become more independent (Weber, 1978: 984). We return to the idea that the attainment of output legitimacy can at times result in minimising input legitimacy. Despite challenges to the principal-agent model, it is useful for explaining the dynamics of delegation and discretion in the EU. To successfully implement this in future research, it should be applied cautiously with an emphasis placed on institutional mapping.

2.6. Horizontal Accountability

Accountability can be categorised in several ways, many of which are explored above, however some authors have made a distinction between vertical and horizontal accountability (see Mulgan 2003; Day and Klein 1987: 28; Sinclair 1995: 223; Scott 2000: 42; Goetz and Jenkins 2001: 363; Keohane 2002: 22; Bovens 2005 and Schilleman 2011). *Vertical* accountability is based on the principle of ownership and is seen implicitly in the principal-agent approach, in other words, a superior and a subordinate (accountor and accountee). In the case of *horizontal* accountability, scholars largely agree that the accountee is independent from both agent and principal and thus does not fit within the traditional spectrum of a principal-agent relationship[8]. The literature diverges, however, on whether horizontal is an extension of the principal-agent relationship or whether it offers something distinct and complimentary. The second option has dominated the literature, suggesting that horizontal accountability can be beneficial particularly from a learning perspective (Aucoin and Heintman 2000; Behn 2001; Bovens et al 2008).

[8] Schilleman (2011) defines four elements of horizontal accountability: (1) A relationship between an accountor and an accountee qualifies as a case of horizontal accountability when it is formalized, acknowledged by the accountor and the accountee is independent from the hierarchical principal of the accountee and the accountor; (2) the accountability process begins with the information phase, where the accountor is obliged to explain and justify their conduct; (3) after which the debating phase follows, in which the accountee poses questions, they engage in dialogue, and the accountee passes judgment; and, (4) consequences: the accountor may face consequences through either formal sanctions or informal consequences through published voice or voice in policy networks.

As agencies and institutions are becoming increasingly independent, types of horizontal accountability have been offered as a remedy to accountability deficits and to compliment traditional or hierarchical accountability (Scott, 2000; Mulgan, 2003; Bovens, 2005; Schillemans, 2008). Specifically, horizontal accountability has been highlighted as a promising solution to the accountability problems of agencies (Schillemans, 2011). These problems are generally related to the size, scope, and complexities of agencies, often with multiple principals (national and European) to remain accountable to. The raison d'etre of most agencies is to facilitate coordination and harmonisation among member states, thus many evolved from networks whose aim was to coordinate NCA's. This embryo stage has consequences for their governance and accountability arrangements, which, arguably, are incompatible with traditional Weberian notions of accountability[9]. Chapter 4 will analyse the impact of this evolution on the financial governance of two EU financial supervisors, ESMA and the ECB's SSM, and the current and potential role of horizontal accountability mechanisms.

The conceptual murkiness surrounding the definition of accountability has led to a problematic gap in the literature (Busuioc, 2010). Within the sphere of accountability assessments of EU agencies, studies have differed significantly in their recommendations: from a cautious evaluation that "*a more intense delegation of responsibilities and powers to agencies, it is true, may pose a threat to the Meroni principles of institutional balance and democratic accountability. But, for the time being, I think that it would be better to keep watching them, and to wait and see*" (van Ooik, 2005: 152). Conversely, the need for swift action is proposed by others: "*European mechanisms must be found which ensure that such bodies, their independence notwithstanding, may nevertheless be answerable to each of the organs of the Union, to the individual Member States and to the European public*" (Everson, 1995: 198).

Reflecting ESMA's central role in EU financial market governance and its expanding influence, a significant pressure has been placed on ESMA's legitimation and accountability arrangements. The following chapters analyse the current arrangements of ESMA (and the SSM), attempting to come to an improved balance between the efficiency of independence and the necessary accountability of EU agencies.

[9] Weber was concerned by an increasing bureaucratisation and intervention by the state in areas of evaluation and auditing (Murphy 2009).

3. Research Design

Normative research projects are inherently murky in nature. Without a clear demarcation of the desired scope and content of analysis, the potential contribution to society and the literature is limited. This inadequacy points to the problem that, in general terms, accountability debates have largely stayed on a theoretical or abstract plain without supporting arguments with comparable evidence. While an empirical measurement of the ESMA's accountability is not the objective of this study, it is an element that must be considered with due care. I refer again here to the goal of this research – to develop a framework for an *optimal* balance between *independence* and *accountability*. In this chapter, these three core terms will be addressed in the research design.

Grounded firmly in EU agency literature and principal-agent theory, this chapter will address the inherent concerns of a largely normative research project. The multiplicity of principals concerned with the ESMA warrants a duplicity of design. The chapter proceeds as follows. Firstly, the normative problem of measuring accountability is examined. Firstly, the 'most similar' case study approach is introduced, and the scope of its analysis is explored and justified. Finally, the use of expert interviews as a framework building tool is explained.

This research benefits from expert interviews, analysis of legal accountability and cases, as well as a wider examination of ESA accountability. This research adopts and expands upon the work of Brandsma and Schillemans (2012). The authors present an 'accountability cube' - a three-dimensional space in which accountability relationships can be plotted. It utilises the three core elements of accountability (information, discussion, and consequences) as is generally agreed upon in the literature. The role horizontal accountability mechanisms play, particularly in the information and discussion stages, will be emphasised in my analysis.

This approach focuses on a mechanism-based explanation for accountability and independence respectively. The notion of a mechanism-based explanation, of which its development was motivated by the shortcomings of a previously hegemonic covering-law account of explanation and of purely statistical explanations, simply implies that explanations should deal with the cogs and wheels of the causal process that brought about a certain outcome (Hempel 1965; Hedström and Ylikoski 2010). Importantly, a mechanism-based explanation describes the causal process selectively – meaning it does not aim to provide an exhaustive account of every specific detail, rather It highlights the most crucial elements of the process. The relevance and significance of these details is determined by their potential difference to the outcome of interest. In this case, this process is guided by the current literature and observations from expert interviews.

Main Research Question: *Considering ESMA's increased powers, are the corresponding accountability measures sufficient? Further, regarding the comparisons drawn between the SSM and ESMA, is the balance between independence and accountability that characterizes the latter optimal?*

Sub-questions:

4. What lessons/comparisons can be drawn from the SSM towards the broader discussions of accountability/independence balances in financial governance, particularly the ESMA?
5. Considering the accountability, independence and optimization definitions adopted in the previous chapter, how does the ESMA perform in each of these regards?
6. What role does horizontal accountability play in financial market supervision?

These questions will be built upon with normative assessments of effectiveness and optimization.

3.1. Measuring Accountability and the Accountability Cube

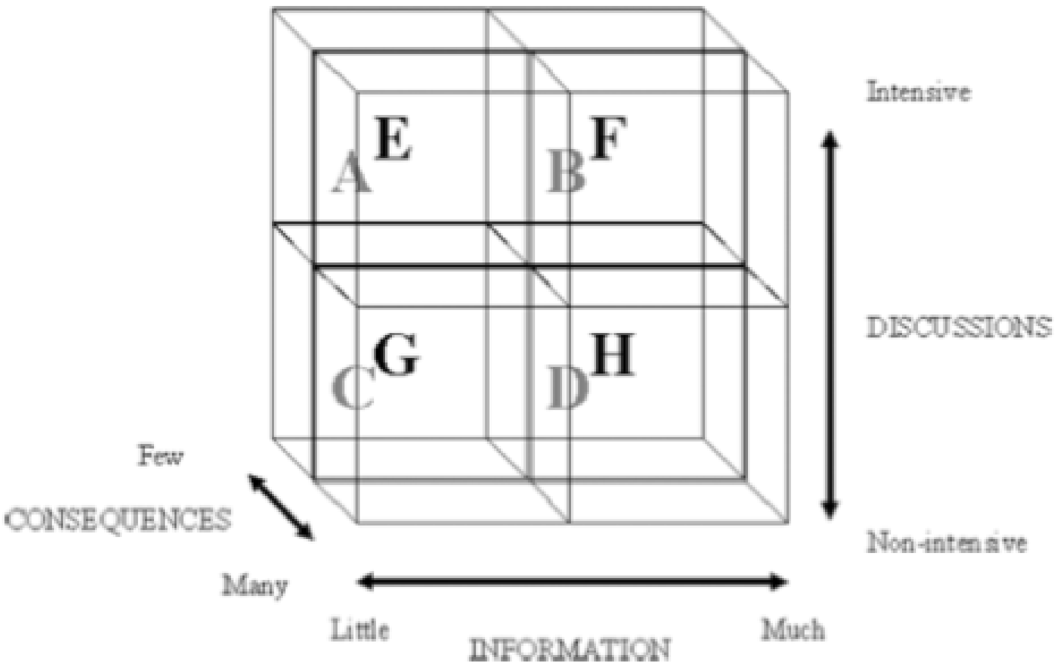
The measurement of accountability was highlighted as a problematic aspect of the literature in the previous chapter. Given that most scholarly contributions so far have focused on single case studies, there is significant space to explore multiple case studies and comparative projects. Important to note here; it is not the objective of this project to measure explicit levels of accountability, rather it highlights specific moments of accountability deficits and seeks to improve the current framework using several methodological tools.

The accountability cube, developed by Brandsma and Schillemans (2012), is demonstrated in Figure X. It is an accountability mapping tool designed to examine the three phases of accountability processes. The authors note the importance of analysing these sub-concepts separately, while also discussing them together as a whole. Each of the dimensions has the possibility of higher and lower results, in total resulting in eight possible outcomes for a general characterisation of the accountability relationship. An example sub-question like *how effective is the ESMA stakeholder group in ensuring accountability*, could be plotted on the cube to highlight areas of deficit or high levels of perceived accountability.

It should be emphasised that this is a tool that visually measures the concentration of accountability processes and helps to pinpoint areas that are lacking, however, it cannot overcome the question of whether empirically establishing an accountability deficit is normatively problematic (Brandsma and Schillemans 20122). The answer to this, is subject to what is subjectively perceived as good governance. As the data and analysis examined in this study does not meet the requirements for empirically measuring accountability, instead the three stages are used, as suggested by the authors, to identify points that are lacking. Similarly, the interrelationship these three stages have with independence is discussed.

The accountability cube is not a perfect solution to this empirically lacking literature. Firstly, it measures specific instances of accountability, useful in the authors' used case of comitology proceedings, however, not as useful in the case of agencies where there are multiple relationships to consider. Secondly, it does not recognise the issue of failing principals within the dynamic of principal-agent theory. The research question in this project dictates the necessity of a corresponding importance weighted to the levels of independence and the 'output efficiency' of the agency. Moreover, the measurement of an optimal balance, defined as the best possible outcome, is a very subjective term. With regards to the ESMA, an optimal balance is firstly described of the quality of accountability/independence regarding the achievement of objectives. These objectives are first and foremost the agencies mandate, however, as seen in later chapters this could be expanded to incorporate a broader set of tasks. The mapping techniques that can be utilised through the accountability cube, however, offer a useful offset this subjectivity of optimality problem. Similarly, when we think of an optimal balance between accountability and independence, we face the issue of measuring this against an 'output', which in the case of ESMA and financial governance is a difficult scenario to measure. In aid of this, specific cases, such as the Wirecard case and the short selling case will be used as specific examples where the outcome, or perhaps lack of negative outcome, can be more easily observed.

Figure 1 Accountability Cube



Source: Brandsma and Schillemans (2012)

Table 1 indicates the three accountability phases, outlining the core parts of the following chapters analysis.

Table 1 Accountability Stages

	General
Information	The information stage refers to an exchange of knowledge on the topic of discussion, as well as the context of decision-making. The main for aspects of the information stage are: governance decisions, policy performance, transparency and interactions with stakeholders.
Discussion	This stage can be seen in both formal and informal forms. However, the central point of this element is to develop a consensus or point of view through an exchange of views.
Consequences	This stage exemplifies the principal's approval or disapproval of behaviour. This can include sanctions, rewards, or, particularly in the case of horizontal accountability mechanisms, more informal feedback, or onboarding of opinions.

3.2. Case Selection: the ESMA and SSM

As mentioned in Chapter 1, studying the SSM alongside the ESMA offers a proof-of concept for increased supervisory integration. Whilst recommending a new integrated SSM-like structure for the ESMA is not the objective, it highlights the balance between independence and accountability for a body with increased powers and independence.

The case selection method for the ESMA and SSM is most similar. This method, in its purest form, is a pair of cases which are similar on all measured independent variables, bar the independent variable of interest (Seawright and Gerring 2008; Lijphart 1971, 1975; Przeworski and Teune 1970; Skocpol and Somers 1980). In this instance, the variables could be simply understood as X_1 = supervisory powers, X_2 = governance structure, X, with the measured Y value perceived levels of accountability.[10] Table 2 provides an overview explanation of the variables studied. This section focuses predominantly on the vertical accountability mechanisms, as they provide the greatest scope for comparability between the two cases. Due to the research goal, which requires a normative assessment of optimal balance, this research represents both X-centred and Y-centred designs.

The SSM, designed specifically as a single supervision mechanism for Eurozone banks, provides substantial evidence for an integrated supervisory structure (Moloney, 2018a). This is not to say that simply transplanting this structure directly into the EU's capital markets supervisory structure would be without several constitutional, political and governance complexities. Further differences can be inferred from the ECB's (and SSMs) status as a Treaty institution, meaning that comparisons with an agency like the ESMA can only be extended so far. Nevertheless, an exploration of the SSM can provide some insights for the future role of the ESMA. Specifically, the Parliament's role as an accountability forum for the SSM through the Banking Dialogue is an example of potential accountability improvements to the ESMA (Amtenbrink and Markakis, 2018).

[10] X_1 is the similar background conditions. X_2 is the variable of difference. Y is the variation in outcome.

Table 2 Most similar cases: the ESMA and SSM variables

Cases	X_1 (Supervisory powers and independence)	Governance	Accountability	Independence (Capacity to act in emergent situations is also analysed)	Development
ESMA	The ESMA has a quasi-regulatory mandate, as well as its supervisory powers over CRAs.	Two tier governance system, with the Board of Supervisors the primary decision-making body. Management board, Board of Supervisors (made up of Member State NCA representatives, Chairperson, Commission representative, single member representatives from the other ESAs)	Ex ante controls include the boundaries in its founding regulation. Ongoing controls and accountability occur through the NCAs, as well as the Commission. Ex post accountability includes financial mechanisms (Commission's say on the budget). The Commission also plays a role in the ESMA's staff employment policies. In terms of political accountability, the ESMA is accountable to the Council and Parliament and is subject to considerable reporting requirements. The ESMA also engages informally with the Parliament and its Economic and Monetary Affairs Committee. Joint Board of Appeal and CJEU can decide appeals by affected parties against decisions taken by the ESAs.	This section will refer to cases, such as the Short Selling case and analyse the capacity of the ESMA to act in emergent situations, as well as the validity of such actions.	A product of the Financial Crisis

			Horizontal accountability within the Joint Committee of the ESAs.		
SSM	Supervisory responsibility for 'significant' credit institutions Overseas national authorities' direct supervision of 'less significant' banks	Comprises a Supervisory Board with a Chair and Vice Chair, four ECB representatives, and one national authority representative from each participating country	The ECB is accountable for its supervisory role to the Council and the Parliament. Regular reporting and review requirements to the Commission and the Euro Group. The ECB must also reply to questions put to it by the Euro Group or Parliament. The European Court of Auditors can also review the supervisory activities of the ECB when it examines its operational efficiency. Additional obligations apply with regards to the Parliament and its competent committees. The Parliament also plays a role in appointing and removing the Chair or Vice Chair. Reporting obligations also apply to the national Parliaments of Participating Member States.	The IMF 2018 FSAP report highlighted the capacity of the Supervisory Board and Governing Council, despite high membership levels, to act efficiently and swiftly in emergent situations (IMF, 2018). Delegation framework has since been implemented, allowing ECB managerial staff to adopt routine decisions (SSM Supervisory Manual, 2018).	A product of the Financial Crisis

Source: The information in this table is provided in the founding regulations of both the ESMA and the SSM.

3.3. Expert Interviews and the SMSG

Meuser and Nagel (1991) define experts as persons who are responsible for the development, implementation, or control of a solution, or persons who have privileged access to people or decision-making processes. Based on this criterion, members of the ESMA Stakeholders Group (SMSG) can be identified as ESMA experts. The group is made up of a combination of academics, consumer representatives, financial market participants, users of financial services and small and medium enterprises, of which the respondents represented all bar small and medium enterprises. The SMSG's role is to facilitate consultation between the EMSA, its Board of Supervisors and stakeholders on the ESMA's areas of responsibility and provides technical advice on its policy development. This process represents a significant aspect of the agency's horizontal accountability framework and ensures that stakeholders can contribute to the formulation of policy from its initial stages.

Generally, expert interviews are distinguished by their epistemological function and can be separated into three types: exploratory, systemising, and theory generating (Bogner and Menz 2009). Stefanie Döringer (2021) attempts to move beyond traditional approaches to the expert interview, rather combining the theory generating expert interview with the problem-centred interview (PCI) to emphasise the interpretative expert knowledge. The benefits to this approach allow a contribution with social relevance to the expert knowledge, while also highlighting individual perspectives through the PCI approach.

Largely the interview structure was formatted in line with PCI specific research design tools for conducting interviews. To summarise the structure, it follows an initial open-ended question to stimulate a narrative based on the individuals concerns. The interview guide is outlined in Appendix 1. Despite the guide, the interviews were relatively free in their structure, dependent on the time constraints of the respondent, personal interests, relevance of specific topics, and capacity to answer openly. Following the interviews, they were then verbatim transcribed and coded accordingly. Due to the relatively small N, the coding process acted as an analytical exercise that guided the normative assessments of the ESMA's accountability. Here, I define coding as the process of defining the data you are analysing, or in other words, a process in which one searches for and identifies concepts and finds relations between them (Gibbs, 2007). While cross-over issues identified by all respondents were examined in greatest detail, specific issues brought up by smaller percentages of respondents are also addressed, reflecting the constituencies that they represent.

From a design perspective, the validity of these interviews, in terms of saturation, is regarded as a non-issue as the interviews were uitlised as guiding tools rather than subjects to be measured. The term saturation was first developed by Glaser and Strauss (1967) as a part of their influential 'grounded theory' approach to qualitative studies. In their sense, saturation refers to the "point in data collection when no additional issues or insights emerge from data and all relevant conceptual categories have been identified, explored, and exhausted" (Hennink, Kaiser and Marconi 2016). The small pool of participants reflects the small pool of experts there were to draw from. Even within this expert group, knowledge areas and concerns differed significantly, thus the aim was geared towards the development of a breadth of knowledge and opinions, as opposed to saturation. Nonetheless, saturation and validity of results will be discussed in the following chapters.

4. Case studies: the ESMA and the SSM

This chapter explores the role of the ESMA, an analysis of its development and its governance and accountability structures. Secondly, it addresses the ECB's Single Supervisory Mechanism, its evolution, and the existing similarities and differences of governance impacting its accountability/independence dichotomy. This chapter is not advocating for a an SSM-like structure for Capital Markets, rather it aims to illustrate the current obstacles in place for an integrated supervisory structure. The case study comparison of the SSM and the ESMA, considering the ESMA's increasing competences, examines whether the current accountability and independence relationships are optimal for its expanding role. As previously stated in Chapter 3, attention will be drawn to the three stages of accountability: information, discussion, and consequences, to discern potential accountability deficits within the comparison.

4.1. ESMA: Origins and Development

The period following the GFC has seen the EU overhaul and strengthen the supervisory framework for banking and financial markets. The crisis critically challenged the previous Lamfalussy system[11] and revealed the need for reform. In February 2009, the Commission released a report based on the work of a High-Level Group that suggested the establishment of an integrated system of financial supervision (de Larosière Report, 2009). What was then suggested by the Commission, and in turn created, was the European System of Financial Supervision (ESFS). The ESFS includes the Member States' national regulators or national competent authorities (NCAs), the European Systemic Risk Board (ESRB), to deal with macro-stability issues, and three European Supervisory Agencies (ESA): the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA). The ESFS is a single-market-oriented, coordination-based arrangement, which captures the vast population of financial actors subject to EU regulation. It aims at:

[11] The Lamfalussy process introduced a new four-level law-making model in financial services. Level 1: adopting framework principles in specific areas of substantive law by Directives or Regulations under the ordinary legislative procedures of Art. 294 TFEU; Level 2: contretising framework principles by the Commission by means of implementing measures adopted under Comitology procedures; Level 3: advising the Commission on the feasibility of measures proposed at level 2 by the so-called level 3 committees – Committee of European Securities Regulators (CESR), Committee of European Banking Supervisors (CEBS), Committee of European Insurance and Occupational Pension Supervisors (CEIOPS); Level 4: envisaging timely and correct transposition of EU legislation into national law and taking action against Member States if transposition was not in compliance with European law.

> "*Upgrading the quality and consistency of national supervision, strengthening oversight of cross-border groups and establishing a European single rule book applicable to all financial market participants in the internal market*" (Regulation 1095/2010).

Although the ESFS represents a single system, it's coordination limits among the sectoral division of competences between the ESAs has coordination limits, as will be discussed in Chapter 5. Conversely, the Banking Union is an active executive construct, based on centralised supervision and risk mutualization, and currently limited in scope to banks. Nonetheless, there are leakages and synergies between the ESFS and Banking Union that have shaped ESMA's development (Moloney, 2018).

ESMA's establishment in 2011 replaced the Committee of European Securities Regulators (CESR). The CESR was created on 6 June 2001 by the European Commission under the terms of the Commission's Decision (2001/527/EC). It was founded to advise on the technical details of securities legislation to enhance cooperation between the EU and national supervisory agencies. ESMA's founding regulation (1095/2010) recognises the shortcomings of the previous system, notably in the areas of cooperation, coordination, consistent application of Union law and trust between national supervisors.

In 2015 the Juncker Commission created the agenda for the formation of a pan-European capital market called the Capital Markets Union (CMU). Its goal was to promote economic growth and greater financial stability across the EU. The combination of the completion of the CMU, as well as the UK leaving the EU, has created a potent context for reform. The ESA Review in 2017/2018, as well as the new direct powers that will be in place at the beginning of 2022 highlight the ESMA's ever-growing powers. The stress these new powers place on the current governance and accountability structures will be explored in this chapter, and further in Chapter 5.

4.2. ESMA: Powers

Financial market regulation and supervision in the EU can be divided into pre and post ESMA periods. Since its establishment in 2011, ESMA has exerted significant influence over a short period of time. ESMA is exclusively competent for the direct supervision of credit rating agencies (CRAs) and trade repositories (TRs), and is the only ESA that can exercise monitoring, investigating and sanctioning powers by itself. Its mandates are delivered under the 2010 ESMA Regulation, as well as subsequent legislative empowerments. Despite a straightforward description, ESMA can be characterised in a few ways: as a component of the ESFS, a form of financial market regulator; an EU agency, directed to single market support; and an EU/international network actor. The nature of its complexity and hybridity are important to recognise, particularly as the ESMA's role 'hardens' into the territory currently held by national competent authorities (NCAs). The research goal is to examine the ESMA's role in financial market supervision (in doing so, each of ESMA's characterisations will be explored) and the challenges posed to its effectiveness, accountability, and legitimacy as a technocratic EU agency.

There are several issues to unpack in relation to the ESMA. Firstly, the authority experienced a relatively speedy rise to the role of a powerful direct supervisor. This occurred following a series of Commission proposals over 2017/2018, which have been further extended to include increased direct powers in 2022. The nature and implications of ESMA's influence have changed since its inception in 2011. With the above-mentioned completion of the CMU agenda coinciding with Brexit creating a context for continued reforms to occur and, in doing so, placing significant stress on its original governance structures (Moloney, 2018). Secondly, the ESMA is institutionally distinctive in its hybridity: part agency, part traditional financial market regulator, part international standard-setter. Despite agencies being a standard part of the modern EU governance apparatus, the ever-evolving nature of financial market supervision and its increasingly overlapping and interconnected policy objectives, means the ESMA requires further examination.

The ESMA Regulation (1095/2010) places as ESMA as part of the ESFS and, somewhat ambiguously, as an independent Union 'body' with a legal personality (Articles 2(1) and 5(1)) and requires the ESMA to act in the interest of the EU alone (Article 1(5)). The ESMA's objective is directed to its single market setting and is to protect the public interest by contributing to the short-, medium-, and long-term stability and effectiveness of the financial system, for the EU economy, its citizens and business (Article 1(5)). This main objective is complemented by a number of auxiliary ones covering the improvement of the functioning of the internal market, ensuring the integrity, transparency, efficiency, and orderly function of financial markets; strengthening international supervisory coordination; preventing regulatory arbitrage and promoting equal conditions of competition; ensuring the taking of investment and other risks are appropriately regulated and supervised; and enhancing consumer protection (Article 1(5)). The main tasks and powers conferred on the ESMA can be classified into four areas: regulatory governance, supervisory convergence, risk assessment and direct supervision (ESMA, Annual Report on 2017). Although the other ESA's carry out similar tasks, direct supervision is a distinct feature of the ESMA's design and necessitates further analysis. Table 3 highlights the 9 major policy areas of the ESMA and their corresponding legislation.

Table 3: 9 Major Policy Areas and their Legislative Frameworks

Policy Area	Main (simplified) legislation	Legislation
Corporate Disclosure / Financial Reporting	2003 Prosepectus Directive / 2017 Prospectus Regulation, 2994 Transparency Directive, and 2002 International Accounting Standards Regulation (IAS Regulation)	Directive 2003/71/EC [2003] OJ L345/64; Regulation (EU) No 2017/1129 [2017] OJ L168/21; Directive 204/109/EC [2004] OJ L390/38; and Regulation (EC) no 1606/2002 [2002] OJ L243/1
Credit Rating Agencies (CRAs)	2011 Consolidated Credit Rating Agency Regulation (CCRAR)	Directive 2003/71/EC [2003] OJ L345/64; Regulation (EU) No 2017/1129 [2017] OJ L168/21; Directive 204/109/EC [2004] OJ L390/38; and Regulation (EC) no 1606/2002 [2002] OJ L243/1
Fund Management	2009 Undertakings for Collective Investment in Transferable Securities (UCITS) Directive, 2011 Alternative Investment Fund Managers Directive, 2013 European Venture Capital and European Social Entrepreneurship Fund Regulations (EU-VECA and EUSEF Regulations), 2015 European Long Term Investment Fund Regulation (ELTIF Regulation), and 2017 Money Market Fund Regulation (MMF Regulation)	Directive 2009/65/EC [2009] OJ L302/32; Directive 2011/61/EU [2011] OJ L174/1; Regulation (EU) No 345/2013 [2013] OJ l115/1; Regulation (EU) No 346/2013 [2013] OJ L115/18; Regulation (EU) No 2015/760 [2015] OJ L123/98; and Regulation (EU) No 2017/1131 [2017] OJ L169/8
Investor Protection	2014 Markets in Financial Instruments Directive II (MiFID II) and 2014 Packaged Retail investment and Insurance Based Production Regulation (PRIIPs)	Directive 2014/65/EU [2014] OJ L173/349 and Regulation (EU) No 1286/2014 [2014] OJ L352/1
Market Abuse	2014 Market Abuse Regulation	Regulation (EU) No 596/2014 [2014] OJ L173/1

Markets and Investment Firms	MiFID II and 2014 Markets in Financial Instruments Regulation (MiFIR)	Regulation (EU) No 600/2014 [2014] OJ L173/84
Benchmarks	2016 Benchmark Regulation	Regulation (EU) No 2016/1011 [2016] OJ L171/1
Short selling	2012 Short Selling Regulation	Regulation (EU) No 236/2012 [2012] OJ L86/1
Post-trading	2012 European Market Infrastructure Regulation (EMIR) and 2014 Central Securities Depositories Regulation (CSDR)	Regulation (EU) No 648/2012 [2012] OJ L201/1 and Regulation (EU) No 909/2014 [2014] OJ L257/1

4.3. The ESMA: Direct Supervisory and Intervention Powers

Firstly, the ESMA has powers to direct NCAs and market participants to take specified action when the exceptional circumstances set out in the ESMA regulation arise[12]. Secondly, the ESMA has been conferred with some sector specific intervention powers in relation to short selling, product/service intervention, and commodity derivatives markets. Finally, the agency has exclusive and direct supervisory jurisdiction over two sets of EU regulated actors: trade repositories and credit rating agencies. From 1 January 2022, an additional two new direct supervisory powers have been added to the ESMA's remit:

1. Benchmarks: ESMA will supervise critical benchmarks and their administrators. In addition, ESMA will be responsible for the recognition of third-country benchmarks;
2. Data Service Providers: In 2022, the authority will also have the supervisor powers to authorise and supervise different types of data service providers, for example, Approved Publication Arrangements, Authorised Reporting Mechanisms and Consolidated Tape Providers.

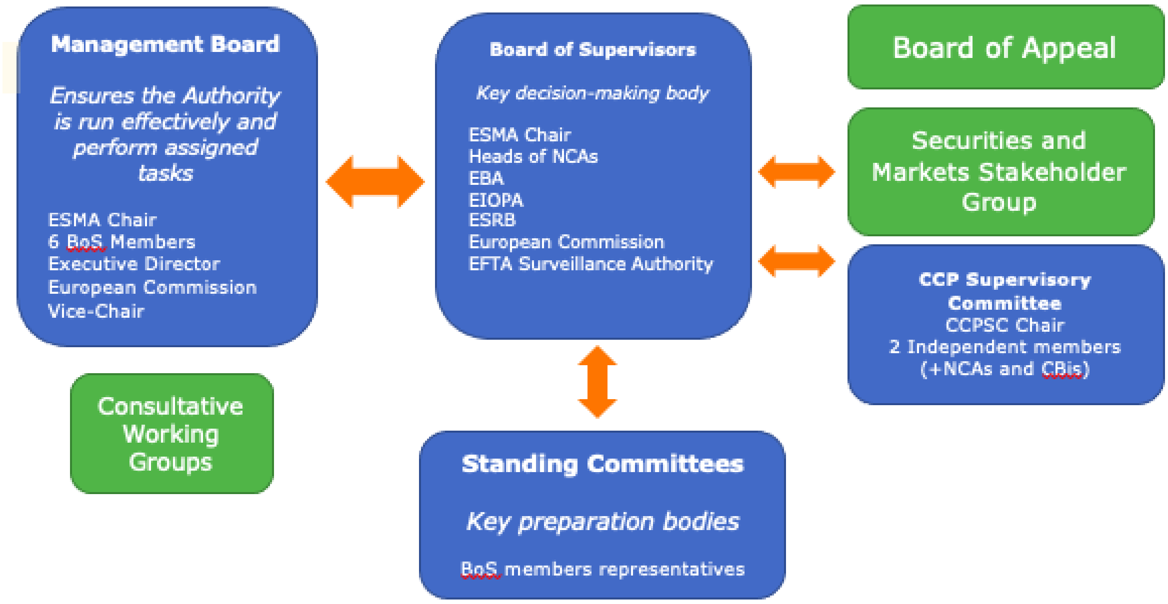
4.4. ESMA: Governance

This section avoids questions of optimal institutional organisation for EU financial market governance, instead addresses the aptness of the ESMA's current design to deploy EU financial market policy effectively. Questions of optimality will be discussed later in this chapter.

[12] The defined 'exceptional situations' are persistent cases of inaction by NCAs (prior to this stage, ESMA has the power to investigate and provide recommendations, and the Commission can then follow up with a formal opinion) and serious threats to the orderly functioning and integrity of the financial markets or instability of the financial system where 'swift and concerted' response at the Union level is required.

The ESMA is composed of a series of bodies, illustrated simply in Figure 2 below. Traditionally, European agencies have utilised a single tier governance structure with a management board, executive director, and the input of a specialist committee. Comparatively, the authority's governance arrangement is two tiered, as are the other ESAs. This means that the management board covers organisational tasks, and the Board of Supervisors is the primary decision-maker (Di Noia and Gargantini 2014).

Figure 2 ESMA Governance Structure



Although independence is prioritized within the ESMA Regulation (Articles 1, 42, 46, 49, 52 and 59 Regulation 1095/2010), the functional reality of the governance structure inhibits this. One major example is the tension between NCA interests and the European level objectives of the ESMA's mandate. With the heads of NCAs holding voting positions on the Board of Supervisors, there is a very real risk of national interests impeding the process (ESA Review 2017, Howell 2019, and Everson and Vos 2016). The potential for a conflict of interest to occur is further exacerbated by the requirement for NCAs to contribute to the ESMA's revenues (Howell, 2019). While it is certainly possible that influential NCAs have the capacity to dominate discussions within the Board of Supervisors and sway decision-making, this should not be overstated. The potential influence is, to a certain degree, mitigated by the Qualified Majority Voting mechanism (QMV). Moreover, further nuances to this debate can observe a fluidity between national and European level interests, as witnessed in the votes taken by euro EBA members during the banking crises (Moloney, 2018a).

The Commission arguably represents a greater constraint to the ESMA through institutional pressure, as compared to NCA interests. The Commission is a member of the Board of Supervisors, management board, and is also involved in selecting the Chairperson and Executive Director (Payne, 2017). This conflicts with the notion that EU agencies have, in the past, been established to combat the lack of sustained commitment of the Commission in reaching policy objectives (Busuioc 2009). In direct contradiction with justifications of their creation, it seems that as agency powers developed, a simultaneous escalation of unease about their accountability and legitimacy developed (Busuioc and Groenleer 2013). However, as Busoic, Groenleer and Howell all argue, a truly independent European agency does not exist. Here, the Commission's definition of agency independence described in Chapter 2 is reiterated for context; independence for European agencies is established through 'legal personality, budgetary autonomy, collective responsibility, administrative powers, and independence of internal governance' (COM 2009). By this definition, the ESMA's independence is called into questioned on several counts.

Firstly, the Commission's role as a voting member on the Management board gives it the capacity to vote on the budget. In addition, it contributes to the ESMA's funding through via the EU budget. This level of institutional pressure must be regarded as a constraint to the agent's autonomy (Payne, 2017). Secondly, the above established role of the Commission within the ESMA's internal governance, is a further constraint on its independence.

In terms of accountability, giving regard to the three stages of accountability (information, discussion, and consequences), the ESMA's mechanisms are well developed in several areas. Ex ante, the ESMA's boundaries are set out in its founding regulation (Regulation 1095/2010). Article 1 defines the scope of its activities, as well as its mandate and objectives, and Article 8 establishes its tasks and powers, which have been detailed above. Ongoing accountability dialogues exist with principals, like NCAs and the Commission, through their roles on the Management Board and the Board of Supervisors. The Commission then conveys these to the Council and Parliament (Vos, 2018).

Ex post accountability mechanisms, on the other hand, are deployed in several ways. Articles 62 – 64 of the ESMA Regulation address the financial obligations, including the Commission's say on the budget, and draft budgets assessed by the Commission, Parliament and Council. Article 3 of the ESMA Regulation outlines the ESMA's obligations to its principals (the Council and Parliament), regarding political accountability. These obligations include extensive reporting requirements, as well as more informal engagements with the Parliament through Economic and Monetary Affairs Committee. The

ESMA's annual report is a key accountability tool, in that it provides information on the ESMA regulatory and supervisory actions, as well as more administrative and budgetary matters (Art. 53; Di Noia and Gargantini 2014).

Considering the stages of accountability, information requirements are, in general, fulfilled through reporting requirements and transparency. Where there appears to be a deficit, is in the discussion stage. A true dialogue between the ESMA and the Parliament is limited, other than *adhoc* questions and informal meetings. Formal consequences and judicial accountability are facilitated through the Joint Board of Appeal, whereby appeals can be brought against decisions of the ESAs (Art. 54, 55, 60 and 61). Where necessary further actions can be brought to the CJEU for Appeal under Article 263 of the Treaty on the Functioning of the European Union (TFEU). An overall assessment of the ESMA (and the ESAs) is conducted every three years (Art. 81). Included in this is the evaluation of whether the sectoral supervisory structure (division of competences between the three ESAs) is still the best solution, or if a more integrated supervisory model, for example the 'twin peaks'[13], would be a preferable long-term architecture.

Horizontal accountability mechanisms are not widely addressed in the literature on the ESMA. However, Di Noia and Gargantini (2014) and Moloney (2018) address horizontal accountability through the Joint Committee for the three ESAs, where information exchanges and discussions can take place on topics with overlapping competences (Art. 37 1095/2010). This topic, and the role of the Securities and Markets Stakeholder Group in facilitating accountability will be explored in detail in Chapter 5.

The result from these many intertwined and complex mechanisms, is an agency whose accountability structures are significantly high for its correspondingly low level of independence. Although there are areas where the discussion stage could be improved (particularly with the European Parliament), there is burgeoning need for operational independence to be strengthened through a disentanglement with the institutional pressures of the Commission. These results are not new: initial assessments of the ESA framework in 2013 by the International Monetary Fund produced similar results, highlighting weaknesses in the ESMA's design that could impact both accountability and independence (IMF 2013). These assessments strengthen the idea that independence and accountability are not always opposing forces, rather effective accountability mechanisms can strengthen the operational independence and efficiency of agencies.

[13] This was already suggested in the Larosiere Report, as well as again in the 2017/2018 ESA Review by a series of Consumer organisations in the EU.

4.5. Legal basis and the *Meroni* doctrine

So far, the ESMA's accountability mechanisms towards the European institutions has been detailed. What must be considered now, are the limits to delegation, in accordance with the EU Treaties. The very cornerstone of EU agency delegation is the *Meroni* judgement (Case 9/56 *Meroni v High Authority* 1957 and 1958 ECR 133). The case was brought against the High Authority of the Coal and Steel Community in 1958 and related to the establishment of delegation through private law. The widely cited judgement from the CJEU stated that this delegation was permissible if these delegated powers were subject to restrictions.

The judgement made a clear distinction between executive powers and discretionary powers. The distinction established *inter alia* that powers may be delegated to agencies from the Commission only if the delegation conferred no discretion that would amount in policymaking. The judgements relevance today primarily stems from the reflection that agencies are executive bodies detached from the central EU administration, and that delegated policymaking must be subject to the limitations of the Treaties (Craig, 2012). However, as Craig argues, political imperatives, like the GFC and the resulting creation of the ESAs, continue to place traditional legal interpretations under strain (Craig, 2012).

The *Meroni* doctrine is subject to contentious debate among scholars. It has been noted on multiple occasions that *Meroni* has been repeatedly ignored within the founding Regulations of EU agencies, with extended tasks well beyond those deemed executive functions (Chamon, 2010, Curtin and Dehousse 2012). The 2012 Short Selling case brought by the UK, questions the continued relevance of the *Meroni* doctrine.

4.6. Short Selling Case

On 22 January 2014 the CJEU announced its judgement in the case C-270/12 regarding the annulment brought by the UK against the Parliament and Council of the EU. The UK pursued annulment of Article 28 of the Regulation on short selling and certain aspects of credit default swaps (Regulation 236/2012). The UK argued that Article 28 delegated certain powers to the ESMA which, according to the UK breached the *Meroni* doctrine.

The regulation in question (236/2012) was adopted based on Article 114 TFEU for the approximation of laws necessary for the functioning of the internal market. The ESMA's actions under Article 28 are limited those that must be taken to ensure the orderly functioning and integrity of financial markets and the stability of the financial system or; create a risk of regulatory arbitrage, or; have a detrimental effect on the efficiency of financial markets.

The UK saw a breach of the *Meroni* doctrine because the authority had "a very large measure of discretion" (Case C-270/12). The Article 28 limitations listed above were deemed by the UK to be highly subjective, allowing the ESMA to implement actual economic policy. Further, the UK argued that the ESMA had "extremely wide-ranging discretion when deciding how to take account the factors set out in Article 28".

The resulting judgement concluded that the ESMA's discretion was mitigated by the consultation requirements set out in its founding regulation, as well as the temporary nature of the authorised measures. On this basis, the Court found that the ESMA's powers complied with the delegation doctrine and that "those powers do not, therefore, imply that ESMA is vested with a 'very large measure of discretion' that is incompatible with the FEU Treaty".

The questions that arise from this judgement are whether the ESMA's powers are delineated sufficiently. Nicolaides and Preziosi (2014) argue that the requirement to consult is not sufficient to curb the actions of the ESMA, as the authority is not prevented from acting when it receives negative consultation advice; nor are other accountability requirements sufficient in curbing this discretion. It seems the Court does not recognise that, at least within the financial markets and the delegation of regulatory tasks, the *Meroni* doctrine should be regarded as obsolete (Pelkmans and Simoncini, 2014).

4.7. Where does the Single Supervisory Mechanism come in?

The previous chapter details the justification of the most similar approach to case design for the SSM and the ESMA. Further, however, the SSM represents a 'proof-of-concept' for a move towards further integration or even centralised supervision (Moloney, 2018a). The following sections detail the development of the SSM and its relevant governance frameworks.

4.8. ECB: Origins and Powers

Since its establishment in 1998, the ECB's functions, tasks and objectives have fundamentally evolved. Many of these changes, such as those imposed following the GFC, do not reflect the banking model established in the Maastricht Treaty and, thus, the evolution of the corresponding accountability mechanisms should be considered. The following section largely excludes monetary policy, as it falls outside the scope of this research.

The Maastricht Treaty and its Statute of the European System of Central Banks (ESCB) and of the ECB provided the key constitutional building blocks for the new institution and common monetary policy in EU primary law (Protocol 4 on the ESCB and of the ECB). The ECB's institutional design was based upon two foundational works, the Delors Report concerning the European Monetary Union (EMU) and the draft Treaty provisions proposed by the Committee of Governors. With the design primarily devised by EU central bankers, the key elements were the primacy of the price stability objective, central bank independence and the prohibition of central bank financing of governments. The original central banking paradigm of the ECB relied on a technocratic model, whereby the monetary policy function was clearly separated from other aspects of economic policy (most notably fiscal and wage policies).

In the twenty-three years since its creation, the picture of common central banking has become more multidimensional. Changes made during, and post, crisis have led the ECB to assume a more significant role in breadth and scope. Some changes are the subject of intense debate, like the replacement of short-term cross-border inter-bank markets with a side-effect that Trans-European Automated Real-time Gross Settlement Express Transfer System (Target2) balances between euro area central banks, which have become colossal. With the Eurosystem also the main actor in all euro government bond markets, it has become the main creditor of the Member States. Although the selective bond purchases are already in the phasing-out stage, they have opened the door for direct interventions in the pricing of Member States' financing. This, alongside Troika-related tasks assigned to the ECB, have blurred the important line between monetary and economic policies. The most significant change, in the context of this research is, however, the inclusion of banking supervision in the ECB's tasks. To reflect this, the Single Supervisory Mechanism (SSM) will be the focus of this research.

4.9. Single Supervisory Mechanism

The creation of the Eurozone Banking Union is a 'genuine novelty both at the constitutional and administrative level' and the product of very specific drivers (Chiti, 2015; and Howell, 2019). Considering this, sufficient care must be taken when drawing comparisons between the EU financial market and the banking union.

Central bank accountability should be understood as the legal and political obligation of an independent central bank to explain and justify its decisions to citizens and their elected representatives - in the case of the EU, the European Parliament (Fraccaroli et al. 2018). EU primary law sets out explicit accountability obligations for the ECB in Article 284(3) TFEU and Article 15.3 of the Statute of the European System of Central Bank and of the European Central Bank. These obligations existed prior to the creation of the SSM and have not been changed with the addition of these new tasks and responsibilities.

With the creation of the SSM in 2014, and the subsequent entry into force of the SSM Regulation, the ECB was also given macroprudential tools to tackle the emergence of possible systemic risks in the financial system[14]. As part of the SSM Regulation, a specific regime was laid down regarding the ECB's accountability for this new task. The practical fulfilment of supervisory accountability requirements was further clarified in an Interinstitutional Agreement between the European Parliament and the ECB and a Memorandum of Understanding between the Council and the ECB (2013/694/EU). The Chair of the Supervisory Board attends regular hearings and exchanges of views in the European Parliament[15] and MEPs can address written questions related to supervision to the Chair of the Supervisory Board[16]. Finally, since 2014 the ECB has submitted an annual report on its supervisory activities, which is presented by the Chair of the Supervisory Board to the European Parliament at a public hearing. This report is also further submitted to the Council, the Eurogroup, and the Commission. Despite the creation of accountability arrangements to account for the ECB's new role as a banking supervisor, the unchanged treaty framework that governs accountability led to the assumption that the ECB's accountability had not adjusted to the new policy environment (Howell, 2019).

4.10. Governance, Accountability, and Independence

The governance structure of the SSM is outlined in Article 26 of the SSM Regulation. Similar to the ESMA, the SSM has a Supervisory Board with a Chair and Vice Chair, a national authority representative from each participating country, and four representatives from the ECB. The positions of the Chair and Vice Chair are subject to significant ex ante controls. They are appointed by the Council and approved by the Parliament, based on proposals made by the ECB. The inclusion of the Parliament in the Chair and Vice Chair controls was a late addition, mirroring concerns of a lack of democratic accountability from the Supervisory Board (Ferran and Babis, 2013).

[14] In the field of financial stability, the ECB also provides analytical support to the European Systemic Risk Board.
[15] The Chair of the Supervisory Board also attends exchanges of views with the Eurogroup. In addition, the Eurogroup can address written questions to the Chair of the Supervisory Board.
[16] In 2017, the ECB published 39 replies to MEPs' questions supervisory matters

Moloney (2014) highlights that the ongoing accountability and control mechanisms are built upon the existing approach for monetary policy, however, at a more demanding level. The Interinstitutional Agreement between the Parliament and the ECB (2013/649/EU) outlines the ECB's accountability obligations to the Council and Parliament regarding its supervisory role.

Unlike the ESMA, the SSM has an increased interaction with the Parliament in several ways. Article 21 of the SSM Regulation outlines the reporting requirements of the SSM to the Parliament, in addition to those that extend to the Commission and the Euro Group. Article 20 requires the Chair to appear before Parliament committees and the Euro Group, at their request, as well as respond to questions put to it by both institutions. Moloney (2014) highlights the potential impact the *ex ante* and *ex post* roles of the Parliament to the Supervisory Board have on the ECB's independence, however, she sees a greater challenge stemming from the ECB's Governing Council's capacity to endorse Supervisory Board decisions. Again, accountability and independence are not necessarily direct trade-offs. Rather it is about finding an appropriate balance between independence and the institutional requirements of accountability.

So, where are the strengths of the SSM governance? Despite the large membership of the Supervisory Board and risk of national bias leading to inaction, the Governing Council and Board have proven their capacity to act swiftly in emergent situations (IMF 2018). The Banking Dialogue has been highlighted as a strength of the SSM's accountability relationship, increasing the exchange of information, discussion, and judgement, between the Parliament and SSM. Amtenbrink and Markakis' (2017) qualitative study on the Banking Dialogue showed significant and informed interactions between the principal (Parliament) and agent (SSM), including 41 replies to MEP questions, three adhoc 'discussions' with MEPs, as well as three public hearings which the Chair participated in.

The integrated supervision design of the SSM is evidence for a move towards integrated supervision of the ESMA. Although the SSM is significantly more powerful than the ESMA, with its status as a Treaty institution, it provides beneficial insights when thinking about the future (and increased) role of the ESMA in the future. Aside from changes to supervisory architecture, the Banking Dialogue should be recognised as a noteworthy forum for aiding democratic legitimacy (Amtenbrink and Markakis 2017). If mirrored for the ESMA, the dialogue would provide a useful mechanism for accountability through discussions and information exchange, without impinging upon its independence.

5. Expert Interviews results and discussion

There were two goals in mind in conducting interviews with members of the Securities and Markets Stakeholder Group (SMSG).

Firstly, the group represents a cohort of experts in the field of financial governance and the ESMA, who are qualified to present opinions and assessments of the effectiveness and accountability of the agency. They are privy to the internal processes and the agency's functional capacities from a practical perspective. Understanding and analysing these processes are core goals of this research. Reflecting on the definition of experts, as defined by Meuser and Nagel (1991) in the previous chapter, SMSG members can undoubtedly be considered in these terms.

Secondly, with the goal of analysing forms of horizontal accountability, the respondents have the capacity to reflect on the role of the SMSG as a mechanism of horizontal accountability. With these objectives in mind, as well as the results produced from the interviews, the chapter structure proceeds as follows: internal issues faced by the SMSG as horizontal accountability mechanism, governance and supervisory architecture, and increased powers for the ESMA.

5.1. The role of the Securities and Markets Stakeholder Group

In recent decades, direct representation of stakeholders within organisations has gained credibility and impetus as a tool for accountability (Ferran 2004). Stakeholder representation within the agency governance structure has the capacity to improve the responsiveness of regulators to their relevant constituencies, thereby reducing the risk of capture by conflicting stakeholders (Di Noia and Gargantini, 2014).

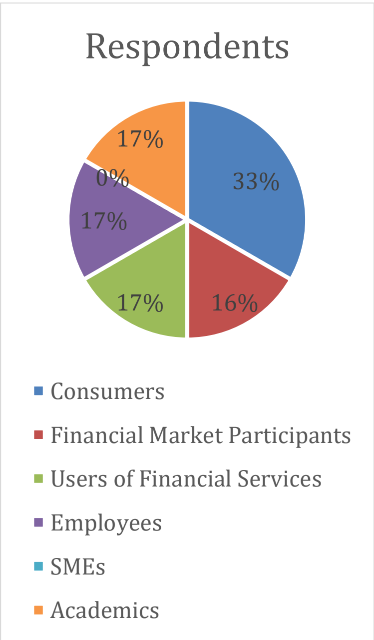
With the aim of the SMSG to "help facilitate consultation with stakeholders in areas relevant to the tasks of the Authority" (Art. 37), the group is consulted on the adoption of technical standards, guidelines, and recommendations. This consultation is compulsory before the adoption of draft technical standards. Where exceptional cases occur, the SMSG must still be informed as soon as possible. On guidelines and recommendations, the ESMA has greater discretion; the SMSG's opinion or advice is only requested 'where appropriate' (Art. 16). This is in slight contradiction with Article 37's statement that the SMSG 'shall' be consulted on actions taken (in accordance with Art. 16), it seems that the SMSG's advice should be requested regardless of the specific legal measure to be adopted. The SMSG has additional abilities to file a request against an NCA for insufficient application of EU law, a significant tool for market stakeholders.

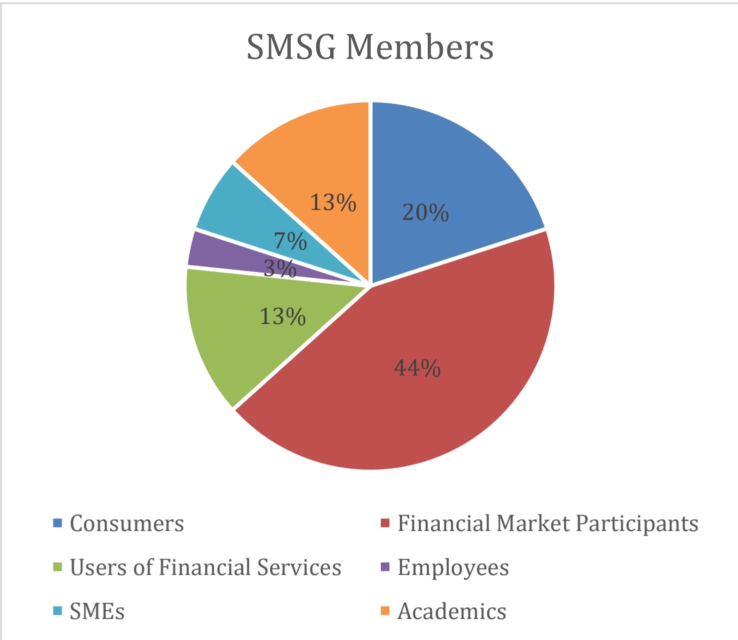
As will be discussed in later in this chapter, the benefits to stakeholder consultation extend beyond accountability to increased effectiveness in rulemaking and greater market acceptance.

5.2. Interviews

Six interviews with SMSG members were conducted over a two-month period in June and July 2021. The interviews varied in length and scope dependent on the availability of the respondent, as well as their areas of interest. Appendix 2 lists the current members and representative proportions within the SMSG (current as of July 2021) and the below charts indicate the current division of the SMSG's 30 members, as well as the six respondents in the study. The respondents were, one academic, two consumer representatives, one employee representative, one user financial services, and one financial market participant. Their names and organisations will remain anonymous. Aiding this anonymity, the interview transcripts will not be included in the appendices, instead, remaining on file with the author. It was not the goal, when selecting participants, to have an exact replication of the SMSG. However, it should be noted that the participant perspectives illustrated here are skewed away from an industry perspective, with only one representative from the financial market participant section, as seen in figure 3. While I believe this is does not detract from the validity of the results presented, when specific cases are discussed, this bias will be countered by a thorough examination of SMSG Advice and Consultation Papers to make certain a balanced view is portrayed.

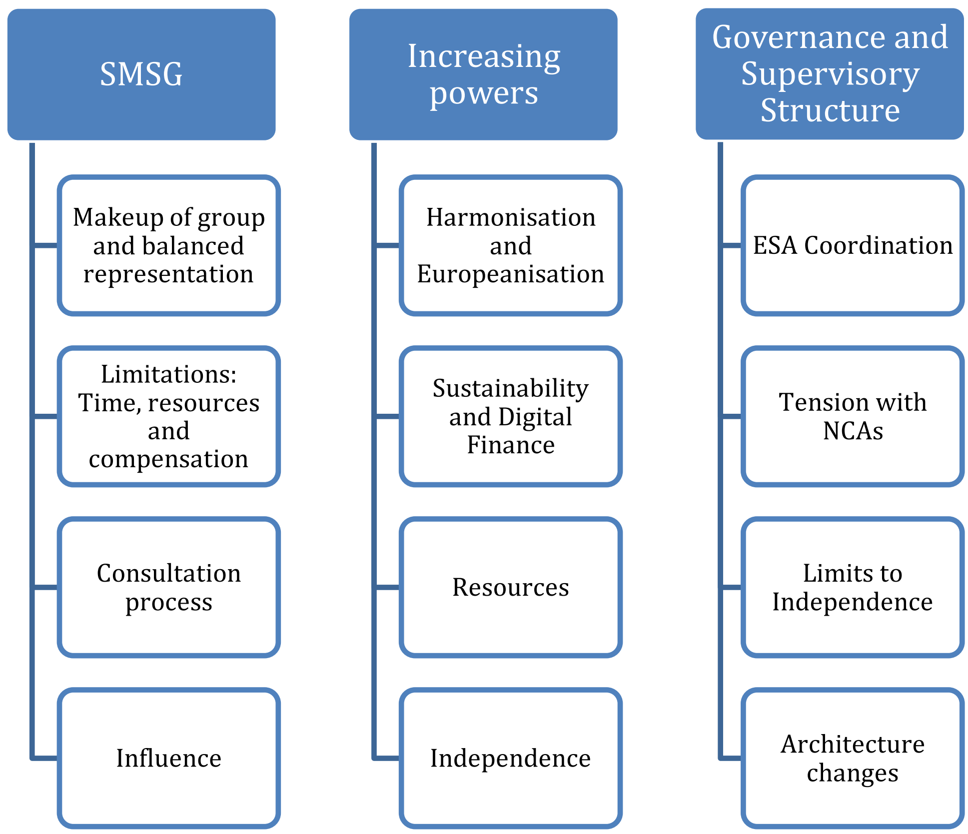
Figure 3: Interview Respondents and SMSG Group Makeup (2021)





The interview structure and questions were targeted towards utilising the insights of SMSG members on the ESMA's internal accountability and the role of the SMSG and other horizontal accountability mechanisms. A list of questions included in the semi-structured format can be found in Appendix 1. Regarding the concepts discussed in the interviews, primarily accountability and independence; the interview began with an open question to assess the general views on accountability and independence in the areas of financial governance and, more specifically the ESMA. For conceptual clarity, the definition of horizontal accountability was offered before questions that involved the SMSG as a component of horizontal accountability. When prompted, the interviewer described, broadly, the definitions of accountability and independence established in Chapter 2. As an initial analytical exercise, all interviews were coded to ensure sufficient saturation, as well as to provide a sufficient level of transparency in the results discussed here. Appendix 3 is the codebook, and evidences the core concepts highlighted during the interviews, their frequency of reference, and the code style (deductive or inductive). The codes were then grouped into core areas outlined in Figure 3 for further discussion.

Figure 4 Code Book Summary



5.3. Balanced Representation in the SMSG

The legal basis for the ESMA stakeholders' group (SMSG) can be found in Article 37 of the ESMA's founding regulation (Regulation 1095/2010). Article 1 of the original 2010 Regulation indicates the importance of consulting 'interested' parties on regulatory or implementing standards, guidelines, and recommendations, and thus the SMSG should be used for that purpose. The need for a balanced representation of financial market participants, small and medium enterprises (SMEs), academics and consumers, as well as other retail users of financial services, is highlighted there. Stakeholder acceptance of the ESMA's standards, guidelines and standards should not be understated as a mechanism for determining market approval, and thus a contribution to horizontal accountability.

The SMSG facilitates this dialogue with stakeholders, which then facilitates greater accountability (Interview 2). This view, that the role of the SMSG is valued by ESMA, was held by all interview participants. The exchange of views between stakeholders and market participants was perceived as a crucial support to regulators and supervisors who are somehow caught up "in their own bubble". The foundation of consensus within the SMSG should be recognised as an extremely useful tool in gauging market acceptance and consumer concerns (advice and consultation papers produced by the SMSG must be unanimous across all members, unless otherwise stated). Where consensus is reached among the many varied participants of the SMSG, this opinion should be weighted heavily among ESMA staff. Horizontal accountability is defined as the degree to which people communicate across the organisation, problem solve with all employees and teams, and build accountability for superior outcomes (Ray and Elder 2007). The SMSG, in the context of the supervision of financial services in the EU, represents a critical accountability tool for ESMA's legitimacy to market participants, consumers and users.

As of 1 January 2020, and following the ESA Review, changes were made to the current personnel makeup of the SMSG. Issues were raised regarding these changes by all 6 interview participants. The core changes to the makeup of the group were an increase in financial market participant requirements from 10 to 13 and a lowering of the requirements for academics from 5 or more to exactly 4 (Art. 2c). The common thread across the interviews was the vital need for academics, suggesting that academics are useful in providing a level of objectivity, as well as skills in drafting reports. Interview 1 highlights that the SMSG "would very much like to have one or a couple more professors in the SMSG". On the practical side, Interview 3 indicates the important clarity that an academic can bring:

> "Additionally, on a more pragmatic way, academics usually try to act as rapporteur … for the academic it is normal to write down papers, to write down analysis and

> therefore, they usually are productive. And you know, that it is important also, which is a problem that is also recently discussed, to try to be as clear as possible."

Prioritising clarity is of even greater importance when considering the technical topics covered by the SMSG, of which not all members have detailed knowledge (Interview 6). When speaking about the increased term length of SMSG members (from 2 to 4 years), respondent 4 even indicated this was an improvement, as there was a need for a sufficient length of time to become better acquainted with the technical topics of ESMA. These changes were not necessarily felt equally among all members; Interview 5 recognised that there was some level of 'protest' within the SMSG regarding the changes made. However, they suggested this was related to the procedure, or lack thereof, that resulted in these changes. This respondent felt no significant 'material' changes as a result in lowering the number of academics.

This procedural issue, as well as changes to the number of representatives in each area, was reflected in the Joint Position Paper on the ESA Review. The four stakeholder groups, the Banking Stakeholder Group (BSG), Insurance and Reinsurance Stakeholder Group (ISRG), Occupational Pensions Stakeholder Group (OPSG), and the SMSG, highlighted four areas of discontent as follows (SMSG Joint Position Paper, 2019).

1. Regret the reduction of the number of academics, from at least 5 to exactly 4.
2. Stress the need for a balanced representation of the industry-side and users-side in all four stakeholder groups.
3. Regret the fact that such important changes have been decided upon without prior consultation – even though not legally required – of the stakeholder groups.
4. Regret the lack of a transition period to implement the new Regulation, which should enter into force on 1st January 2020.

On the second point on a 'balanced representation', data gathered in interviews hints at a deeper complexity to this point, which should consider the resources and capacity for response of each of the SMSG members. When asked about the optimal makeup of the SMSG, Respondent 2 highlighted that it was not at all optimal, first indicating discontent at the reduction in academics, and then introducing the problem of misrepresentation of the user side of the SMSG.

> "We have thirteen industry representatives and then we have thirteen other representatives, which are to be seen as user representatives but in this user group, we also have corporate representatives, we have Treasurers, we have trade union

representatives, so all representatives that do not really represent users or consumers of financial services. We are, from the user side, always understaffed and underpaid. We are working for NGOs or NGO like organisations compared to representatives from asset managers, banks … we have a lack of resources I would say and this makes it even more difficult for us to devote a lot of time to the SMSG." Interview 2

This sentiment was felt across other participants within the user/consumer representatives:

"and it does create on occasion an imbalance because it might mean on occasions that if I don't devote particular resources to a specific topic that or at some of the other consumer associations, it means that opinions might be very heavily industry influenced." (Interview 6)

On the industry side, some concerns were voiced on the monopolization of the consumer perspective by a small number of consumer organisations. While members of the SMSG do not represent the organisations they work for, rather they reflect their own individual voices. Thus there is an unavoidable level of consultation with their constituencies or organisations.

One interview suggested that *Better Finance* had representatives across all four ESA stakeholder groups and was able to utilise this coordination. Within specific topic areas, there was a diverse perspective on the extent to which the respondents further consulted their constituents, organisations, or colleagues on specific topic areas. Variations ranged from:

a total lack of resources and knowledgeable colleagues on the content to consult;
where necessary informal consultations would take place; to
not at all due to a sufficient and varied expertise and experience within the field of financial services.
(Interviews 1, 4 and 6).

The lack of capacity to consult colleagues or constituents was felt to a greater extent within the users' portion of respondents. With consultation of organisations or constituencies by no means a requirement of the position, it raises the question of whether these differences can be considered as a 'lack of resources' or whether this is just part and parcel of the role. Article 37(3) of the ESMA Regulation dictates that "in making its decision, the Board of Supervisors shall, to the extent possible, ensure an appropriate reflection of diversity of the securities and markets sector, geographical and gender balance and representation of stakeholders across the Union" (Regulation 1095/2010). It seems, however, that from both industry and consumer representative perspectives, the SMSG would benefit from an increased number of consumer representatives, diversifying the knowledge base, organisations involved, and mitigating the perceived imbalance between users and industry. At the least, greater transparency and consultation is necessary when deciding on the group makeup.

Article 37 (4) states that "adequate compensation shall be provided to members of the Securities and Markets Stakeholder Group representing non-profit organisations, excluding industry representatives" (Regulation 1095/2010). Two interviewees who are members working for non-profit organisations indicated that this compensation was inadequate for their capacity as 'experts'. Increased compensation would make it more viable to devote increased time and resources to the user/consumer position, in doing so attempting to counter existing imbalances. Dialogues between stakeholders and the ESMA has been established above as a crucial aspect of the ESMA's horizontal accountability mechanisms. Although broader level consultation processes exist for specific projects, the SMSG represents the most efficient (read timely and accessible) dialogues between the market and the ESMA. Therefore, addressing any imbalances within the group should be prioritised.

Additional suggestions to counter this, as expressed in interview 6, could be the introduction of additional resource budget for the SMSG to carry out research on specific areas. This would act in a similar capacity to the research budget of the Commission's Financial Services User Group, allowing members working on this research to be compensated appropriately. Whether respondents fell on the user or market participant side of the SMSG, a persistent attention was drawn to the benefits of creating a more balanced cohort. Simply, this means devoting increased resources in the form of compensation and personnel to the user/consumer representatives.

5.4. The consultation processes

Every interview included a question on what the consultation process between the ESMA and SMSG consisted of. This question signifies an important aspect of the research goal – to understand and analyse horizontal accountability mechanisms, and in doing so expose any limitations to the process. Thus, the following explanation of the consultation processes is a combination of the 6 interviews, as well as basic information found within the ESMA Regulation. Firstly, Article 37 of the ESMA Regulation states that "the Securities and Markets Stakeholder Group shall be consulted on actions taken in accordance with Articles 10 to 15 concerning regulatory technical standards and implementing technical standards and, to the extent that these do not concern individual financial market participants, Article

16 concerning guidelines and recommendations" (Regulation 1095/2010). The SMSG is first notified of an issue and then members can then indicate their interest in responding. When at least 7 members have an interest, a working group is set up to draft a response. More specific questions can also be addressed to the SMSG from the ESMA without a formal consultation taking place. SMSG members can also initiate an advice on their own accord without a request from the ESMA. Following the drafting of an advice or report, the members must come to a consensus on its outcome or, since the ESA Review, when members cannot agree on advice, one third of its members or the members representing one group of stakeholders shall be permitted to issue separate advice (Regulation 1095/2010).

The follow up question to this was, are there any limitations to the process? While the respondents all made the assessment that in general the process works very well, they all had some concerns to highlight. One such concern was how the process works regarding internally divisive topics. An example of such a situation is the 'SMSG advice to ESMA on its Consultation Paper on Guidelines on the Markets in Financial Instruments Directive II / Markets in Financial Instruments Regulation Obligations on Market Data' in January 2021. This matter sparks a controversial debate among industry representatives, particularly between those that represent brokers and those who represent stock exchanges. In simple terms, a conflict exists on the ownership of trading data and the obligations outlined in the Market in Financial Instruments Directive (MiFID). In this consultation, the chair of the working group was held by a stock exchange representative, and the resulting advice was very detailed consultation response with little applicable use for the ESMA. Interview 1 indicated the learning from this process resulted in a renewed focus on what the SMSG can actually agree on. This lengthy process could be framed as both a limitation and strength of the SMSG; while not always resulting in useful advice, the discussion process itself is indicative of a rigorous stage of accountability.

All but one of the respondents indicated the short timeframe of consultations to be a limitation of the process.

> "I think it's part of good governance that you have a very good consultation process. And once in a while, the documents arrived so late, that, you know, consultation needed to be done within 10 days. And this is really not enough, because typically you need to set up a working group, then you need at least two video conversations" (Interview 5).

This is further iterated by respondent 2:

> "…now there's one major limitation that is the timeliness where, as we all have our own jobs and our daily business, so we cannot devote full time job to this work at the SMSG, that's for sure. And sometimes we're informed quite late about the consultation. We receive specific requests, where there is, for example, we also receive requests where there is no public consultation, but ESMA asks, wants to hear the view of the SMSG. Sometimes this is quite late. So we only have a few weeks time to reply to a consultation paper, which for us is really challenging and a reason why we from time to time even do not manage to respond to a consultation paper".

The reasons given for the untimeliness was both unavoidable emergent situations, and poor governance. Exploring these reasons further is outside the scope of data available for this research. However, future research could investigate these concerns. Interestingly, although not statistically valid, is the one representative on the industry side did not indicate the timeliness of consultations as a concern, perhaps indicating a greater resource pool to draw from during the consultation process.

5.5. The influence of the SMSG

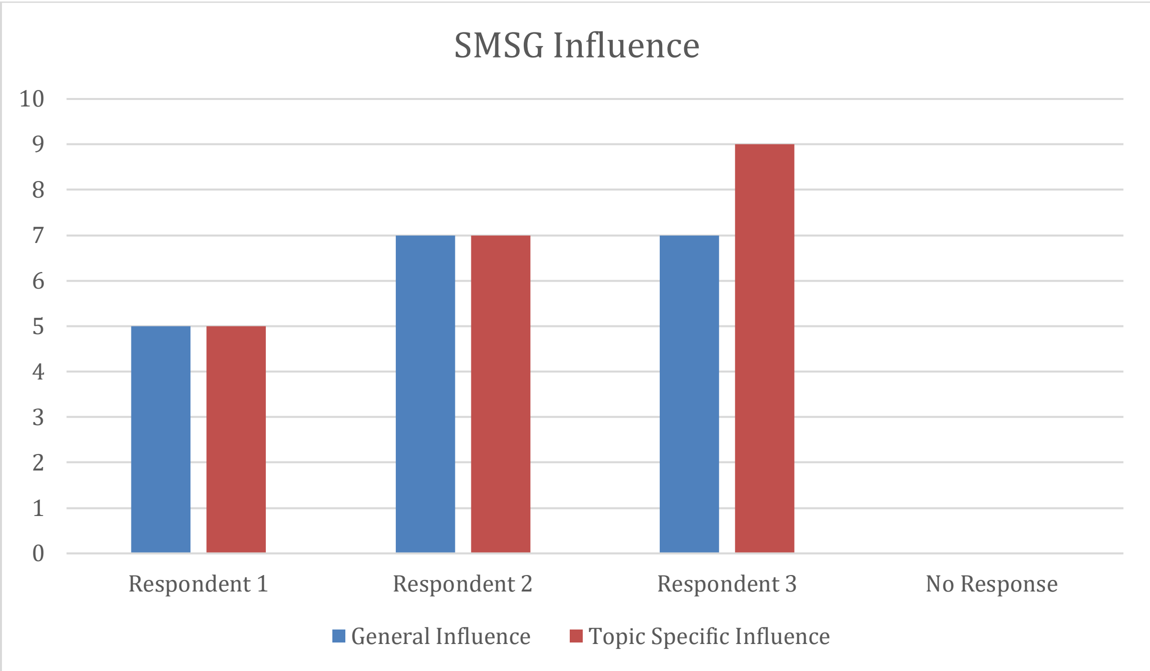
The final deductive code to be discussed in relation to the SMSG is its influence on the ESMA. Exploring this code was an important aspect in uncovering the 'output' or result of horizontal accountability applicable to the SMSG. Some measurements of this influence can be viewed in the ESMA's consultation papers, however, largely the assessments of its influence included here are subjective. Although Article 37 (7) requires the ESMA to make the results of its consultations as well as information on how advice and results of consultations have been considered, this information is often not explicit within consultation papers or opinions. One respondent highlighted a feedback concern when asked about the influence of the SMSG.

To gauge the SMSG's influence, respondents were asked to indicate their perception with a rating from 1 to 10. This question was not very successful as some respondents were uncomfortable putting a numerical value on influence. Nonetheless, the results and opinions are illustrated in Figure 4. Two thirds of the numerical answers indicated that there was no real change between policy or topic areas of the SMSG influence. This was reiterated verbally by two other respondents:

> "the influence, the potential influence, is absolutely the same in any case. In my view, the actual influence depends on the argument… you know, when you receive a consultation, and you bring a good idea … and if you find the flaw in the process,

> if you find the flaw in the system, or in the draft procedure. Well, I think that if your arguments are valid, the will be listed … And so I think that potentially fully able to influence the path" (Interview 3).

Figure 5: SMSG Influence



Three respondents had no numerical response.

The increase in influence observed by respondent 3 was explained by an increased interest and responsiveness of the ESMA, as well as the European institutions, to issues of investor protection. The topic, however, is not without its complexities as will be explored later in this chapter.

5.6. Governance and Supervisory Architecture: ESA Coordination

This section incorporates both broader agency-wide issues, as well as integrating the perspective of the SMSG. The structure of this section is guided by a series of inductive and deductive codes that the respondents highlighted as necessary to improve the effectiveness and functioning of the ESMA, as well as the broader supervisory efforts of the ESAs.

ESA coordination was not initially a core concept within this research project. However, throughout the interview process it became clear that coordination between the three ESAs was a significant point of tension in the overall institutional architecture of EU financial regulation. The creation of the ESAs following the GFC has proved to be another important moment in the continued process of agencification in the EU. There are still important questions to be raised regarding the effectiveness of the ESAs in financial market regulation and supervision when regarding the normatively important limitations of the ESAs. These limitations, including the legal basis constraint, the *Meroni* constraint, and partial lack of democratic legitimacy, are too large a topic to discuss in relation to every ESA here (Schiavo and Türk 2016). However, the changes to supervisory structures and coordination between the three, as introduced by the respondents, will be explored.

The questions posed to the respondents regarding ESA coordination was focused on the stakeholder groups, however, these will be used as illustrative example of how this coordination can be beneficial on a larger scale. When asked the question: can you see benefits to greater ESA coordination in the future? Or can you see benefits to greater coordination between the ESA stakeholder groups? All respondents could see the output benefits of coordination.

An example used where the joint efforts proved fruitful was the development of the Sustainable Finance Disclosure Regulation (SFDR). Interview 5 indicated that the SFDR, as opposed to the EU taxonomy, which is a tool to help investors understand whether an economic activity is environmentally sustainable, was:

> "extremely important because it is very useful to have to make sure the burden is the same. You know, in some documents, they said sustainability and some they said ESG. And you never know if they mean the same or not. And here, they really made an effort to use exactly the same nomenklatura, which is paramount in my opinion. And I hope that this is going on into other areas as well".

This problem of *nomenklatura* is of particular importance when implementing European directives into local legislation within member states to maintain clarity of meaning among all levels.

As lines are becoming increasingly blurred between the supervision activities of the three authorities, there is a need to continually reassess whether the current ESA architecture is a good fit with how markets and financial intermediaries perform their functions (Interview 3). Respondents suggested that the separation between the three ESAs is potentially invalid, with banks and insurance services acting within the same competitive arena. The focus should be on the services provided by the actor, and whether it performs the same function as an actor supervised by another authority. There are certainly areas where products or services are very specific to an ESA, for example life insurance to the EIOPA and trading to the ESMA, however areas such as sustainability reporting, the Packaged Retail Investment and Insurance based Products Regulation (PRIIPs), and the developing scope of digital finance that are and would benefit from increased cooperation. While further research would be beneficial to understand the necessity of this distinction and the importance of cross-over activities, particularly with regard to the maintenance of a level playing field. This research will focus on the benefits provided by increased coordination.

Currently, joint efforts made by the ESA stakeholder groups are facilitated by the Joint Committee (Art. 56 on joint positions and common acts, ESMA Regulation). Yet, as the interview responses indicate, this forum is not necessarily sufficient (Interview 2).

> "ESMA is not alone in the world. They have two other ESAs, and they have a joint committee in which they deal with everything we're all part of, or at least two ESAs are concerned. This joint committee issues consultation papers, as well as ESMA itself. But on these consultations, we are hardly informed. And again, the limitation of the stakeholder group is that we don't have a full-time job there. To get the three ESAs in working groups and the stakeholder groups together to work on a project is really a challenge."

Where respondents suggested greater coordination was not desirable, the explanation given was related to the complexity of 53rganizing this joint effort, not on the advantageous outcomes it could produce (Interview 6).

> "I'm not saying that it's not undesirable. Potentially it is desirable. There are often cross cutting topics like the PRIIPs. The idea would be one example of a topic where obviously the EIOPA, EBA and the ESMA would be concerned. So … it could be desirable, but I think there's just challenges involved." (Interview 6)

The complex challenges in orchestrating joint ESA efforts are not minimal, yet nor are they insurmountable. Changes proposed later in this chapter explore options for an increasingly integrated supervisory structure.

5.7. Limits to the ESMA's independence and tensions with NCAs

Discussions of independence are complex, in that the framing of independence is subject to the context in which it exists. Interview respondents held different definitions of the concept even within the same EU financial governance context, making generalisations and comparisons difficult. Nonetheless, the interviews elucidated noteworthy insights into the limitations and successes of the ESMA's independence. This section focuses on limits to independence, with potential areas of increased powers to be discussed later in this chapter.

First, on the general notion of the ESMA's independence, the respondents highlighted the European institutions, Member States, NCAs, ESAs and the SMSG as all contributors to limiting the independence of the ESMA. Actors like the European institutions, ESAs and

SMSG were deemed as necessary principals to ensure the ESMA's accountability, however, some actors were, including the NCAs, deemed to limit the capacity of the ESMA to achieve optimal results.

> "And I think one of the big challenges also with the ESAs is that they are not independent, really, you know, they are controlled by their NCAs. And so, if the ESAs want to take some kind of action to enhance supervisor conversions in the EU, but NCAs are opposed to its measures, then I think you very often have this conflict between what the NCAs and what European supervisors might ideally want." (Interview 6)

This challenge stems from the governance structure of the ESMA and the NCAs role on the Board of Supervisors, explored in Chapter 4. Additionally, during the ESFS review, measures were proposed to enhance the independence of the ESAs yet were rejected because of discussions within the Council. Undoubtedly Member States are a necessary aspect of the supervisory structure, however, it must be better understood what roles are most efficiently held at what levels. Interview one highlights the need for further research to understand where powers are most efficiently held, suggesting that there is an additional regional level to consider. The results presented here are subject to skepticism of the political feasibility to changes within the governance structure, particularly those that relinquish control form the national level in salient areas (one such example suggested in Interview 5 is taxation).

Towards the end of the interview, respondents were asked how they perceived the future of the ESMA evolving and whether they saw a need for increased independence or increased accountability. All respondents, across both user and industry, revealed that the ESMA has the potential to do more if greater levels of independence existed between the ESMA and actors like NCAs and Member States.

5.8. Increased Powers

Respondents were asked if they saw a greater role or increased powers for the ESMA in the future. The following suggestions, outlined in Table 4, were made.

Table 4: The Future of the ESMA: Stakeholder Input

Increased Power or Role	Description	Frequency of Reference
Consumer Testing	Need for increased resources to broaden ESMA scope in this area. This also means making	High

	information digestible to consumers.	
Prospectuses	The need for ESMA to play a role in developing clarity and simplification of prospectuses. An attempt for supervision of prospectuses to be a remit of the ESMA was attempted in the last ESA review, with no success.	Low
Financial Literacy	Increased resources necessary. Respondents saw this as a crucial area to develop, particularly with banks dominating financial literacy exercises.	High
Cross-border investor protection	Increase in cross-border fraudulent activities, however, the ESMA currently has no mandate in this area. Concerns with European harmonization in these areas (for example, funds) as member states interpret this as limiting competition	Medium
Reporting standards	Harmonisation of reporting standards broadly and, specifically, in relation to sustainable finance.	Medium
Sustainable Finance Ratings	Many respondents indicated ESG and sustainable finance ratings as possible remit for the ESMA, particularly in the similar way they have direct supervisory powers over CRAs.	High
Data Management	ESMA as data manager of European Single Access point of data.	Low
Digital Finance	FinTech, Digital Assets, Crypto-currencies, and other Distributed Ledger Technology, including blockchain. Regulation is still developing in this space, however, ESMA is poised to play a greater role in this space with the development of the Markets in Cyrpto-Assets Regualtion proposal 2020.	High
Competitiveness of financial markets	Expanding the ESMA's mandate to include the competitiveness of financial markets. This would mean the ESMA would perform additional tasks similar to the UK's Financial Conduct Authority.	Low

Taxation	The need for harmonization and a common ground for the taxation of capital markets products and savings products to limit arbitrage opportunities and promote sustainable cross-border selling.	Low
Mystery shopping	With the revised ESMA regulation published in December 2019, following the ESA review, the ESMA's increased mandate included the coordination of mystery shopping. The success of this is dependent on the willingness of NCA's to cooperate. The respondent saw this as a key area for ESMA's powers to develop, allowing them to conduct mystery shopping exercises without NCAs.	Low

Frequency was measured subjectively but took into consideration concentration, depth and rate of suggestions across all respondents.

These suggestions see the development of the ESMA's tasks in areas it has a current mandate, including investor protection, consumer protection, financial literacy, and financial stability, as well as expanding its mandate into market competition. New areas, like digital finance, see a natural development of the ESMA mandate, with digital assets often attached to the securities markets. However, these areas will also expand the role of the EBA and EIOPA regarding Fintech, Central Bank Digital Currencies (CBDC), stable coins and other DLT facilitated products, creating a need for further coordination or integration between the ESAs.

5.9. The Wirecard scandal

The Wirecard case was cited by all but one respondent as an illustration of the ESMA's success and failure as an independent authority. Wirecard was a global FinTech[17] group that, simply put, processed payments, and provided infrastructure and services for payments (Wirecard Annual Report, 2018). For all intents and purposes, it was a case of accounting fraud dating back to 2008, masked to regulators until 2018 (for a full account of the scandal and its implications see Barba Navaretti, Calzolari and Pozzolo 2020). Respondent 5 highlighted the case as an example of the authority acting swiftly and

[17] The Financial Stability Board (2019) defines FinTech as a 'technologically enabled financial innovation that could result in new business models, applications, processes or products with an associated material effect on financial markets and institutions and the provision of financial services'

decisively towards the German Federal Financial Supervisory Authority, Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin):

> “they had this on the radar already before somebody told them to issue something. So, they were also very strict with the German BaFin, I believe, so. This was a case where one could see that it works. And I also see that their reporting regarding transparencies is improving more and more.” (Interview 5)

On 3 November 2020, the ESMA produced a press release titled ‘ESMA identifies deficiencies in German supervision of Wirecard’s financial reporting’. The article detailed several deficiencies including BaFin’s independence from issuers and government, market monitoring by BaFin and the Financial Reporting Enforcement Panel (FREP), examination procedures of FREP, and the effectiveness of the supervisory system in the area of financial reporting (ESMA, 2020).

In response to the Wirecard scandal and the ESMA’s subsequent press release, the SMSG were triggered to produce an own initiative report, which they released on 15 February 2021. Within the report they made a series of suggestions to the ESMA, as well as other European institutions, in the areas of supervision and enforcement that fall under the ESMA’s remit, and more generally on banking supervision, corporate governance and collective redress (SMSG 2021). The advice highlighted the necessity of increased supervisory convergence across NCAs to increase transparency in NCA investigations and enforcement, as well as foster information exchanges between different supervisors. While the case stressed the importance of horizontal accountability mechanisms, like the SMSG, and the ability of the ESMA to provide swift recommendations and condemnations of NCAs’ actions, it also highlighted the limitations of the current financial supervisory structure.

5.10. Architecture Changes: Areas of exploration

The preceding sections highlighted the benefits of increased independence, greater coordination across ESAs and the need to strengthen the voice of horizontal accountability mechanisms. Although this research focuses on the ESMA, it has become clear that the supervision areas of the EBA, EIOPA and ESMA are increasingly intertwined. The below suggestion stem from the previous chapter analysis and insights from SMSG respondents.

Twin Peaks Model

First pioneered in Australia, the twin peaks regulatory structure recognises the blurring boundaries of traditional sectors like banking, securities and insurance, and deconstructs sectoral agencies, like the ESAs, and reconstructs them into two broader industry-wide bodies (Jackson, 2021). The first area is focused on prudential regulations, and the second on market conduct requirements. A recent example of this transition is the UK. On April 1, 2013, the UK transitioned to a 'twin peaks' model of financial regulation. This model meant that the Financial Services Authority was dissolved, and its work was split into two new regulatory authorities, the Prudential Regulation Authority (PRA) (part of the Bank of England) and the Financial Conduct Authority (FCA). The PRA is tasked with the prudential regulation of banks, credit unions, insurers, and major investment firms, whereas the FCA is charged with regulating the conduct of financial services firms. Table 5 emphasises the increasing movement towards integrated supervision.

Table 5: Supervisory Structures Summary

Sectoral	**Twin peaks**	**Integrated (without central bank role in supervision)**	**Integrated (with central bank role in supervision)**
Bulgaria	Belgium – 2011	Denmark – 1988	Austria – 2002
Cyprus	Croatia – 2005	Estonia – 2002	Finland – 2009
Greece	France – 2003	Hungary – 2000	Ireland – 2003
Lithuania	Italy – 1999	Latvia – 2001	Czech Republic – 2006
Luxembourg	Netherlands – 2002	Malta – 2002	Germany – 2002
Slovenia	Portugal – 2017	Poland – 2008	Slovakia – 2006
Spain	UK – 2011	Sweden – 1991	Japan – 2000
	Australia – 1998		
	Canada – 1987		
	US – 2011		

Updated from De Haan, Schoenmaker and Oosterloo, 2012.

The argument for a twin peaks structure in Europe has gained traction following Brexit, with scholars reasoning that there is a need to upgrade capital markets supervision linked with the UK's exit (Schoenmaker and Véron, 2017). Another argument for the twin peaks model is that prudential supervision and market conduct supervision require two different skill sets (Schoenmaker and Véron, 2017). A functional cross-sector model like twin peaks could go some way to alleviating the current tension within the SMSG consumer cohort, allowing those with expertise in financial conduct and investor protection to play a greater role in the second peak. In fact, consumer organisations have already supported the adoption of the new model. In 2017, six major consumer organisations, BEUC, Better Finance, Finance Watch, Age Platform, EFIN, and Families Europe, signed an open letter highlighting their disappointment with the missed opportunity to propose ambitious ESA reforms in the shape of a twin peaks proposal (BEUC et al. 2017). Adopting a new model for financial supervision is a significant task and not without its obstacles (Treaty changes, geographical constrains of the current banking union). However, it does present opportunities to be harnessed in the long-term that would overcome some of the current issues facing the ESAs. Further research addressing the industry perspective, political viability, and legal challenges, would be a significant contribution to the literature.

This research project covers several broad topics and thus requires brevity in areas that expose what seems to be an ever-increasing number of questions. However, referring to the research questions, this chapter aimed to address two core sub-questions:

1. *Considering the accountability, independence and optimization definitions adopted in earlier chapters, how does the ESMA perform in each of these regards?*
2. *What role does horizontal accountability play in financial supervision?*

The outcome that characterizes optimal independence and accountability for the ESMA has been, so far, regarded as the capacity of the ESMA to reach its objectives as outlined in its mandate. Throughout interviews with SMSG members, this optimal outcome has been expanded to include areas of potential impact, and increased independence. Overall, the respondents were generally satisfied with the current vertical accountability measures, with some specific concerns in terms of feedback from ‘principal’ institutions, like the Commission, and improved internal governance to enhance the timeliness of consultations. The SMSG provided a unique insight into horizontal accountability mechanisms within financial supervision, highlighting the important role they play in facilitating a dialogue with stakeholders. There is noteworthy room for further research into evolving financial supervision structures towards the optimization of accountability and independence.

6. Conclusion

Financial market regulators are crucial to the administration of financial market public policy. This news is unlikely to shock anyone. Yet as mandates of financial market regulators and supervisors expand, a critical pressure has been placed on their ability and capacity to manage these increased powers and mandates. Charged with maintaining financial stability, ensuring consumer and investor protection, and the orderly functioning of markets, the potential outcomes extending from this mandate are significant. Further, this mandate must also be carried out with due regard to proportionality, legitimacy, and transparency. Thus, the role of an actor like the ESMA, as has been detailed in previous chapters, is undeniably complex.

Since the ESMA's establishment in 2011, it has inserted itself as a decisive actor within the governance of the EU's financial markets. Certainly, the financial market governance can be easily divided between pre- and post-ESMA eras. This thesis has explored its many roles, governance structures and accountability/independence relationships, exposing nuances and intricacies that are worth consideration.

The first sub-question at the beginning of this paper posed the question: What lessons or comparisons can be drawn from the SSM towards the broader discussions of accountability/independence balances in financial governance, particularly the ESMA? Most notably, the exploration of the SSM highlighted the accountability and independence dynamic for an actor, similar to the ESMA in many ways, however with a more powerful legal standing (as a Treaty body) and integrated supervisory architecture. With the ESMA a central actor in financial market regulation and supervision, it is crucial to reshape its current accountability structure and independence to guarantee autonomy and legitimacy. Examination of the SSM illustrated the non-opposing nature of accountability and independence when sufficient independence (through legal basis) and legitimacy is established (through a variety of accountability mechanisms). By no means is the SSM a perfect construct, however it functions with a higher level of autonomy as well as accountability, a key construct of which being its Banking Dialogue. This dialogue with the European Parliament is a key takeaway that should be explored in future reviews.

The second sub-question was: Considering the accountability, independence and optimization definitions adopted in the research, how does the ESMA perform in each of these regards? This question is weighty has been examined in detail throughout Chapters 4 and 5. For the sake of brevity, the ESMA performs well in several of these areas, nevertheless with room for growth. The ESMA would, as Chapter 4 demonstrated, benefit from greater independence, through disentangling the arms of the Commission from (almost) every aspect of its governance. Simultaneously, a more meaningful discussion focused dialogue with the Parliament would strengthen the democratic accountability and perhaps, allow for a greater level of independence, regarding the objective of its mandate. The ESMA performs well in information stages of accountability, with transparency a core aspect of its legitimizing mechanisms. The optimization of these concepts (accountability and independence) is fundamentally aimed at most effectively, and successfully achieving objectives within the ESMA's mandate. At times, the goal of optimization has pointed the author towards the recommendation of a new supervisory architecture for financial supervision. Here, further research is needed to explore the different models (integrated, 'twin peaks' etc.), their political viability, and their effectiveness.

The third, and final, sub-question was: What role does horizontal accountability play in financial market supervision? Currently, the role of horizontal accountability, specifically through the SMSG and Joint Committee, is moderate. This normative assessment is based upon the accounts of SMSG members and the subsequent analysis. What is noted prominently, however, is how significant the feedback of stakeholders is in terms of usefulness to the ESMA. Its feedback, advice, and recommendations, presented through consultations should not be understated, particularly the establishment of a consensus within the SMSG is illustrative of a wider market acceptance. Staying in touch with the market through stakeholders is a crucial aspect of accountability established in Chapter 5, as well as broader efficiency for the ESMA. With the complex tasks of the authority easily unobserved by the wider public, the representation of stakeholders like consumer representatives, and user representatives in general, is crucial in ensuring the needs EU citizens are at the center of the ESMA's mandate.

The implications of this research project extend beyond just the ESMA, to the ESAs and financial supervision more generally. As the ESMA's powers continue to expand, think of digital finance and sustainability in particular, the need to reexamine and reshape its current supervisory structure is highlighted again and again. Although ESMA's evolution has been described as incremental, at some point its current structure will be pushed to breaking point. (Moloney, 2018). Whether this transformation results in something like a single financial market supervisor, or a twin peaks structure, and where it sits alongside or below the ECB is still to be seen. It seems, however, inevitable that a punctuated change must come.

.

Bibliography

Alesina, A. and Tabellini, G. 2008. 'Bureaucrats or politicians? Part II: Multiple policy tasks'. *Journal of Public Economics.* 426: 440 and 444-5

Amtenbrink, F. and Markakis, M. 2019. 'Towards a Meaningful Prudential Supervision Dialogue in the Euro Area? A Study of the Interaction Between the European Parliament and the European Central Bank in the Single Supervisory Mechanism'. *European Law Review* 44(1): 3-23

Anand, A. 2010. 'Is Systemic Risk relevant to securities regulation?' *University of Toronto Law Journal* 60: 941

Barba Navaretti, G. Calzolari, G. and Pozzolo, A. 2020. 'What are the wider supervisory implications of the Wirecard case?'. Study requested by the European Parliament ECON Committee. DG Internal Policies. October 2020

Bergman, T., Müller, W. and Strøm, K. 2000. 'Introduction: Parliamentary democracy and the chain of delegation'. *European Journal of Political Research* 37(3): 255-60

BEUC, Better Finance, Finance Watch, Age Platform, EFIN, and Families Europe. 2017. 'Open Letter: Proposal for the EU financial supervisory reform'. Brussels, 27 November, 2017. Accessed at: https://www.beuc.eu/publications/beuc-x-2017-139_fal_proposal_for_the_eu_financial_supervisory_reform_open_letter.pdf

Bogner, A. and Menz, W. 2009. 'The theory-generating expert interview: Epistimelogical interet, forms of knowledge, interaction'. In: Bogner, A., Littig, B. and Menz, W. (Eds.) *Interviewing experts.* Palgrave and Macmillan

Bovens, M. 2005. Public Accountability. In: Ferlie, E., Lynne, L., and Pollitt, C. (Eds.) *The Oxford handbook of public management*: 182-208. Oxford: Oxford University Press.

Bovens, M. 2007. 'Analysing and assessing accountability: A conceptual framework\. *European Law Journal* 13(4): 447-68

Bovens, M., Goodin, R.E. and Schillemans, T. 2014. *The Oxford Handbook Public Accountability*. Oxford: Oxford University Press.

Brandsen, T., Vrielink, M.O., Schillemans, T. and van Hout, E. 2011. 'Nonprofit organisations, democratisation and new forms of accountability: A preliminary evaluation. In *Social accounting and public management. Accountability for the common good*, ed. Osborne, S. and Ball, A. 90-201. London Routledge.

Brandsma, G.J. and Schillemans, T. 2012. 'The Accountability Cube: Measuring Accountability'. *Journal of Public Administration Research and Theory*. 23(4): 953-975

Busuioc, M. 2009. 'Accountability, Control and Independence: The Case of European Agencies'. *European Law Journal* 15: 599-615

Busuioc, M. and Groenleer, M. 2013. 'Beyond Design: The Evolution of Europol and Eurojust'. *Perspectives on European Politics and Society* 14(3): 285-304

Chamon M. 2010. 'EU Agencies: Does the Meroni Doctrine Make Sense?' *Maastricht Journal of European and Comparative Law* 17(3):281-305

Chiti, E. 2015. 'In the Aftermath of the Crisis – the EU Administrative System between Impediments and Momentum'. *EUI Department of Law Research Paper*. No, 2015/13

Case 9/56 *Meroni v High Authority* 1957 and 1958 ECR 133

Commission. 2012. *Joint Statement on Decentralised Agencies*
Commission. 2017. *ESAs' Review: Proposal COM(2017) 536 Final*

Commission. 2017. *Proposal for a Regulation as Regards CCPs and Requirements for the Recognition of Third-Country CCPs COM(2017) 331*

Commission. 2017. *Reinforcing Integrated Supervision to Strengthen CMU and Financial Integration in a Changing Environment COM(2017) 542: 13*

Considine, M. 2002. 'The end of the line? Accountable governance in the age of networks, partnerships, and joined-up services. *Governance* 15(1): 21-40

Craig, P. 2012. *EU Administrative Law*. Oxford University Press

Curtin, D. 2004. 'European Union Executive Actors Evolving in the Shade?'. In J. de Zwaan, J. Jans and F. Nelissen (eds). *The European Union: An Ongoing Process of European Integration.* Liber Amicorum Alfred E. Kellerman. The Hague: TMC Asser Press, 97-110

Curtin, D. 2006. 'European Legal Integration: Paradise Lost?'. In D. Curtin, A. Klip, J. McCahery, J. (eds.)

Curtin, D. and Dehousse, R. 2012. 'European Union agencies: tipping the balance?' In: Busuioc, M., Groenleer, M. and Trondal J. (eds.)

Day, P. and Klein, R. 1987. *Accountabilities: Five public sectors.* London: Tavistock.

De Haan, J., Shcoenmaker, D. and Oosterloo, S. 2012. *Financial Markets and Institutions: A European Perspective*. Second Edition. Cambridge: Cambridge University Press

Delors, J. 1989. *EU Commission Working Document*

Delreux, T. and Adriaensen, J. 2017. Introduction. Use and Limitations of the Principal-Agent Model in Studying the European Union. In: Delreux, T. and Adriaensen, J. (eds) The Principal Agent Model and the European Union. *Palgrave Studies in European Union* Politics

Di Noia, C. and Gargantini, M. 2014. 'Unleashing the European Securities and Markets Authority: Governance and Accountability after the ECJ Decision on the Short Selling Regulation'. EBOR 15(1)

ESMA. 2018. Annual Report on 2017

Everson, M. 1995. 'Independent Agencies: Hierarchy Beaters?'. *European Law Journal* 1(2): 180-204

Everson, M and Vos, E. 2016. 'European Agencies: What about the institutional balance?' In (Eds.) Lazowksi, A and Blockmans, S. 2016. *Research Handbook on EU Institutional Law*

Ferran, E. 2004. *Building an EU Securities Market*. Cambridge University Press p. 64

Ferran, E. and Babis, V. 2013. 'The European Single Supervisory Mechanism'. *JCLS* 13: 255

Financial Stability Board. 2019. 'Assesses Fintech developments and potential financial stability implications'. Report 14. February 2019

Fraccaroli et al. https://www.ecb.europa.eu/pub/economic-bulletin/articles/2018/html/ecb.ebart201805_01.en.html#toc3

Geradin, D. 2005. 'The Development of European Regulatory Agencies: Lessons from the American Experience' in D. Geradin *et al.* (eds) 215-245

Gibbs, G. 2018. Thematic coding and categorizing. In *Analyzing qualitative data* (pp. 53-74). SAGE Publications Ltd

Glaser, B. and Strauss, A. 1967. *The discovery of grounded theory: Strategies for qualitiative research.* Chicago: Aldine

Hennink, M., Kaiser, B. and Marconi, V. 2016. 'Code Saturation Versus Meaning Saturation: How Many Interviews Are Enough?' *Qualitative Health Research*. 2017;27(4):591-608

High-Level Group on Financial Supervision in the EU. 2009. *Report*. Brussels. 25 February 2009 (de Larosière Report)

IMF. 2013. *FSAP: Technical Note on Issues in Transparency and Accountability Country Report No. 13/65.* March 2013

IMF. 2018. *FSAP Technical Note: Assessment of Observance of Basel Principles for Effective Banking Supervision No. 18/233* July 2018 ECB

Jackson, H. 2021. Foreword. In: Godwin, A. and Schmulow, A. (Eds.) 2021. *The Cambridge Handbook of Twin Peaks Financial Regulation.* Cambridge: Cambridge University Press

Lehn, B. 2008. 'Bearing more risk for results: Performance accountability and nonprofit relational work'. *Administration & Society* 39(8): 959-83.

Lijphart, A. 1971. 'Comparative politics and the comparative method'. *American Political Science Review* 65(3): 682-93

Lijphart, A. 1975. 'The comparable cases strategy in comparative research'. *Comparative Political Studies* 8: 158-77

Majone, G. 2000. 'The Credibility Crisis of Community Regulation'. *Journal of Common Market Studies* 38(2): 273-302

Meuser, M. and Nagel, U. 1991. 'ExpertInneninterviews – Vielfach erprobt, wenig bedacht.' In D. Garz and K. Kraimer (Eds.), *Qualitativ-empirische Sozialforschung: Konzepte, Methoden Analysen* (pp. 71-93). Westdeutscher Verlag.

Meuser, M. and Nagel, U. 2009. 'The expert interview and changes in knowledge production'. In A. Bogner, B. Littig, & W. Menz (Eds.), *Interviewing experts* (pp. 17–42). Palgrave Macmillan UK.

Moloney, N. 2011a. 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A tale of two competences: Part (1) Rule-Making'. *European Business Organization Law Review* 12: 41-86.

Moloney, N. 2011b. 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A tale of two competences: Part (2) Rules in Action'. *European Business Organization Law Review* 12: 177-225.

Moloney, N. 2014. 'European Banking Union: Assessing its Risks and Resilience'. *Common Market Law Review* 51(6): 1609-1670

Moloney, N. 2018. *The Age of ESMA*.

Moloney, N. 2018a. *EU financial governance after Brexit: the rise of technocracy and the absorption of the UK's withdrawal.* In: Alexander, Kern, Barnard, Catherine, Ferran, Eilís, Lang, Andrew and Moloney, Niamh, (eds.) Brexit and Financial Services: Law and Policy. Hart Publishing, Oxford, UK

Monnet, J. and Ball, G. 1978. *Memoirs*. Garden City, N.Y.: Doubleday.

Mulgan, R. 2003. *Holding power to account: Accountability in modern democracies*. London: Palgrave Macmillan.

Murphy, M. 2009. 'Bureaucracy and its limits: Accountability and Rationality in Higher Education'. *British Journal of Sociology of Education* 30(6)

Nielson, D. and Tierney, M. 2003. 'Delegation to international organisations: Agency theory and world bank environmental reform'. *International Organization* 57(2): 241-76

Ooik, van R. 2005. 'The Growing Importance of Agencies in the EU: Shifting Governance and the Institutional Balance', in D. Curtin and R. Wessel (eds). *Good Governance and the European Union. Reflections on concepts, institutions and substance.* Antwerp: Intersentia 125-52

Pelkmans, J. and Simoncini, M. 2014. 'Mellowing Meroni: How ESMA can help build the single market'. CEPS Commentary. 18 February 2014

Protocol (No. 4) on the Statute of the European System of Central Banks and of the ECB, [2016] OF C 202/230

Przeqorski, A. and Teune, H. 1970. *The logic of comparative social inquiry*. New York: John Wiley

Quaglia, L., Howarth, D., and Liebe, M. 2016. 'The Political Economy of European Capital Markets Union'. *Journal of Capital Markets Studies*. 54: 185

Quintyn M. and Taylor, M. 2003. 'Regulatory and Supervisory Independence and Financial Stability.' 49 CESifo Economic Studies. 259: 269

Quintyne M. and Taylor, M. 2007. 'Robust Regulators and their Political Masters: Independence and Accountability in theory'. In D. Masciandaro and M. Quintyn (eds), *Designing Financial Supervision Institutions* (2007) 4.

Ray, D. and Elder, D. 2007. 'Managing Horizontal Accountability'. *The Journal for Quality and Participation*

Romzek, B. and Dubnick, M. 1987. 'Accountability in the public sector: Lessons from the *Challenger* tragedy.' *Public Administration Review.* 47(3): 227-38.

Schiavo G.L. and Türk A. 2016. The Institutional Architecture of EU Financial Regulation: The Case of the European Supervisory Authorities in the Aftermath of the European Crisis. In: Talani L. (eds) Europe in Crisis. Palgrave Macmillan, London

Schillemans, T. 2008. 'Accountability in the shadow of hierarchy: the horizontal accountability of agencies.' *Administration and Society*. 8: 175-194

Schmitter, P. 2000. *How to Democratise the European Union… And why bother?* Lanham, Rowman & Littlefield Publishers. Governance in Europe.

Schoenmaker, D. and Véron, N. 2017. 'A twin peaks vision for Europe'.
Scholten, M. and van Rijsbergen, M. 2014. 'The ESMA-Short Selling Case: Erecting a New Delegation Doctrine in the EU upon the Meroni-Romano Remnants'. *Legal Issues of Economic Integration* 41(4)

Scott, C. 2000. 'Accountability in the regulatory state.' *Journal of Law and Society*. 27: 38-60

Seawright, J. and Gerring, J. 2008. 'Case selection techniques in case study research: A menu of qualitative and quantitative options'. *Political Research Quarterly* 61(2): 294-308

Skocpol, T. and Somers, M. 1980. 'The uses of comparative history in macrosocial inquiry'. *Comparative Studies in Society and History* 22(2): 147-97

SMSG ESMA. 2019. Joint Position Paper on the ESA Review. December 4, 2019. Accessed at: https://www.esma.europa.eu/sites/default/files/library/esma22-106-2053-joint_opinion_esa_review.pdf

SMSG ESMA. 2021. SMSG advice to ESMA on its Consultation Paper on Guidelines on the MiFID II / MiFIR Obligations on Market Data'. January 11, 2021. Accessed at: https://www.esma.europa.eu/sites/default/files/library/esma22-106-3087_smsg_advice_on_guidelines_on_the_mifid_ii_mifir_obligations_on_market_data.pdf

SSM. 2018. *SSM Supervisory Manual* (March 2018); *ECB Annual Report on Supervisory Activities* 2017 (March 2018)

Strøm, K. Müller, W. and Bergman, T. 2006. *Delegation and accountability in parliamentary democracies*. Oxford, UK: Oxford University Press.

Thatcher, M. and Stone Sweet, A. 2002. 'Theory and Practice of Delegation to Non-Majoritarian Institutions'. *West European Politics* 25(1)

Verschuere, V., Verhoest, K., Meyers, F. and Guy Peters, B. 2006. 'Accountability and accountability arrangements in public agencies. In *Autonomy and regulation: Coping with agencies in the modern state*, ed Christensen, T. and Laegreid, P. 268-97. Cheltenham, UK: Edward & Elgar.

Vos, E. 2018. 'EU Agencies on the Move: Challenges Ahead.' *Swedish Institute for European Policy Studies*

Weber, M. 1978. *Economy and Society: An outline of interpretive sociology.* Edited by G. Roth and C. Wittich, Translated by E. Fishoff et al. Berkley: University of California Press

Appendices

Appendix 1

Introduction:

- Explain research project and myself
- Confidentiality or anonymity question: Are you happy to be named as a participant in the project?
- Interview and recording consent
- Background of participant

Opening Questions:

- Accountability
- Financial supervision and independence
- Role of ESMA
- (Gain a general idea of participants perspective on these areas)

Key questions (Internal):

1. How do you see the role of the stakeholders group in ensuring accountability for ESMA?
- Could you grade the ability of the stakeholder group to ensure accountability in a scale from 1 to 10?
- In your view, what is the added value of the group in ensuring legitimacy or accountability?
2. How does the consultation process work?
- Do you further consult your constituencies?
- Does this process work smoothly?
3. Are there any limitations you can see?
- Or how effective is it as a horizontal accountability mechanism? In this case, I refer to horizontal accountability as accountability towards peers and stakeholders as opposed to traditional or vertical accountability to obligations - in ESMA's case formally to the European Parliament and Council and also Commission.
4. Structure of the SMSG - importance of each stakeholder section, is the makeup optimal
5. How much influence does the SMSG have? Could you indicate this on a scale of 1-10?
- Does this differ in quantity in for different areas? Or do you see the influence as largely homogenous?

Key questions (External):
1. General legitimacy and accountability of ESMA:
- More broadly, not specifically towards the SMSG, how accountable is it as an agency?
- Is this a concern for you?
2. Relationship between ESMA and EU institutions: Commission, EP etc
- Perceived quality of feedback from EU institutions?
- Adversarial vs supportive attitude by other institutions?
3. Greater independence or greater democratic accountability?
- How do you see the relationship between independence and accountability currently? Is it optimal?

4. If not, what changes would make it optimal? Or in which direction should it go?
5. How do you see ESMA's supervisory powers evolving?

Appendix 2: SMSG Members (July 2021)

Members	*Representing*
Barbara Alemanni	Academics
Emilios Avgouleas	Academics
Henning Bergmann	Financial market participants
Geoffrey Bezzina	Users of Financial Services
Piotr Biernacki	Small and medium enterprises
Florence Bindelle	Financial market participants
Morten Bruun Pedersen	Consumers
Lubomir Christov	Users of Financial Services
Jasper De Meyer	Consumers
Urban Funered	Financial market participants
Ivana Gažić	Financial market participants
Adina Gurau Audibert	Financial market participants
Christiane Hölz	Users of Financial Services
Dermott Jewell	Consumers
Eric Litvack	Financial market participants
Sari Lounasmeri	Users of financial services
Stjepan Mandic	Small and Medium Enterprises
Christian Martin Stiefmueller	Consumers
Martha Oberndorfer	Consumers
Giovanni Petrella	Academics
Guillaume Prache	Consumers
Rainer Riess	Financial market participants
Virginie Saade	Financial Market Participants
Ignacio Santillán	Financial market participants
Martin Scheck	Financial market participants
Alexander Schindler	Financial market participants

Jean-Marc Servat	Financial market participants
Chris Vervliet	Employees
Tanguy van de Werve	Financial market participants

Appendix 3: Code Book (In alphabetical order, not order salience)

CODE	TYPE	FREQUENCY	DESCRIPTION	EXAMPLE FROM DATA
ACCOUNTABILITY	Deductive/Inductive	9	This code was used when broader aspects of accountability were discussed or where multiple types of accountabilities are incorporated in one idea, not specifically in relation to one certain principal or mechanism. It is also used when the respondent offered a definition.	So, accountability should rather be defined as accountability towards those who are most directly involved. (Interview 4)
ASSESSMENT	Inductive	31	This code was used as a notice point for (inductive) assessments made by the respondents without prompting from the interviewer. Assessments refers to a normative account of efficiency, independence or	As you know, Parliament and the Commission, of course, are looking at what they (ESMA) are doing. I think they have they are interacting with lots of other stakeholders who can be quite vocal if they do something that we don't like. But I think it's fair to say, I haven't looked at, I think the discussions around ESMA has been fairly balanced. I, you know, of course, you know,

accountability for the SMSG or ESMA, as well as suggested improvements.

This code is very broad in its scope, however, was a useful tool for the researcher to collate all assessments in one place.

during the pandemic, for example, they could be criticised for moving slowly. I mean, why didn’t they do anything? But I think that has more to do with, you know, it was exceptional for all of us. And, of course, they were kind of tricked in the wire card case, because, you know they had a very limited mandate. So I think if they are ever criticised people don’t really understand what their mandate is. It’s quite limited in some areas. But I think Verena Ross and I mean, has done a very good job and also the chair. (Interview 1)

But the final judgement in the overall picture, which issues are more important and which issues are less important? So I’m totally fine that the ESMA Chair is taking care of that. So it’s not, I mean, I see the task of our group really to serve the purpose to shed the light on the issue from all angles. Be it a big topic or a small topic just to make ESMA aware how certain things are perceived by certain groups or stakeholders.

				And so this is our role, to bring this to the table, but it's not our business to decide, we are a consultation mechanism. And we are consulting and not deciding, so that, so totally fine. It's our role. (Interview 5)
BALANCE	Inductive and Deductive	7	Balance refers primarily to the independence/ accountability balance. However also refers to specific imbalances, for example, between Member State preferences.	(On CRAs) They had to, of course, have a direct kind of role to play there. In some areas, of course, have a direct kind of role to play there. In some areas, of course, they will, again, in areas where you have very national markets, you know, member states may not want to, you know, actually give them more powers. So I think there is a balance to be struck. (Interview 1) And then, you know, in terms of balance, I mean, there are five consumer representatives. I think on the SMSG, there's also some user representatives, as well. But obviously, there are many financial market participants. And I'd say that there, there is some imbalance between the different types of stakeholders. And I think that, you know, we would pay for more

				balance within the stakeholder group (Interview 6)
BREXIT	Inductive	2	This code was used any time a respondent referred to implications of the UK leaving the EU.	There was of course, a tendency that the UK knowing much about the markets, kind of frame the rules so that they work well for multinational big entities, while in the rest of Europe, you have small to medium sized players. (Interview 1)
COMPENSATION	Inductive	3	This code is a subset of the resource code. It refers specifically for compensation related issues within the SMSG.	Making sure that consumer representatives are compensated for the work that they do is another good recommendation. And there have been some changes in relation to compensation for some organisations, and I think that has, you know, allows consumer representatives to provide more input. Potentially, that needs to be explored more even further. (Interview 6)
COMPLEXITY	Inductive	5	This code is a related code to financial literacy. However, it also relates to the particularly complex topics discussed by the SMSG and the problems this produces.	The only thing I would really stress is that things must be understandable. And there are certain documents, which really make people refrain from buying securities, because they … I heard nowadays, people, typically when they open an account, or a securities deposit, they sign 40 pages .. And

				I really feel this is too much. So there should be an effort to make this easier. (Interview 5) And I, generally speaking, I would say, there are about three things or themes that we should take into account, though that is from an operational point of view, the legislation or whatever it is, whatever is being decided, as technical standards or whatever remains feasible, remains, practically remains possible from a practical point of view for people in the field, I give you one, you can make legislation or regulation so complex, that if that if someone is sitting in front of a client it cannot be carried out. (Interview 4)
CONSULTATION PROCESS	Deductive	22	This is a largely deductive code and refers to responses prompted by the interviewer's questions on the stakeholder group consultation process.	Because, you know, the stakeholder groups are basically a way to have the authority in correspondence with the stakeholders at large and they have the possibility to have a single point of communication with the stakeholder group. With the stakeholder group, they will find immediately investors,

				they will find immediately intermediaries, they will find immediately markets. So that's the way in which it works, it works as otherwise they can communicate with stakeholders at large you know imagine the consultation process. (Interview 3) What usually happens is we consult amongst ourselves, whether it would be useful to set up a working group on a particular issue, it may require a sufficient interest to set up a working group. (Interview 4)
CONSUMER	Inductive	9	The consumer cohort of the SMSG was a significant topic of conversation, both due to the representation of respondents from that group and specific issues that face that group that all parties were interested in. This code specifies consumer specific discussions.	Because I believe you have coordination in a lower level anyway, just thinking about consumer aspects. There is an organisation like Better Finance, for example. They also care about pension, for example. So there is an overlap there. (Interview 5) I think adding more consumer representatives to ensure more balance is certainly one good recommendation. (Interview 6)

COORDINATING NATIONAL LEVEL	Inductive	10	This code was used when the problems of coordinating NCAs or Member States preferences were discussed. Both in terms of effectiveness, independence and accountability obligations.	And the taxonomy is maybe a good catalyst to make things happen. This is a very positive issue, I would say. I always noticed that everything which is related to taking power which the sovereigns want to have in their national portfolio, yeah. So then it gets really difficult when the taxes are touched upon. (Interview 5)
DIGITAL FINANCE	Inductive	4	Code used to describe any type of digital finance issue, including Distributed Ledger Technology, cryptocurrencies and RegTech.	I think to a large extent digital has so far been about payments etc., but the DLT technology, for example, and crypto currencies that's all about securities markets, so ESMA will have a role to play and these are areas really where you need to have a centre, again, with lots of resources and knowledge because no single member state can any longer, I mean with the UK outside, no country has its own resources. (Interview 1)
EFFECTIVENESS	Deductive and Inductive	15	Refers to any assessments of effectiveness of the SMSG or ESMA.	So I think from the industry side, I don't think that anyone in the industry would say, let's cut off the resources to ESMA. I think we would say give them resources so that they can do a proper supervision. Because if

				they don't, we will be blamed. And actually, I think it's also because they do quit a good job with limited resources. (Interview 1)
ESA COORDINATION	Deductive and Inductive	13	Refers to current coordination between ESAs (both at the supervisory and stakeholder level) and future outlook.	Yeah, that's something that we sometimes consider that in theory, in theory, we might want to coordinate with the other groups but in practice it is not easy to do. (Interview 3)
ESMA GOVERNANCE AND SUPERVISORY ORGANISATION	Inductive	15	Internal governance of ESMA and the ESAs.	I think part of it is god governance, that you have a very good consultation process. And once in a while, the documents arrived so late, that, you know, consultation needs to be done within 10 days. (Interview 5)
EUROPEANISATION / HARMONSIATION	Inductive	10	Refers to any points based on further integration at a political level. Used for broader discussions of a political nature. It also refers to issues of greater harmonisation.	But one of my kind of missions in life has been to convince my members, the banks and others in the Nordics that actually, you know, ESMA and others, they are trying to do a good job, we all have something to gain from other parts of Europe developing as well. (Interview 1) While in the Commission in Brussels, I mean they are much more bureaucrats, and they

				are excellent, but quite a number of them are, you know they have a vision of, either they are quite young or you kind of have true believers in the European project and I mean I believe in the European project but I don’t think that, if you look at the politics in Europe it’s not really that the citizens of Europe want much more Europe. (Interview 1)
EVOLUTION	Inductive	5	Refers to the historical development of the ESMA.	The organisation has been built from scratch only 10 years ago, I believe, and so they have a very modern management style and did not have the burden of the past. So I think it was good. And they also showed their capacities, in particular in data management. (Interview 5)
FEEDBACK	Inductive and Deductive	7	This refers to the aspect of accountability that requires a feedback loop between the principal and the agent. This code includes discussions of what this feedback looks like, its	(Payment for order flow models) And I think it was quickly a concern that the Commission also took on board and I think as you know, they were invited in front of the econ committee in order to provide an explanation. And subsequently, this issue has also been investigated much more closely by ESMA and they also recently

			frequency and effectiveness.	published a document, looking more closely into the matter. (Interview 6) I think there have also perhaps been occasions where it's not certain whether ESMA has taken on board some of the positions that the SMSG might have given. (Interview 6)
FINANCIAL LITERACY	Inductive	3	Refers to problems of lacking financial literacy among the broader public.	I feel it's crucial to not let the banks do the financial education alone, because they always have commercial interest. And it's really important to have other institutions to offer something, which is not with commercial interests behind. (Interview 5)
HORIZONTAL ACCOUNTABILITY	Deductive	26	Refers specifically to discussions of horizontal accountability for ESMA and the SMSG.	Because essentially, all the people who are being affected by the regulation have a word and they can have a voice, and they can contribute. (Interview 5) And the interim chair said, it is so important for us to get your views to have the exchange with you, too, to hear from the market participants what's really going on in the market, because the regulators,

				supervisors, thy are in their own bubble, they are exchanging with themselves, they are discussing with themselves. But to get in this root view, which is based on consensus, which is a very important element and additional tool for ESMA. To get its accountability. (Interview 2)
INCREASED POWERS	Deductive and Inductive	15	Used for any suggestions made by the respondent for where ESMA's or the SMSG's role could be increased, or current powers could be used more actively.	I think what we say, you know, when it comes to the supervisory powers of the ESAs where you wish on occasions that they would make more active use of the product intervention powers. (Interview 6)
INFLUENCE OF SMSG	Deductive	6	Responses to questions on the influence of the SMSG.	The potential influence is absolutely the same in any case in many areas. In my view, the actual influence depends on the argument. You know, when you receive a consultation, and you bring a good idea and if you find the flaw in the process, if you find the flaw in the system, or in the draft. (Interview 3)
LIMITS TO INDEPENDENCE	Deductive and Inductive	18	Any areas that impact the independence of ESMA.	But there are limits to its independence in a way, because they can only act within the

				framework given to it by member states. (Interview 1)
RESOURCES	Inductive	14	Refers to anytime the term resources was used to explain current problems or lacking effectiveness.	If anything, I can say that we would on our side (industry) want to increase resources to ESMA. (Interview 1)
SMSG ACCOUNTABILITY	Deductive and Inductive	16	Refers to general SMSG accountability topics. Relates and overlaps with the code horizontal accountability.	And as far as I can say, from the group, I am contributing to this is extremely productive and extremely fruitful. And people really strive to achieve the best outcome. IT is very good that the issues are being discussed openly. So that you know, everybody can understand the needs and desires and concerns of the other groups. (Interview 5)
SMSG MAKEUP	Deductive	18	Responses regarding the question of optimal representation in the SMSG. For example, more academics or more consumers.	Sometimes you have the feeling that the major stakeholder groups and I can understand this, are our consumer representative and the industry. In the SMSG, our representation is minimal (employee), but it is there. I would regret if the employee representatives would disappear altogether. (Interview 4)

SUSTAINABILITY	Inductive	16	Refers to topics of sustainability in the remit of ESMA, as well as the SFDR or ESG topics.	Now, it is very much about digitalisation and transparency with SFDR to make all this really work and ensure that the measurements and transparency is there, and also the learnings from cases like Wire Card or Robin Hood, these are also topics which arise and which are taken care of. (Interview 5)
TENSION WITH NCAS	Inductive	18	Refers to any points that refer to tension between ESMA and NCAs.	So what they have to do now, ESMA, is that they kind of issue recommendations to member states, not to take action or not to focus on this. And we can see that in Sweden as well, because our supervisors will then , they can't say, as an international agency that look, we won't enforce these rules. But they can say that, you know, we have lots of work to do and it's soon Christmas. So I don't think we will focus on that until March next year. (Interview 1)
TIME	Inductive	10	Usually in response to the question that refers to limits to the consultation process, where lack of time played a role.	On occasions, consultations can be very short, especially given the complexity of some of the topics that we're dealing with. And that can be challenging on some

				occasions to provide proper advice to ESMA within a proper timeframe. (Interview 6) Now there is one major limitation that is the timeliness. (Interview 2)
VERTICAL ACCOUNTABILITY	Deductive and Inductive	9	Used when European institutions are specifically named as principals in an accountability relationship with ESMA.	First of all, ESMA is accountable to the European institutions. So accountability towards Parliament, towards the council … (Interview 2)
WIRE CARD	Inductive	7	The wire card case came up as examples with implications for ESMA's accountability/independence framework, and was thus coded correspondingly.	So they were also very strict with the German Bafin, I believe, so this was a case where one could see that it works. And also see that their reporting regarding transparencies is improving more and more. (Interview 5)
CODE	**Type**	**Frequency**	**Description**	**Example from data**
ACCOUNTABILITY	Deductive/Inductive	9	This code was used when broader aspects of accountability were discussed or where multiple types of accountabilities are incorporated in one idea, not specifically in relation to	So, accountability should rather be defined as accountability towards those who are most directly involved. (Interview 4)

			one certain principal or mechanism. It is also used when the respondent offered a definition.	
ASSESSMENT	Inductive	31	This code was used as a notice point for (inductive) assessments made by the respondents without prompting from the interviewer. Assessments refers to a normative account of efficiency, independence or accountability for the SMSG or ESMA, as well as suggested improvements. This code is very broad in its scope, however, was a useful tool for the researcher to collate all assessments in one place.	As you know, Parliament and the Commission, of course, are looking at what they (ESMA) are doing. I think they have they are interacting with lots of other stakeholders who can be quite vocal if they do something that we don’t like. But I think it’s fair to say, I haven’t looked at, I think the discussions around ESMA has been fairly balanced. I, you know, of course, you know, during the pandemic, for example, they could be criticised for moving slowly. I mean, why didn’t they do anything? But I think that has more to do with, you know, it was exceptional for all of us. And, of course, they were kind of tricked in the wire card case, because, you know they had a very limited mandate. So I think if they are ever criticised people don’t really understand what their mandate is. It’s quite limited in some areas. But I think Verena Ross and I

				mean, has done a very good job and also the chair. (Interview 1) But the final judgement in the overall picture, which issues are more important and which issues are less important? So I'm totally fine that the ESMA Chair is taking care of that. So it's not, I mean, I see the task of our group really to serve the purpose to shed the light on the issue from all angles. Be it a big topic or a small topic just to make ESMA aware how certain things are perceived by certain groups or stakeholders. And so this is our role, to bring this to the table, but it's not our business to decide, we are a consultation mechanism. And we are consulting and not deciding, so that, so totally fine. It's our role. (Interview 5)
BALANCE	Inductive and Deductive	7	Balance refers primarily to the independence/ accountability balance. However also refers to specific imbalances, for	(On CRAs) They had to, of course, have a direct kind of role to play there. In some areas, of course, have a direct kind of role to play there. In some areas, of course, they will, again, in areas where you have very national markets, you know, member states

			example, between Member State preferences.	may not want to, you know, actually give them more powers. So I think there is a balance to be struck. (Interview 1) And then, you know, in terms of balance, I mean, there are five consumer representatives. I think on the SMSG, there's also some user representatives, as well. But obviously, there are many financial market participants. And I'd say that there, there is some imbalance between the different types of stakeholders. And I think that, you know, we would pay for more balance within the stakeholder group (Interview 6)
BREXIT	Inductive	2	This code was used any time a respondent referred to implications of the UK leaving the EU.	There was of course, a tendency that the UK knowing much about the markets, kind of frame the rules so that they work well for multinational big entities, while in the rest of Europe, you have small to medium sized players. (Interview 1)
COMPENSATION	Inductive	3	This code is a subset of the resource code. It refers specifically for	Making sure that consumer representatives are compensated for the work that they do is another good recommendation. And there

			compensation related issues within the SMSG.	have been some changes in relation to compensation for some organisations, and I think that has, you know, allows consumer representatives to provide more input. Potentially, that needs to be explored more even further. (Interview 6)
COMPLEXITY	Inductive	5	This code is a related code to financial literacy. However, it also relates to the particularly complex topics discussed by the SMSG and the problems this produces.	The only thing I would really stress is that things must be understandable. And there are certain documents, which really make people refrain from buying securities, because they … I heard nowadays, people, typically when they open an account, or a securities deposit, they sign 40 pages .. And I really feel this is too much. So there should be an effort to make this easier. (Interview 5) And I, generally speaking, I would say, there are about three things or themes that we should take into account, though that is from an operational point of view, the legislation or whatever it is, whatever is being decided, as technical standards or whatever remains feasible, remains,

				practically remains possible from a practical point of view for people in the field, I give you one, you can make legislation or regulation so complex, that if that if someone is sitting in front of a client it cannot be carried out. (Interview 4)
CONSULTATION PROCESS	Deductive	22	This is a largely deductive code and refers to responses prompted by the interviewer's questions on the stakeholder group consultation process.	Because, you know, the stakeholder groups are basically a way to have the authority in correspondence with the stakeholders at large and they have the possibility to have a single point of communication with the stakeholder group. With the stakeholder group, they will find immediately investors, they will find immediately intermediaries, they will find immediately markets. So that's the way in which it works, it works as otherwise they can communicate with stakeholders at large you know imagine the consultation process. (Interview 3) What usually happens is we consult amongst ourselves, whether it would be useful to set up a working group on a particular issue, it

				may require a sufficient interest to set up a working group. (Interview 4)
CONSUMER	Inductive	9	The consumer cohort of the SMSG was a significant topic of conversation, both due to the representation of respondents from that group and specific issues that face that group that all parties were interested in. This code specifies consumer specific discussions.	Because I believe you have coordination in a lower level anyway, just thinking about consumer aspects. There is an organisation like Better Finance, for example. They also care about pension, for example. So there is an overlap there. (Interview 5) I think adding more consumer representatives to ensure more balance is certainly one good recommendation. (Interview 6)
COORDINATING NATIONAL LEVEL	Inductive	10	This code was used when the problems of coordinating NCAs or Member States preferences were discussed. Both in terms of effectiveness, independence and accountability obligations.	And the taxonomy is maybe a good catalyst to make things happen. This is a very positive issue, I would say. I always noticed that everything which is related to taking power which the sovereigns want to have in their national portfolio, yeah. So then it gets really difficult when the taxes are touched upon. (Interview 5)
DIGITAL FINANCE	Inductive	4	Code used to describe any type of digital finance issue, including Distributed Ledger	I think to a large extent digital has so far been about payments etc., but the DLT technology, for example, and crypto

			Technology, cryptocurrencies and RegTech.	currencies that's all about securities markets, so ESMA will have a role to play and these are areas really where you need to have a centre, again, with lots of resources and knowledge because no single member state can any longer, I mean with the UK outside, no country has its own resources. (Interview 1)
EFFECTIVENESS	Deductive and Inductive	15	Refers to any assessments of effectiveness of the SMSG or ESMA.	So I think from the industry side, I don't think that anyone in the industry would say, let's cut off the resources to ESMA. I think we would say give them resources so that they can do a proper supervision. Because if they don't, we will be blamed. And actually, I think it's also because they do quit a good job with limited resources. (Interview 1)
ESA COORDINATION	Deductive and Inductive	13	Refers to current coordination between ESAs (both at the supervisory and stakeholder level) and future outlook.	Yeah, that's something that we sometimes consider that in theory, in theory, we might want to coordinate with the other groups but in practice it is not easy to do. (Interview 3)
ESMA GOVERNANCE AND	Inductive	15	Internal governance of ESMA and the ESAs.	I think part of it is god governance, that you have a very good consultation process. And once in a while, the documents arrived so

SUPERVISORY ORGANISATION				late, that, you know, consultation needs to be done within 10 days. (Interview 5)
EUROPEANISATION / HARMONSIATION	Inductive	10	Refers to any points based on further integration at a political level. Used for broader discussions of a political nature. It also refers to issues of greater harmonisation.	But one of my kind of missions in life has been to convince my members, the banks and others in the Nordics that actually, you know, ESMA and others, they are trying to do a good job, we all have something to gain from other parts of Europe developing as well. (Interview 1) While in the Commission in Brussels, I mean they are much more bureaucrats, and they are excellent, but quite a number of them are, you know they have a vision of, either they are quite young or you kind of have true believers in the European project and I mean I believe in the European project but I don't think that, if you look at the politics in Europe it's not really that the citizens of Europe want much more Europe. (Interview 1)
EVOLUTION	Inductive	5	Refers to the historical development of the ESMA.	The organisation has been built from scratch only 10 years ago, I believe, and so they

				have a very modern management style and did not have the burden of the past. So I think it was good. And they also showed their capacities, in particular in data management. (Interview 5)
FEEDBACK	Inductive and Deductive	7	This refers to the aspect of accountability that requires a feedback loop between the principal and the agent. This code includes discussions of what this feedback looks like, its frequency and effectiveness.	(Payment for order flow models) And I think it was quickly a concern that the Commission also took on board and I think as you know, they were invited in front of the econ committee in order to provide an explanation. And subsequently, this issue has also been investigated much more closely by ESMA and they also recently published a document, looking more closely into the matter. (Interview 6) I think there have also perhaps been occasions where it's not certain whether ESMA has taken on board some of the positions that the SMSG might have given. (Interview 6)
FINANCIAL LITERACY	Inductive	3	Refers to problems of lacking financial literacy among the broader public.	I feel it's crucial to not let the banks do the financial education alone, because they always have commercial interest. And it's

				really important to have other institutions to offer something, which is not with commercial interests behind. (Interview 5)
HORIZONTAL ACCOUNTABILITY	Deductive	26	Refers specifically to discussions of horizontal accountability for ESMA and the SMSG.	Because essentially, all the people who are being affected by the regulation have a word and they can have a voice, and they can contribute. (Interview 5) And the interim chair said, it is so important for us to get your views to have the exchange with you, too, to hear from the market participants what's really going on in the market, because the regulators, supervisors, thy are in their own bubble, they are exchanging with themselves, they are discussing with themselves. But to get in this root view, which is based on consensus, which is a very important element and additional tool for ESMA. To get its accountability. (Interview 2)
INCREASED POWERS	Deductive and Inductive	15	Used for any suggestions made by the respondent for where ESMA's or the SMSG's role could be	I think what we say, you know, when it comes to the supervisory powers of the ESAs where you wish on occasions that they

			increased, or current powers could be used more actively.	would make more active use of the product intervention powers. (Interview 6)
INFLUENCE OF SMSG	Deductive	6	Responses to questions on the influence of the SMSG.	The potential influence is absolutely the same in any case in many areas. In my view, the actual influence depends on the argument. You know, when you receive a consultation, and you bring a good idea and if you find the flaw in the process, if you find the flaw in the system, or in the draft. (Interview 3)
LIMITS TO INDEPENDENCE	Deductive and Inductive	18	Any areas that impact the independence of ESMA.	But there are limits to its independence in a way, because they can only act within the framework given to it by member states. (Interview 1)
RESOURCES	Inductive	14	Refers to anytime the term resources was used to explain current problems or lacking effectiveness.	If anything, I can say that we would on our side (industry) want to increase resources to ESMA. (Interview 1)
SMSG ACCOUNTABILITY	Deductive and Inductive	16	Refers to general SMSG accountability topics. Relates and overlaps with the code horizontal accountability.	And as far as I can say, from the group, I am contributing to this is extremely productive and extremely fruitful. And people really strive to achieve the best outcome. IT is very good that the issues are

				being discussed openly. So that you know, everybody can understand the needs and desires and concerns of the other groups. (Interview 5)
SMSG MAKEUP	Deductive	18	Responses regarding the question of optimal representation in the SMSG. For example, more academics or more consumers.	Sometimes you have the feeling that the major stakeholder groups and I can understand this, are our consumer representative and the industry. In the SMSG, our representation is minimal (employee), but it is there. I would regret if the employee representatives would disappear altogether. (Interview 4)
SUSTAINABILITY	Inductive	16	Refers to topics of sustainability in the remit of ESMA, as well as the SFDR or ESG topics.	Now, it is very much about digitalisation and transparency with SFDR to make all this really work and ensure that the measurements and transparency is there, and also the learnings from cases like Wire Card or Robin Hood, these are also topics which arise and which are taken care of. (Interview 5)
TENSION WITH NCAS	Inductive	18	Refers to any points that refer to tension between ESMA and NCAs.	So what they have to do now, ESMA, is that they kind of issue recommendations to member states, not to take action or not to focus on this. And we can see that in

				Sweden as well, because our supervisors will then , they can't say, as an international agency that look, we won't enforce these rules. But they can say that, you know, we have lots of work to do and it's soon Christmas. So I don't think we will focus on that until March next year. (Interview 1)
TIME	Inductive	10	Usually in response to the question that refers to limits to the consultation process, where lack of time played a role.	On occasions, consultations can be very short, especially given the complexity of some of the topics that we're dealing with. And that can be challenging on some occasions to provide proper advice to ESMA within a proper timeframe. (Interview 6) Now there is one major limitation that is the timeliness. (Interview 2)
VERTICAL ACCOUNTABILITY	Deductive and Inductive	9	Used when European institutions are specifically named as principals in an accountability relationship with ESMA.	First of all, ESMA is accountable to the European institutions. So accountability towards Parliament, towards the council … (Interview 2)
WIRE CARD	Inductive	7	The wire card case came up as examples with implications for ESMA's	So they were also very strict with the German Bafin, I believe, so this was a case where one could see that it works. And also

		accountability/independence framework, and was thus coded correspondingly.	see that their reporting regarding transparencies is improving more and more. (Interview 5)