LUISS

Master's Degree Program in Policies and Governance in Europe

Course of Regulation by Independent Agencies

Building the Capital Markets Union: The Meroni Doctrine on Expanding ESMA's Supervisory Authority

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Academic Year 2024/2025

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Introduction

Over the past decade, the European Union has increasingly framed capital markets integration as a strategic tool to boost European competitiveness and reduce reliance on external financial systems. The Capital Markets Union (CMU) has long been presented as essential to unlocking private investment, supporting innovation, and strengthening the EU's position in global capital markets. Yet progress has been slow: despite numerous initiatives, the CMU has largely remained an objective more affirmed in policy than realized in practice.

Recognizing this persistent implementation gap, the European Commission has recently advanced a series of measures intended to make EU supervision more centralized, effective, and market-integrated. Within this renewed strategy, the European Securities and Markets Authority (ESMA), established in 2011 and already entrusted with key supervisory responsibilities, has been identified as a central institution to realize the CMU's aims.

The Commission now intends to enhance ESMA's powers further, presenting, in its latest proposal[1], the agency as a cornerstone for driving the EU's financial competitiveness agenda.

Yet the proposed strengthening of ESMA's mandate raises structurally sensitive questions within the EU legal order. ESMA is a body created by secondary legislation under Article 114 TFEU, operating within a framework in which primary responsibility for supervision formally remains with national authorities and in which the allocation of powers among Union actors is structured by the Treaties. Expanding its supervisory role therefore does not merely concern administrative efficiency. It touches upon the limits of delegation, the preservation of institutional balance, and the degree of discretion that may be entrusted to a non-Treaty body.

In particular, this dissertation focuses on situations in which additional powers involve evaluative judgment, and the nature and intensity of discretion thereby become legally significant. The core issue is not whether ESMA may receive new tasks as such, but whether the scope, structure, and safeguards surrounding those tasks remain sufficiently circumscribed, reviewable, and anchored in objective criteria to comply with the limits articulated in the Court's non-delegation case law[2].

[1] EU COM (2025) 943 final, Proposal for a regulation […] as regards the further development of capital market integration and supervision within the Union", 4/12/2025 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52025PC0943.

[2] This is what it known as the Meroni doctrine, with *Meroni & Co. v. High Authority* (Joint Cases C-9/56 and C-10/56) being the foundational judgment that established the doctrine.

Before turning to these foundations, one preliminary clarification is necessary. Throughout this dissertation, the term "constitutional" is used deliberately and recurrently to describe certain structural features of the EU legal order. This requires justification. The European Union does not possess a constitution in the state-like sense, and its constitutional nature remains contested. Nevertheless, the Treaties have long been understood to perform constitutional functions: they structure the allocation of powers among institutions, entrench fundamental principles, and constrain both legislative and administrative action[3]. The use of constitutional terminology in this work therefore does not presuppose the existence of a European federation, but reflects the functional role that primary law plays within the Union's legal hierarchy. This ambivalent constitutional status is particularly visible in the field of economic integration, where Treaty freedoms operate simultaneously as market-building instruments and as higher-order legal norms capable of limiting institutional action. Referring to these dynamics in "constitutional" terms highlights their structural significance within the EU legal order. Acknowledging this contested yet functionally constitutional character is essential because it shapes both the legal weight attributed to the free movement of capital and the legitimacy of institutional and supervisory reconfigurations designed to give effect to it.

Against this background, this dissertation examines whether the newly proposed extensions of ESMA's supervisory powers — advanced in the name of competitiveness and deeper capital market integration — remain compatible with the constitutional limits imposed by the Meroni doctrine. Rather than treating Meroni as a static prohibition, the analysis investigates how this doctrine structures, conditions, and constrains the permissible reform of agency supervision.

The central research question guiding this dissertation is therefore:

To what extent, and under which conditions, does the Meroni doctrine constrain the Commission's reform of ESMA's supervisory powers?

More specifically, the dissertation asks whether the envisaged expansion of ESMA's mandate remains within the boundaries of permissible delegation under EU law, or whether it risks altering the distribution of responsibility in a way that is incompatible with the institutional balance structured by the Treaties.

To address this question, the dissertation conducts a qualitative document analysis of the Commission's 2025 supervisory reform package, focusing on the proposed legal bases, governance

[3] See Craig, P. and de Búrca, G., (2024), The Development of European Integration. In EU Law: Text, Cases, and Materials UK Version. Oxford: Oxford University Press, pp. 1-41, especially the discussion of the four freedoms as the core of the EU's economic constitution and the post-Lisbon constitutional architecture.

arrangements, accountability mechanisms, and the scope of discretion conferred upon ESMA. The analysis is organized as a structured compliance assessment grounded in a "mellowed[4]" understanding of the Meroni doctrine, which accepts that EU agencies may exercise limited discretion provided that essential constitutional safeguards are respected. Through this framework, the dissertation evaluates whether the envisaged enhancement of ESMA's supervisory role remains compatible with the non-delegation limits established by the CJEU and with the institutional balance enshrined in the Treaties.

To do this, the work proceeds as follows. Chapter 1 reconstructs the legal and strategic foundations of capital market integration in the European Union. By tracing the constitutional trajectory of the free movement of capital and the evolution of the Capital Markets Union into a competitiveness-driven project, it explains why supervisory centralization has emerged as a proposed solution to structural market fragmentation. This contextual foundation clarifies the political and economic pressures underlying the Commission's reform initiative.

Chapter 2 then focuses on the institutional and constitutional framework governing EU financial supervision. It situates ESMA within the broader phenomenon of EU "agencification[5]", maps its existing powers, and reconstructs the Meroni doctrine and its subsequent evolution in the Court's case law. This chapter establishes the doctrinal parameters that define the permissible scope of delegation and discretion within the EU legal order, thereby constructing the analytical lens through which the reform must be assessed.

Building on this groundwork, Chapter 3 undertakes the core analysis of the dissertation. It examines the Commission's 2025 reform package in detail and evaluates the proposed expansion of ESMA's supervisory powers against the limits derived from the Meroni doctrine. Particular attention is paid to the nature and intensity of the discretion conferred, the safeguards surrounding its exercise, and the implications for institutional balance.

Taken together, the chapters aim to determine if the reform risks transforming ESMA from a constrained supervisory authority into a body exercising policy powers beyond the boundaries set by the Treaties. While the analysis does not presuppose that the proposal is incompatible with the Treaties, the working hypothesis of this dissertation is that the Commission's proposal reflects an attempt to operate at the outer edge of a "mellowed[6]" Meroni framework, expanding ESMA's

[4] Pelkmans, J. & Simoncini, M., (2014), 'Mellowing Meroni: How ESMA Can Help Build the Single Market', CEPS Commentary: Thinking Ahead of Europe, pp. 1-6.
[5] Groenleer, M.L.P., (2009), The Autonomy of European Union Agencies: A Comparative Study of Institutional Development, Doctoral Thesis, Leiden University.
[6] Pelkmans, J. & Simoncini, M., (2014).

operational autonomy while embedding it within procedural and accountability safeguards designed to preserve constitutional equilibrium. The findings therefore contribute to the broader debate on the evolution of EU administrative governance and the tension between functional integration and legal constraint.

Chapter 1. From the Free Movement of Capital to Capital Markets Union: Legal Foundations and Strategic Transformation

This chapter reconstructs the legal and political foundations of capital market integration in the European Union in order to situate the proposed expansion of ESMA's supervisory powers within its broader structural context. It examines how the freedom of movement of capital was designed, elevated to Treaty status, and progressively operationalized, and how its incomplete realization has generated the governance pressures that now underpin the Commission's call for stronger Union-level supervision.

The starting point of the chapter is the freedom of movement of capital as one of the four fundamental freedoms enshrined in the Treaties. Section 1.1 introduces the rationale and peculiarities of this freedom as a principle regulating the very skeleton of the European Union. From its inception, the introduction of capital mobility was problematic, reflecting deep concerns about monetary autonomy, financial stability, and national economic control. These early tensions help explain both the cautious design of the original Treaty provisions and the persistent structural difficulties that have accompanied European capital market integration ever since.

Building on this legal foundation, Section 1.2 takes the freedom of capital as a given and moves one step forward by examining how the European Union has sought to transform this written freedom into reality. In particular, it will present the CMU: the Capital Markets Union. If we have accepted the freedom of capital, then, like all the three other fundamental freedoms, a union of capital must exist. The CMU is introduced as a long-term integration project aimed at reducing fragmentation and enabling more effective cross-border allocation of private capital within the Union.

Section 1.3 then situates the CMU within its evolving political and economic context. It shows how CMU has gradually shifted from a technical market-integration initiative to a broader strategic project linked to European competitiveness, resilience, and economic security. This reframing is essential for

understanding why supervisory reform (and in particular, the strengthening of ESMA's powers) has moved to the forefront of the Union's integration strategy.

Against this background, Section 1.4 turns to EU financial regulation and the governance structures through which capital markets are regulated and supervised in practice. It outlines the regulatory and supervisory architecture that implements the freedom of capital and the CMU, and introduces ESMA as a key institutional actor within this framework.

Taken together, the four sections of this chapter serve a single purpose: they explain why the Commission is proposing enhanced supervisory powers for ESMA, why at this particular moment, and why ESMA is the chosen recipient of those powers. The proposal to expand ESMA's role stems from a fundamental premise that runs throughout the chapter: the European capital market integration system is lagging behind, and this lag is increasingly perceived as a structural weakness of the European economy. The driver behind the Commission's reconsideration of ESMA's mandate is precisely the incomplete implementation of the freedom of capital. Starting this work by introducing the freedom of capital is needed because integrated capital markets (or, as it will be discussed, the lack of) has been diagnosed as the illness that prompted the European Commission to propose an enhancement to the European Securities and Markets Authority's (ESMA) powers, ESMA being the authority that oversees the markets through which capital flows. These proposed new powers and their compliance with EU law will be the central focus of this work.

Given the legal approach of this dissertation, it is therefore essential to establish the legal foundations of the freedom of capital before examining how its partial realization has shaped ESMA's evolving role.

By tracing how capital mobility was initially treated with caution in the Treaties, how it was gradually elevated to full Treaty-status under Article 63 TFEU, and how it has been operationalized through the CMU and EU financial regulation, this chapter provides the necessary groundwork for the analysis that follows. It establishes the context in which supervisory centralization has come to be framed as a solution to integration failures. This, in turn, creates the logical transition to the next chapter, which will focus specifically on ESMA: its institutional design, its existing powers, and, most importantly, the constitutional limits imposed on its expansion by the non-delegation (Meroni) doctrine.

1.1. The Free Movement of Capital as a Constitutional Freedom of the Union

The European integration project emerged fundamentally as an economic endeavor. From the 1951 European Coal and Steel Community through the establishment of the European Economic Community in the 1957 Treaty of Rome, the vision of the post-war "founding fathers" of the EU centered on creating a common market, a unified economic space where factors of production and goods could move freely across national borders.

This Single Market concept rested on a simple economic premise: barriers fragmenting national markets into separate units distort competition, misallocate resources, and hold back the efficiency gains that larger, integrated markets generate.

To realize this vision, the Treaties enshrined four fundamental freedoms: the free movement of goods, persons, services, and capital as constitutional pillars designed to dismantle national barriers and ensure undistorted competition. Each freedom targets distinct obstacles: goods provisions eliminate tariffs and discriminatory product regulations; persons provisions remove barriers to worker mobility and professional establishment; services provisions allow for the free selling of intangible services across national borders.

The fourth freedom, about the movement of capital, addresses the flow of financial resources, the very life of investment and economic development. This is the starting point of this dissertation. It will be explained later that free movement of capital is the backbone of the reasoning behind the proposed changes to ESMA's mandate. The Commission's entire supervisory reform strategy rests on the diagnosis that fragmented capital markets prevent the EU from fully realizing this Treaty freedom, limiting investment flows, raising costs for businesses, and weakening European competitiveness. The proposed enhancement of ESMA's powers is thus framed as the institutional response, the "cure" necessary to overcome this fragmentation and deliver the integrated capital markets the Treaties envisioned.

This section examines the origins and legal construction of the free movement of capital as a fundamental freedom of the European Union. Understanding how capital acquired its constitutional status, and the conditions and limits under which it was liberalized, is essential for assessing the contemporary challenges of capital markets integration. This dissertation argues that the incomplete realization of this freedom forms the backdrop against which the European Commission has proposed an expansion of ESMA's role. For this reason, reconstructing the Treaty foundations of capital

mobility is a necessary preliminary step for evaluating the legal rationale and constitutional implications of strengthening ESMA's supranational supervision in EU capital markets.

The concept of capital is an elusive concept, difficult to define with precision. It lacks a single, agreed definition and is often described negatively as that portion of wealth which is not consumed but invested. The EU Treaties themselves do not provide a definition of what they consider to constitute capital. In the absence of a Treaty-based definition, the boundaries of the concept have been shaped through legislation and case law. In particular, Annex I to Directive 88/361/EEC[7] introduced a legislative nomenclature of capital movements, which the Court of Justice has accepted as having indicative value[8]. Almost any money, whether received or spent, may therefore fall within the scope of the free movement of capital. Since the Directive's nomenclature is not exhaustive, the Court has consistently shown its willingness to extend the concept beyond the categories identified by the Union legislature. As a result, capital in the EU legal order has acquired an open and expansive scope, encompassing a wide range of economic transactions as well as certain non-economic transfers, such as personal gifts and inheritances[9].

The free movement of capital occupies a distinctive position among the four fundamental freedoms enshrined in the European Union's founding Treaties. First described in the 1956 Spaak Report as "the last of the freedoms[10]", capital mobility historically developed more slowly than the free movement of goods, persons, and services, not for lack of economic relevance, but because it touched the core of national economic sovereignty, especially monetary autonomy, exchange-rate management, and fiscal capacity.

The Treaty of Rome (1957), establishing the European Economic Community (EEC), approached capital liberalization with caution. Unlike goods (Art. 9–37 EEC), workers and establishment rights (Art. 48–58 EEC), or services (Art. 59–66 EEC), which were under categorical prohibitions on restrictions and discrimination, capital movement was framed in a less strict, more conditional way: Article 67 EEC stated that Member States would "progressively abolish between themselves all restrictions on the movement of capital […] to the extent necessary to ensure the proper functioning of the common market[11]."

[7] Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, 1988.
[8] *Case C-222/97, Manfred Trummer and Peter Mayer* [1999] ECR I-1661, par. 20.
[9] Schütze, R. (2021). "Free Movement of Services and Capital." In *European Union Law*. 3rd ed. Oxford: Oxford University Press, p. 693.
[10] Report of the Heads of Delegations to the Foreign Ministers at the Messina Conference, 21 April 1956. This report provided the blueprint for what would then become the Treaty of Rome (1957).
[11] Treaty Establishing the European Economic Community, Art. 67, March 25, 1957.

Unlike other freedoms, this provision was not conceived as a self-executing right and did not have direct effect: it did not confer on individuals and firms a right which could be protected before national courts[12]. Capital freedom existed on Treaty-level, but its enforcement depended entirely on implementing legislation. This absence placed capital in a weaker position compared to goods, persons, and establishment, which the Court of Justice would interpret expansively as enforceable market-access rights[13].

In the absence of direct effect, capital market liberalization could only progress through positive rather than negative integration[14]. Since Article 67 EEC (now Art. 63 TFEU) did not mandate liberalization, the Council adopted directives to open markets gradually. This approach proved slow, with a sequence of measures paving the way before capital liberalization was eventually elevated to Treaty status.

Under the Delors Commission, which sought to implement the single market by 1992[15], the pivotal 1988 Capital Directive (88/361/EEC[16]) mandated full abolition of capital restrictions between Member States. Crucially, it recognized that opening markets only within the EU would fail unless flows toward third countries were also liberalized—anticipating the external scope later codified at Maastricht. This Directive provided the blueprint for constitutional reform of the capital chapter.

The 1992 Maastricht Treaty finally substituted the old EEC framework, replacing it with Article 73b EC (now Article 63 TFEU). This reform recognized direct effect, placing capital on equal constitutional footing with the other freedoms, and uniquely extending the prohibition to third countries. The Court confirmed that Article 63 confers directly enforceable rights on individuals, even regarding capital movements to or from third States, and applies the same material scope for both intra-Union and extra-Union flows.

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[12] In the *Luisi & Carbone* judgment (CJEU, 1984), the Court clearly stated that Art. 67 EEC was not directly effective, as it did not impose a clear and unconditional obligation on Member States, but required further implementing measures by the Council.

[13] This refers to the Court's early 1960s case law, when the free movement of goods and workers became rights judges could enforce (starting with *Van Gend en Loos* in 1963 and *Costa v ENEL* in 1964). Capital did not follow this path. In *Casati* (C-203/80), the Court confirmed that Art. 67 EEC had no direct effect, blocking individuals from invoking it in national courts. Unlike the free movement of goods, where in *Cassis de Dijon* (1979) the Court developed a doctrine of market access based on mutual recognition and the prohibition of "measures having equivalent effect" even in the absence of harmonizing legislation, the Court chose not to apply a similar approach to capital, leaving its liberalization mainly to Member States and EU legislation. This meant a clear departure from its expansive, interventionist jurisprudence on the other market freedoms.

[14] Schutze, R. (2021), "Free Movement of Services and Capital." In *European Union Law*. 3rd ed. Oxford: Oxford University Press, p. 714.

[15] Commission of the European Communities, *Completing the Internal Market: White Paper from the Commission to the European Council*, COM(85) 310 final (June 1985).

[16] Council Directive 88/361/EEC of 24 June 1988 for the Implementation of Article 67 of the Treaty.

Article 63(1) TFEU now prohibits "all restrictions on the movement of capital between Member States and between Member States and third countries." This external *erga omnes* application distinguishes capital from the other freedoms, which are largely confined to intra-EU market access. The article extends protection to third-country flows because partial liberalization would be economically ineffective, investors could otherwise channel transactions through the most permissive Member State, bypassing controls[17].

The rationale that prompted the founders of the EU to envision the concept of the freedom of capital mirrors the rationale of the internal market as a whole: the efficient allocation of resources[18]. Free capital movement allows savings to flow to their most productive uses, lowers the cost of financing for firms, enhances private risk-sharing across Member States, and supports economic convergence within the Union. In a monetary union, capital mobility also serves as a stabilizing mechanism, enabling investment to respond flexibly to regional shocks. From this perspective, fragmented capital markets undermine not only growth and competitiveness, but the functional integrity of the internal market itself[19]. It is this structural fragmentation that increasingly informs the Union's contemporary reform agenda in financial supervision.

This diagnosis cannot be understood in isolation from the historical and constitutional trajectory of capital mobility in the Union, which has been marked by a slow and deliberately cautious process of liberalization.

The slow and cautious liberalization of capital is a constitutive element of the European Union's constitutional and institutional development. Understanding why the Treaties approached capital mobility with hesitation is essential for this dissertation, because the same concerns that shaped the original design of capital provisions (monetary sovereignty, financial stability, and control over national economic policy) continue to resurface in contemporary debates over capital markets integration and, crucially, over the expansion of ESMA's supervisory powers.

When the EEC was founded in 1957, Europe operated within the Bretton Woods system of fixed but adjustable exchange rates. Capital controls were not an anomaly but a standard instrument of economic governance, used by states to preserve monetary autonomy, manage balance-of-payments pressures, and stabilize domestic financial systems[20]. In this context, liberalizing capital movements

[17] Snell, J., (2021), 'Free Movement of Capital: Evolution as a Non-Linear Process', in Paul Craig, and Gráinne de Búrca (eds), *The Evolution of EU Law*, 3rd edn (Oxford, 2021; online edn, Oxford Academic, p. 583.
[18] Council Directive 88/361/EEC of 24 June 1988 for the Implementation of Article 67 of the Treaty, p. 5-6.
[19] European Commission, "Capital Markets Union: Accelerating Reform," COM(2016) 601 final, September 14, 2016, p. 2-3.
[20] El-Agraa, A. (2007), The Theory of Monetary Integration' in A M El-Agraa (ed), The European Union: Economics and Policies, 8th edn, Cambridge University Press, p. 150.

was qualitatively different from liberalizing trade in goods or services. Removing tariffs or discriminatory product rules primarily affected market access; freeing capital flows, by contrast, directly constrained governments' ability to control credit conditions, interest rates, and exchange-rate policy[21].

This distinction explains why capital was treated as the most politically sensitive of the four freedoms. Unrestricted capital mobility can severely limit national policy space, especially in systems where inflation rates, productivity levels, and financial development diverge significantly across countries. In such conditions (precisely those that characterized post-war Europe) capital liberalization risked triggering destabilizing flows from weaker to stronger economies, exacerbating macroeconomic imbalances and undermining domestic monetary control[22]. These risks were well understood by the Treaty drafters and explain their reluctance to constitutionalize capital freedom in the same way as the other market freedoms.

This political sensitivity is reflected in the vagueness of the wording of the original Article 67(1) EEC, which, as noted earlier, did not prohibit restrictions on capital outright.

The underlying rationale was clear: because capital governs ownership, investment, and financial flows, it affects the core of national economic sovereignty. Decisions about who controls credit, where investment is directed, and how financial risks are managed were regarded as central to state autonomy and democratic accountability. For this reason, capital freedom remained the most contested of the four freedoms for decades. This initial design choice produced vague Treaty provisions, leaving wide discretion to political institutions and delaying the development of a fully integrated capital market.

Only in the 1980s did this approach begin to change. The convergence of inflation rates, the erosion of capital controls at the global level, and the deepening of European monetary cooperation under the Single Market and EMU agendas altered the cost-benefit balance of capital liberalization. This evolution culminated in the Maastricht Treaty in what is now Article 63 TFEU, where capital mobility was elevated to full constitutional status and endowed with direct effect. Yet this constitutional "upgrade" did not erase the legacy of earlier caution. Instead, it layered a strong legal commitment to

[21] Schütze, R., (2021), "Free Movement of Services and Capital." In *European Union Law*. 3rd ed. Oxford: Oxford University Press, pp. 689–691.
[22] El-Agraa, A., (2007), The Theory of Monetary Integration' in A M El-Agraa (ed), The European Union: Economics and Policies.

free capital movement onto a regulatory and supervisory landscape still largely organized along national lines[23].

This historical trajectory is directly relevant for this dissertation. The European Commission's proposal to enhance ESMA's supervisory powers as a remedy for the fragmentation of capital markets rests on the assumption that the freedom of capital has not been effectively realized. However, the political resistance to supervisory centralization that now surrounds ESMA mirrors, in important respects, the original sovereignty concerns that delayed capital liberalization itself. *Mutatis mutandis*, some Member States' reluctance to accept an ESMA endowed with stronger powers reflects enduring anxieties about the loss of control over financial systems that remain closely intertwined with national fiscal capacity, banking sectors, and economic policy choices[24].

In this sense, the constitutional history of capital mobility explains why supervisory reform has become the most contested dimension of the Capital Markets Union. Capital markets integration requires not only legal liberalization, but also credible, centralized supervision capable of managing cross-border risks. Yet the transfer of supervisory authority to a supranational agency reactivates precisely those concerns about responsibility, discretion, and sovereignty that shaped the Treaties' original caution towards capital.

The same logic that once justified vague Treaty provisions on capital now underpins the legal and political limits placed on ESMA's empowerment. Recognizing this continuity is essential for understanding why the enhancement of ESMA's powers is not a purely technical adjustment, but a test of the EU's long-standing compromise between market integration and national economic sovereignty.

1.2. Capital Markets Union as an Instrument of Capital Market Integration

The Capital Markets Union (CMU) is a concept rooted in the freedom of capital enshrined in Article 63 TFEU. It is important to clarify, however, that capital markets integration, rather than the CMU itself, constitutes the underlying idea and long-term objective of European integration in the financial sphere.

[23] Oliver, P. and Roth, W.H., (2004), The Internal Market and the Four Freedoms, Common Market law Review 41, pp. 407-441.
[24] See Quaglia, L., Howarth, D., and Liebe, M., (2016), The Political Economy of European Capital Markets Union, Journal of Common Market Studies, Volume 54, pp. 185–203.

Capital markets integration refers to the substantive condition in which capital can be raised, allocated, intermediated, supervised, and enforced across borders within the Union with minimal legal, regulatory, and institutional frictions[25]. It describes a functional outcome: a European financial space in which national capital markets no longer operate as segmented units, but as components of a genuinely integrated system. In this sense, integration concerns economic reality and regulatory practice rather than institutional form.

By contrast, the CMU is the policy and governance framework through which the European Union seeks to actively pursue and stabilize this integration. The CMU is not a single legal act, nor an end in itself, but a coordinated set of legislative, regulatory, and institutional initiatives designed to give concrete effect to the Treaty-based freedom of capital[26]. In this respect, the CMU can be understood alongside the European Monetary Union (EMU) and the European Banking Union (EBU) as a form of positive integration: each represents an institutional response aimed at implementing, stabilizing, and managing the freedom of capital laid down in Article 63 TFEU. While capital markets integration remains the overarching objective, CMU, EMU, and EBU constitute complementary governance projects through which the Union seeks to overcome the structural limits of market-driven integration alone.

Understanding the CMU in these terms makes it easier to grasp the Commission's reasoning for proposing a substantial expansion of ESMA's powers, driven by the acknowledgement that the CMU has so far failed to deliver its intended outcomes.

The economic rationale that still justifies the Capital Markets Union today is grounded in efficiency, cohesion, monetary stability, and openness. The original intuition of the architects of European integration remains intact: a single, integrated capital market enables European savings to flow toward their most productive use. When financial markets operate across borders rather than in national silos, capital is allocated more efficiently, funding firms and projects with the highest expected returns rather than those with the closest domestic investors. It allows for the allocation of

[25] See ECB, (2020), *Financial Integration and Structure in the Euro Area* for a definition of full integration (single rules/equal access/equal treatment), p.3, https://www.ecb.europa.eu/press/fie/pdf/ecb.fie202003~197074785e.en.pdf. On barriers/frictions including regulation/enforcement and infrastructure, see Jappelli, T. and Pagano, M. (2008), Financial Market Integration Under EMU, CSEF Working Paper n. 197, p. 9 and ECB (2007), Financial Integration in Europe, p. 33, https://www.ecb.europa.eu/pub/pdf/other/financialintegrationineurope200703en.pdf.

[26] European Commission, (2015), *Action Plan on Building a Capital Markets Union* COM(2015) 468 final, p. 3.

resources where they are most needed and where they can be most productive, which naturally depends on individual countries' different competitive advantages[27].

Similarly, a second justification lies in cohesion and convergence. Integrated capital markets enable flows from capital-rich to capital-scarce regions, helping reduce structural investment gaps across the Union.

Another factor that explains the desirability of integrated capital markets connects to the architecture of Economic and Monetary Union. Within the Eurozone, integrated capital markets allow for private risk-sharing across borders, acting as a complement, or partial substitute, to fiscal transfers in the absence of a full fiscal union. When a firm in one Member State is financed by investors across the currency union, economic risk is dispersed rather than concentrated nationally. This reduces vulnerability to asymmetric shocks that could hit one Member State harder than others, capital market integration thus plays a stabilizing role inside EMU, functioning as a decentralized shock absorber[28].

While this efficiency-based rationale remains valid, it does not fully explain why CMU has become a political priority post-2014. The decisive driver today that explains the push for a fully developed CMU is competitiveness, not classical welfare theory.

Despite its formal recognition in EU primary law (Article 63 TFEU), CMU has not yet been achieved as a fully implemented union of capital markets. Today, capital markets are fragmented. Hence, at the moment CMU exists primarily as a normative and policy project.

When EU capital markets are described as fragmented, this does not mean that they are unregulated or isolated from one another. Rather, fragmentation refers to the absence of a single, unified market structure in which capital is raised, intermediated, supervised, and enforced under a genuinely common framework. There are different ways in which this fragmentation manifests itself.

Regulatory and legal fragmentation is a first defining feature. Each EU Member State retains its own rules on company law, securities regulation, insolvency, and taxation. A firm seeking to raise capital

[27] This principle—that capital should flow to its most productive use according to comparative advantage—is foundational to industrial policy within an integrated market. By enabling cross-border investment, the single capital market allows Member States to specialize in sectors where they hold competitive advantages, while capital from across the Union finances those opportunities. See Véron, N and Wolff, G.B. "Capital Markets Union: A Vision for the Long Term," Journal of Financial Regulation no. 2016/02, p. 141.

[28] Indeed, the stabilizing and shock absorbing function of capital market integration was reinforced institutionally by the very creation of ESMA itself. Established in 2011 in the wake of the 2008 financial crisis, ESMA was designed as part of the EU's effort to prevent future market fragmentation and systemic instability. See Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing the European Securities and Markets Authority (ESMA).

or list shares across Europe does not encounter one set of rules, but 27 different national legal frameworks. Investment funds face different licensing requirements, disclosure rules, and investor protection standards depending on where they're domiciled and where they operate. In the absence of one unified rulebook, there is a patchwork of national regulations that have been only partially harmonized[29].

Market infrastructure is also fragmented. Europe has many stock exchanges, trading platforms, and settlement systems that are organized nationally or regionally. Shares and bonds are typically issued, traded, and settled within domestic systems governed by national law. Cross-border transactions are possible, but they require coordination between multiple intermediaries and technical systems[30].

Furthermore, financial markets are supervised by national authorities, each responsible for licensing, monitoring, and enforcing rules within their own country. ESMA as the body that coordinates supervision does exist, but it cannot act as a single regulator. As a result, firms seeking capital that operate across borders must interact with 27 different supervisors, each applying EU rules through national procedures[31].

Finally, market activity itself remains segmented. Companies tend to raise capital primarily in their home country, and investors often invest domestically. Information on firms, investment products, and market practices is organized at national level, often in different languages and formats. Cross-border investment exists, but it takes place across national markets rather than within a single European one[32].

[29] Véron, N. and G.-B. Wolff, (2016), Capital Markets Union: A Vision for the Long Term, Journal of Financial Regulation, 2, pp. 130-153.

[30]European Commission (Dec 2025), "Breaking down barriers to integrate financial markets" factsheet, https://finance.ec.europa.eu/regulation-and-supervision/savings-and-investments-union/factsheet-breaking-down-barriers-integrate-financial-markets_en. Progress on financial integration has been "disappointing overall", see ECB (June 2024), *Financial Integration and Structure in the Euro Area* (FISEA), https://www.ecb.europa.eu/press/fie/pdf/ecb.fie202406~c4ca413e65.en.pdf.

[31] "The coexistence of diverging rules across Member States creates opacity and uncertainty, deterring EU cross-border investors. This variation is due, among other factors, to differences in interpretation of EU law, inconsistency of decisions, and varying resources employed for supervision. The resulting variation in the application and enforcement of EU laws by the respective Member States' supervisory authorities is considered a major obstacle to completion of CMU". See European Parliament, (2024), Viewpoints on a single supervisory authority for capital markets, briefing 05-11-2024, https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2024)766230.

[32] See ECB (June 2024), *Financial Integration and Structure in the Euro Area* (FISEA), https://www.ecb.europa.eu/press/fie/pdf/ecb.fie202406~c4ca413e65.en.pdf for an analysis on financial markets remaining predominantly national, see home-bias investment, Table p. 36.

1.3. From Market Integration to Competitiveness: The Strategic Reframing of CMU

The concept of the Capital Markets Union was introduced by the European Commission in its 2015 CMU Action Plan. Initially conceived as a market-integration project, CMU focused on regulatory harmonization and the removal of barriers to cross-border investment. Fragmentation was framed as a technical inefficiency: although Europe had abundant savings, national legal, supervisory, and infrastructural divergences hindered their effective allocation. Capital markets were treated as passive channels whose integration would organically stimulate growth[33].

From 2017 onwards, CMU's identity began to shift. The "shift" refers to the transformation of CMU from a predominantly technical market-integration agenda, centered on regulatory harmonization and barrier removal, into a strategic policy project explicitly linked to competitiveness, financial scale, private risk-sharing, and economic resilience. This evolution is visible in the progressive reframing of CMU in EU policy documents, beginning with the Commission's *Reflection Paper on the Deepening of Economic and Monetary Union* (COM(2017) 291), which connects capital markets integration to risk-sharing and financial capacity, and becoming explicit in the *2020 Capital Markets Union Action Plan* (COM(2020) 590), which ties CMU to innovation financing, sustainability, and scale-up funding. The shift is consolidated in the post-2023 policy agenda, where CMU is framed as strategic infrastructure for competitiveness and economic security rather than as regulatory optimization alone[34].

The *Reflection Paper on the Deepening of the EMU* reframed CMU within the language of a deeper financial union, linking integration to financial scale, innovation, and private risk-sharing. Harmonization alone was no longer seen as sufficient; market depth emerged as a structural condition for supporting high-growth firms and venture capital ecosystems[35].

The 2020 CMU Action Plan marked a further evolution. Capital markets were explicitly tied to financing Europe's digital and sustainable innovation frontier and to addressing the scale-up financing gap. The United States increasingly served as a benchmark, highlighting Europe's relative

[33] See: European Commission, "Action Plan on Building a Capital Markets Union", COM (2015) 468 final, September 30, 2015.
[34] See European Commission, *Communication on European Economic Security* (JOIN(2023) 20 final), and the reports by E. Letta, *Much More Than a Market* (2024), and M. Draghi, *The Future of European Competitiveness* (2024).
[35] See European Commission, "Reflection Paper on the Deepening of the Economic and Monetary Union," COM (2017) 291 final, May 31, 2017.

lack of market depth. CMU was thus reframed as a competitiveness-enhancing project focused on internal financial capacity rather than global power projection.[36]

From 2014 to 2024, CMU remained the subject of sustained policy discourse, with repeated acknowledgements of its necessity but limited progress in terms of actual implementation. It was only in the 2023–2024 period that a clear shift occurred, as the completion of CMU began to be framed as an urgent and unavoidable priority.

This re-emergence of Capital Markets Union cannot be understood as a purely financial or regulatory development. Rather, it reflected a broader transformation in the political and economic environment that elevated capital markets to a strategic policy concern.

Politically, growing dissatisfaction with the EU's capacity to sustain globally competitive firms, sharpened by high-profile merger disputes, revived attention to the structural limits of Europe's financing model. Capital markets fragmentation increasingly appeared incompatible with the scale and speed required by global competition[37].

At the same time, a cultural shift in economic thinking reduced resistance to more active public coordination of markets, weakening the earlier presumption that financial integration was a self-executing technical exercise[38]. Geopolitically, the COVID-19 pandemic and the war in Ukraine exposed the risks of external dependencies and supply-chain fragility, reframing access to large pools of private capital as a condition for economic security and resilience[39]. Technological change further reinforced this diagnosis: Europe's lag in advanced and capital-intensive sectors underscored the need for financing structures capable of supporting long-term, high-risk investment at scale[40].

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[36] See: European Commission "A Capital Markets Union for People and Businesses—New Action Plan." COM (2020) 590 final. September 24, 2020.

[37] In particular, the 2016 acquisition of German robotics firm KUKA by Chinese company Midea crystallized European anxieties about capital markets fragmentation and strategic vulnerability. KUKA, a leading industrial automation company, was sold for €4.5 billion amid concerns that fragmented European capital markets left strategic firms exposed to foreign takeovers, while limiting their access to the scale of financing needed to compete globally. The episode is often called the "KUKA moment", and it became emblematic of Europe's inability to retain and scale innovative champions, prompting calls for deeper capital market integration. See Some European fear of a surge of Chinese investment. Others can't get enough of it, in Economist, November 30, 2017, https://www.economist.com/europe/2017/11/30/some-europeans-fear-a-surge-of-chinese-investment-others-cant-get-enough-of-it.

[38] See: European Commission, "A New Industrial Strategy for Europe," COM (2020) 102 final, March 10, 2020. Culturally, a "shift of the tide" toward a more prominent role for the state in the economy, reversing decades of market-oriented orthodoxy.

[39] See: European Central Bank, "Capital Markets Union: A Deep Dive," Occasional Paper Series No. 369, Frankfurt am Main, January 2025.

[40] With "European companies in the tech sector significantly rely[ing] on US venture capital financing, revealing structural financing inadequacies. Advanced technologies demand financing structures beyond Europe's fragmented

Within this context, CMU was recast as strategic infrastructure rather than regulatory housekeeping. The 2023 Commission Communication on European Economic Security crystallized this shift, explicitly linking capital market depth to competitiveness, resilience, and strategic autonomy. What has been defined as the "geopolitical Commission"[41] led the CMU to re-emerge as a necessary response to Europe's structural financing constraints, not as a revival of pre-existing integration ambitions but as a project redefined by security and global positioning concerns.

The competitiveness turn of CMU becomes explicit in the 2024 policy agenda, where capital market integration is no longer framed as regulatory optimization, but as strategic infrastructure for European economic power. This section logically extends the previous diagnosis of fragmentation as a structural financing constraint: if Europe's core weakness lies in the inability to pool savings at scale, then CMU becomes a competitiveness project by necessity, and supervisory governance becomes just as important as rule alignment. The question is no longer how to open markets, but how to govern them effectively at Union level, and which institution is capable of doing so.

The 2024 Letta Report[42] is a key signal of this shift. It positions CMU as an infrastructure for European competitiveness embedded in the long-term future of the Single Market. Capital markets are described as essential to finance innovation, enable European firms to scale, and deepen integration through financial rather than purely regulatory channels. The report emphasizes that the Single Market cannot reach its full economic potential while finance remains nationally fragmented, implicitly framing capital market union as a precondition for competitiveness rather than its outcome. Crucially, Letta stresses the need for EU-level supervision and enforcement, arguing that integration requires stronger central coordination to prevent regulatory divergence from reappearing through inconsistent national oversight. The report does not propose integration for integration's sake, but because market scale without governance produces vulnerability rather than competitiveness. In this vision, supervision is infrastructure, not bureaucracy.

The 2024 Draghi Report[43] reinforces this logic with even sharper competitive framing. Draghi's diagnosis builds directly on CMU's structural problems: Europe must develop deeper, more liquid financial markets to compete globally, and capital market scale is a structural determinant of

markets. See: European Central Bank, "Capital Markets Union: A Deep Dive," Occasional Paper Series No. 369, Frankfurt am Main, January 2025, p.10.

[41] Presenting the 2019-2024 College of Commissioners, President Von der Leyen called it a "geopolitical Commission". See Speech by President-Elect von der Leyen in the European Parliament Plenary on the Occasion of the Presentation of Her College of Commissioners and Their Programme" - Strasbourg, November 27, 2019.

[42] Letta, E. (2024), Much More than a Market: Speed, Security, Solidarity: Empowering the Single Market to Deliver a Sustainable Future and Prosperity for All EU Citizens. Brussels: European Council, April 2024.

[43] Draghi, M. (2024), The Future of European Competitiveness. 2 parts. Brussels: European Commission, 2024.

competitiveness, equivalent to energy costs, technology capacity, or industrial supply chains. Unlike earlier CMU documents that treated supervision as a technical follow-up to harmonization, Draghi makes enforcement central to competitiveness. His prescription explicitly calls for stronger centralized supervision, more integrated enforcement, and governance reforms capable of sustaining continental financial depth. ESMA is repeatedly identified as the key institution for delivering this transition.

Crucially for the scope of this dissertation, ESMA becomes the privileged actor in this framing for three structural reasons. First, credibility: CMU depends on enforcement consistency, and national supervisors, even when aligned on rules, diverge on risk tolerance, legal interpretation, and enforcement intensity. ESMA, as a Union authority, is portrayed as the only institution capable of anchoring enforcement credibility across borders. Second, convergence: CMU cannot function if supervision remains national in practice; supervisory convergence requires a coordinator with hierarchical legitimacy, which Draghi assigns to ESMA. Third, oversight capacity: cross-border markets generate pan-European risks, and ESMA is framed as the only body positioned to monitor the EU market as a single system rather than a mosaic of national perimeters.

Both reports converge on the need to reform ESMA so it can operationalize these roles more forcefully. Letta envisions ESMA as the institutional guarantor of deeper Single Market integration through finance, implicitly calling for stronger coordination powers to prevent fragmentation from reconstituting itself. Draghi goes further, explicitly linking ESMA to economic power outcomes. Draghi proposes ESMA not only as a convergence facilitator, but as the EU's core capital markets enforcer, capable of market policing at scale, with expanded powers for cross-border oversight, centralized enforcement tools, and stronger mechanisms to ensure national authorities apply rules consistently. In this framing, ESMA is meant to evolve from a coordinator of supervision into a supervisor of integration.

Neither report details a full legal blueprint, but both clearly imply that CMU's competitiveness purpose requires ESMA reform to include enhanced enforcement capacity, greater authority over supervisory convergence, and more direct cross-border oversight instruments. While Letta sees ESMA as the financial integrator of the Single Market, Draghi recasts it as a geopolitical necessity: without a Union-level capital markets authority with sharper teeth, CMU cannot deliver the competitiveness scale that Europe now defines as essential. This absence of CMU is now framed as a structural competitiveness barrier for the EU.

1.4. EU Financial Regulation and the Governance of Capital Markets

So far it has been argued that the freedom of movement of capital constitutes one of the constitutional pillars of the European Union and that its incomplete realization has progressively come to be understood as a structural weakness of the European economy.

While the freedom of capital and the Capital Markets Union define the legal and strategic objectives of integration, their practical realization depends on the regulatory framework that governs how financial markets operate across the Union. Capital does not circulate through legal freedoms alone, but through markets structured by rules on market access, transparency, conduct of business, prudential safeguards, and supervision. For this reason, the integration of European capital markets is inseparable from the development of EU financial regulation, which provides the legal and institutional infrastructure within which cross-border capital allocation becomes possible and enforceable.

This regulatory infrastructure takes the form of EU financial regulation, understood as the harmonized framework of rules governing market-based financial intermediation in the European Union. It is within this regulatory architecture that ESMA operates and within which its proposed empowerment must be assessed.

EU financial regulation regulates the major actors in financial markets, including issuers of securities, investment funds, investment firms, rating agencies, and market infrastructures such as trading venues. It addresses the relationships and risks arising from capital flows between investors and firms. The regulatory system is supervised through the European System of Financial Supervision (ESFS), comprising national competent authorities (NCAs) and the European Securities and Markets Authority (ESMA).

This regulatory framework is not an end in itself. Its scope and rationale are defined by the broader objectives of the European Union as set out in the Treaties. At its core, EU financial regulation serves the construction and functioning of the internal market, which Article 3(3) TEU identifies as a foundational objective of the Union. Financial markets are a constitutive component of that market: without integrated mechanisms for raising, allocating, and supervising capital, the free movement of goods, services, and establishment cannot operate effectively. Accordingly, an integrated EU financial market, underpinned by harmonized rules, has traditionally been understood to expand and strengthen capital pools across the Union by enabling financial market actors to operate freely in all Member States. This integration is also presumed to lower capital costs for businesses, enhance risk management practices, and stimulate economic growth and job creation.

Since the global financial crisis, however, the scope of EU financial regulation has expanded decisively to include the safeguarding of financial stability as a central objective. The crisis exposed the systemic risks generated by fragmented supervision and nationally bounded enforcement in an integrated financial system. As a result, EU financial regulation increasingly reflects a dual logic: it is designed both to enable cross-border market activity and to control the risks that such activity generates. This duality is essential to understanding the contemporary role of supervisory authorities, particularly ESMA, whose mandate sits at the intersection of market integration and risk containment.

At the same time, EU financial regulation has always been embedded in a longer-term structural ambition: to rebalance the European financial system away from its historically dominant reliance on bank-based finance[44] and toward more developed, market-based sources of funding. This objective can be traced back to early integration efforts, including the 1966 Segré Report[45], and has been repeatedly reaffirmed in successive waves of financial market legislation. The CMU represents the apotheosis of this project, explicitly framing capital markets as the primary channel through which European savings should be mobilized to finance innovation, growth, and structural transformation. In this sense, EU financial regulation is not merely reactive but constitutive: it seeks to actively shape the structure of European finance in line with policy objectives.

To pursue these aims, the European Union has relied primarily on harmonization. Where the free movement guarantees alone are insufficient to eliminate barriers, particularly in a field such as financial markets, where strong public interests justify national regulation, the Union has used its internal market competences to replace divergent national rules with common standards. This harmonization process must comply with the limits imposed by the Treaties. EU financial market measures must be based on a conferred competence, typically on harmonization under Article 114 TFEU, and must respect the principles of subsidiarity and proportionality laid down in Article 5 TEU.

The institutional framework for adopting EU financial markets regulation follows the Lamfalussy model, which organizes financial market rules into four levels[46].

“Level 1” refers to legislative measures set trough legislative acts adopted by the European Parliament and the Council on a proposal from the Commission. These acts establish the normative architecture of financial market regulation and define the boundaries within which further rulemaking can occur.

[44] Véron, N and Wolff, G.B. (2016) "Capital Markets Union: A Vision for the Long Term," Journal of Financial Regulation no. 2016/02, p. 131.
[45] Segrè, C. (1966), chairman. The Development of a European Capital Market: Report of a Group of Experts Appointed by the EEC Commission. Brussels: European Economic Community, November 1966.
[46] Schaub, A. (2005), "The Lamfalussy process four years on". Journal of Financial Regulation and Compliance, Vol. 13 No. 2 pp. 110–120.

"Level 2" encompasses technical and administrative rules. Rule-making takes the form of either delegated or implementing acts formulated and adopted by the Commission under Art. 290 and 291 TFEU, subject to oversight mechanisms that safeguard the legislators' legislative prerogative and that ensure oversight of the delegation of law-making powers from the legislators to the Commission. Secondly, 'Regulatory Technical Standards' (RTSs) or 'Implementing Technical Standards' are binding measures proposed by the relevant supervisory authority (in this case, ESMA), adopted by the Commission and subject to oversight processes.

"Level 3" contains soft law measures, where the relevant administrative authority (ESMA) can adopt a range of (by definition) non-binding measures.

Finally, "level 4" is the field of enforcement by the Commission, which uses its Treaty-given powers of enforcement against Member States that breach EU law.

Against this backdrop, the law-making process to regulate financial markets is implemented through legislation ("level 1") and administrative rules ("level 2"). Most importantly for this work, the level of "administrative rules" is the level where ESMA acts.

Together, these regulatory layers constitute the Single Rulebook[47] that forms the foundation of EU financial integration. This Single Rulebook is complemented by a substantially larger administrative rulebook and an equally extensive soft law rulebook, forming a mature, "multi-layered", and increasingly sophisticated financial markets governance system[48].

At its core, this framework is dedicated to building and regulating a unified, integrated financial market, following the CMU objectives. Within both the administrative rule-making ("level 2") and soft law ("level 3") rulebooks, ESMA plays a central role.

The freedom of capital, as operationalized through the CMU project, functions through a dense and multi-layered system of EU financial regulation. Within this system, administrative rulemaking and supervisory coordination play a decisive role in shaping how market integration unfolds. The effectiveness of capital market integration therefore depends not only on legislative harmonization, but also on how rules are specified, interpreted, and enforced by European and national supervisory authorities. It is within this administrative and supervisory dimension of financial governance that ESMA occupies a structurally central position.

[47] Moloney, N. (2023). EU Securities and Financial Markets Regulation, Fourth Edition, Oxford EU Law Library, p. 7.
[48] *Ibid*.

In this framework that ESMA emerges as a central actor, as a key pillar of the Union's financial governance architecture. Crucially for the scope of this dissertation, the growing reliance on ESMA to deliver supervisory convergence and enforcement consistency places the Authority at the core of the Union's financial governance architecture and raises a distinct set of legally significant questions.

The chapter has shown that today's push to strengthen ESMA is rooted in the persistent fragmentation of European capital markets and in the broader reframing of CMU as a matter of competitiveness and economic security. This diagnosis only becomes understandable when placed against the longer legal trajectory of capital mobility, whose cautious elevation to Treaty-level status and incomplete implementation has shaped the EU's integration path from the beginning. Understanding this structural background clarifies why supervisory governance has come to be seen as a necessary complement to market integration. With this context established, the analysis can now turn to ESMA itself.

The next chapter turns to these questions by examining ESMA as an EU agency, situating it within the broader landscape of EU agencies, exposing its tasks and powers, to then assess its constitutional limits (most notably the non-delegation doctrine) that shape and constrain the expansion of its powers in EU financial supervision.

Chapter 2. ESMA and the Constitutional Limits of EU Financial Supervision

This chapter focuses on the institutional and legal framework within which capital integration is being pursued. Having established in Chapter 1 that the deepening of EU capital markets has generated pressures for more centralized forms of governance, the analysis now turns to the body that lies at the center of those developments: the European Securities and Markets Authority (ESMA). The chapter introduces ESMA as an agency whose mandate and powers are shaped by structural limits embedded in the EU legal order.

There is no explicit definition of EU agencies in the Treaties. Generally, they are understood as Union bodies entrusted with specialized technical or regulatory tasks, created to support the implementation of EU policies through expertise, coordination, and, in some cases, limited decision-making powers[49].

A more precise definition presents EU agencies as "EU level public authorities with a legal personality and a certain degree of organizational and financial autonomy that are created by acts of secondary legislation in order to perform clearly specific tasks[50]."

While the Lisbon Treaty does not formally define EU agencies, Art. 263 TFEU strengthens their constitutional status by expressly subjecting their acts to judicial review by the Court of Justice of the European Union. This development contributes to the constitutionalization of agency activity and decision-making within the EU legal order.

Historically, EU agencies emerged through a process of "agencification[51]": the term refers to the process through which the EU has increasingly relied on specialized agencies to exercise regulatory and administrative functions. Beginning in the early 1990s and accelerating after the 2000s, this process led to the proliferation of EU agencies across policy areas linked to the internal market, risk regulation, and financial governance, driven by the functional needs of the internal market[52].

As market integration deepened, the Commission identified both the necessity and the opportunity to expand the Union's regulatory capacity. However, further direct transfers of powers to the Commission faced resistance from Member States in the Council[53] .

The creation of specialized agencies thus represented a political compromise: regulatory capacity could be expanded at the EU level while preserving Member State control through institutional safeguards, including governance structures dominated by national appointees inside agencies themselves[54] .

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[49] European Commission, The Operating Framework for the European Regulatory Agencies COM (2002) 718 Final (2002).
[50] Kelemen, D. (2005). "The politics of Eurocracy: building a new European state?" The state of the European Union. vol. 7, p. 175.
[51] See Groenleer, M.L.P., (2009), The Autonomy of European Union Agencies: A Comparative Study of Institutional Development, Doctoral Thesis, Leiden University, who identifies three waves of EU agency creation: a first wave beginning in the mid-1970s, involving agencies established under the former First Pillar with primarily informational and advisory functions vis-à-vis the Commission (e.g. CEDEFOP and EUROFOUND); a second wave emerging in the early 1990s, marked by the creation of agencies in fields related to social policy and market regulation; and a third wave starting in the early 2000s, characterized by an expansion of regulatory agencies and culminating in the establishment of the European Supervisory Authorities (EBA, EIOPA and ESMA) in the context of the 2008 financial crisis.
[52] *Ivi*, p.99.
[53] See Majone, G. (1997). "From the positive to the regulatory state: causes and consequences of changes in the mode of governance." Journal of public policy,17 (2), pp. 139- 167.
[54] *Ivi*; Dehousse, R. (2008), "Delegation of powers in the European Union: the need for a multi-principals model." West European Politics, 31(4), 789-805.

Building on this background, the chapter pursues two main objectives. First, it maps ESMA's institutional design and existing powers in order to understand how the Union has implemented financial supervision within a system that remains formally decentralized. Second, it identifies the legal framework that structures and limits the delegation of powers to ESMA, preparing the ground for the later assessment of the Commission's reform proposals.

Section 2.1 situates ESMA within the broader phenomenon of EU agencification and explains how its legal basis, mandate, and governance reflect a compromise between the functional need for Union-level oversight and the continued primacy of national supervision. Section 2.2 then provides a structured overview of ESMA's current powers (rule-making, soft law, and supervisory powers), mapping the degree of discretion they involve and the safeguards that accompany them. This reconstruction is essential, because the constitutional compatibility of ESMA's role depends on the nature and limits of the authority it exercises.

Section 2.3 introduces the Meroni doctrine as the key legal lens through which this institutional design must be understood. It reconstructs Meroni as an expression of the principle of institutional balance, traces its evolution in the Court's case law and engages with the academic debate on whether the doctrine has been attenuated in light of functional and systemic pressures. Through this analysis, the chapter refines the Meroni doctrine into an operational analytical framework that clarifies the space of action currently available to ESMA under EU law.

2.1. The Institutional Design of ESMA

The European Securities and Markets Authority (ESMA) was established in 2011 through Regulation (EU) No 1095/2010 as part of the European System of Financial Supervision[55] (ESFS). Its creation responded to the profound institutional weaknesses exposed by the 2008 financial crisis, particularly the inability of national supervisors to manage risks in an integrated financial market. The failure of coordinated supervision in the banking sector made it clear that a purely national approach could not sustain the stability of the internal market in financial services[56]. In this context, ESMA was conceived as an independent technical authority designed to centralize rule-making, harmonize supervisory

[55] Together with the European Insurance and Occupational Pensions Authority (EIOPA) and the European Banking Authority (EBA).
[56] Simoncini, M. (2021). *The Delegation of Power to EU Agencies After the Financial Crisis*. EU Papers Vol. 6 No.3, p. 1486.

practices, and directly supervise specific market segments where uniform oversight was deemed indispensable[57].

The "crisis-led" rationale for ESMA's creation[58] shaped its mandate: ESMA's core objective is to safeguard the stability of the European Union's financial system by enhancing the protection of investors and promoting stable and orderly financial markets.

Since ESMA's creation derives from a Regulation, an act of secondary law, the legal basis for ESMA lies in Art. 114 TFEU, which empowers the Union to adopt "measures […] which have as their object the establishment and functioning of the internal market[59]". This means that ESMA does not possess an unlimited power to regulate the internal market; instead, ESMA was set up to "improve the conditions for the establishment and functioning of the internal market itself[60]". ESMA's mandate is therefore embedded in the internal market logic, it is one of a technocratic body designed to support market integration.

The creation of ESMA did not imply a transfer of supervisory competence from Member States to the Union level. On the contrary, the Treaties continue to allocate primary responsibility for supervision and enforcement to national authorities. ESMA was designed to operate within this decentralized system, coordinating national supervisors, promoting convergence, and addressing cross-border risks that national authorities, acting alone, might fail to manage effectively. As an instrument of regulatory integration without fiscal or political union, ESMA's institutional design reflects a deliberate compromise: strengthening Union-level oversight without upsetting the constitutional balance between EU institutions and Member States.

2.2. ESMA's Powers: Rule-Making, Soft Law and Supervisory Powers

The purpose of this section is to map ESMA's existing powers, as their compatibility with the Treaties depends on both the nature of the powers delegated and the degree of discretion attached to their exercise.

In order to fulfill its mandate of ensuring the integrity, stability, and orderly functioning of EU financial markets, ESMA is equipped with a range of regulatory and supervisory tools.

[57]European Securities and Markets Authority (ESMA). (2025). *Who is ESMA?* Luxembourg: Publications Office of the European Union. https://www.esma.europa.eu/sites/default/files/2025-06/Who_is_ESMA_factsheet.pdf.
[58] Moloney, N., (2011), 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, p. 48.
[59] Consolidated Version of the Treaty on the Functioning of the European Union, 2016. Official Journal of the European Union C 202: 47–200.
[60] *Ivi*, p. 70.

These tools constitute a differentiated toolkit through which ESMA performs its tasks within the limits set by EU law.

ESMA's founding regulation traces two main fields of action: rule-making and supervisory tasks. In rule-making (what has been previously addressed as "Lamfalussy level 2"), ESMA on one hand adopts technical standards; on the other, it engages in soft law measures, mainly guidelines and recommendations.

In its supervisory powers, ESMA has two main roles: as a "supervisor of supervisors[61]" and as a direct supervisor. This level is what has been previously specified as "Lamfalussy level 3".

The following subsections examine these three dimensions of ESMA's mandate. Section 2.2.1 analyses ESMA's rule-making powers, focusing on the drafting of regulatory and implementing technical standards and the procedural constraints that structure the relationship between the Authority and the Commission. Section 2.2.2 then turns to ESMA's soft-law instruments, highlighting how formally non-binding measures nonetheless shape supervisory behavior. Finally, Section 2.2.3 addresses ESMA's supervisory powers, distinguishing between its role in coordinating and converging national supervision and the limited areas in which it exercises direct supervisory authority. This mapping is necessary to assess not only the formal scope of ESMA's powers, but also the degree of discretion attached to each category, which is central to evaluating their compatibility with the Treaties and with the non-delegation doctrine.

2.2.1. Rule making powers

Technical standards

As stated in the ESAs founding regulation, ESMA together with its sister authorities EBA and EIOPA, has the exclusive power of initiative of draft regulatory standards, which take the form of either regulatory or implementing technical standards[62].

It is ESMA that elaborates and submits draft standards to the Commission, following mandatory open public consultations[63]. While these technical standards are non-binding in their essence, they gain a binding effect after they are adopted by the Commission.

[61] Vèron, N., (2025), Breaking the deadlock: A single supervisor to unshackle Europe's capital markets union, Peterson Institute for International Economics Working Paper, p. 25.
[62] Reflecting the Treaty distinction between delegated acts and implementing acts, respectively Art. 290 and 291 TFEU.
[63] Regulation (EU) No 1095/2010 (ESMA's founding regulation), Art. 10(1).

As a rule, the Commission cannot adopt a regulatory technical standard in the absence of a draft from the relevant Authority; the only exception arises where the Authority fails to submit a draft within the prescribed time limits[64]. The Commission's capacity to initiate the procedure for the adoption of technical standards and steer the regulatory agenda is therefore significantly constrained.

Once a draft has been submitted, the Commission may decide to endorse it, to endorse it only in part, or to refuse endorsement[65]. However, this discretion is in fact tightly circumscribed. The founding regulations require the Commission, where it does not endorse a draft or endorses it with amendments, to return the draft to ESMA and to provide a reasoned explanation for its decision[66]. This shows a Commission placed in a position where it must justify its regulatory choices vis-à-vis the agency. This constraint is especially evident in the case of regulatory technical standards: such drafts should be amended only in very restricted and exceptional circumstances, which are exhaustively listed[67]. Moreover, the Commission is expressly prohibited from unilaterally revising the substance of a draft technical standard[68].

For both regulatory and implementing technical standards, the founding regulations state that the Commission may not alter the content of a draft prepared by an Authority without prior coordination with that Authority[69]. Where the Commission proposes amendments, it must therefore transmit the draft back to the Authority, which is granted a six-week period to revise and resubmit it[70]. Only if, at the end of this period, the Authority has failed to submit an amended draft, or has submitted a draft that does not reflect the Commission's proposed changes, may the Commission proceed to adopt the technical standard incorporating its own amendments[71].

Taken together, it is evident that these procedural requirements create strong incentives for the final act adopted by the Commission to closely mirror the draft originally prepared by the Authority. Deviations are not only substantively limited but also subject to heavy procedural scrutiny. In cases of non-endorsement or amendment, the Commission is additionally required to inform the Authority,

[64] *Ivi*, Art. 10(3).
[65] *Ivi*, Art. 10(1).
[66] *Ivi*, Art. 10 (1), fifth subparagraph.
[67] See Recital (23) of Regulation (EU) No 1093/2010: "Draft regulatory technical standards would be subject to amendment if they were incompatible with Union law, did not respect the principle of proportionality or ran counter to the fundamental principles of the internal market for financial services as reflected in the acquis of Union financial services legislation".
[68] Regulation (EU) No 1095/2010, Art. 10(1) recites: "The Commission may not change the content of a draft regulatory technical standard prepared by the Authority without prior coordination with the Authority […]".
[69] *Ivi*, Art. 10(3).
[70] *Ivi*, Art. 10(1), fifth subparagraph.
[71] *Ivi*, sixth subparagraph.

the European Parliament, and the Council, clearly stating the reasons for its decision, reinforcing the exceptional character of any departure from the agency's draft[72].

ESMA's role in drafting technical standards is tightly framed by procedural safeguards that preserve the Commission's formal decision-making authority. These procedural arrangements are designed to ensure that the Commission ultimately retains its Treaty-based powers, while the agency exercises only delegated authority. As will be shown below, this allocation of powers lies at the very core of the Meroni doctrine.

In this exclusive power to initiate a draft, ESMA certainly has a degree of discretion, the counterweight is that this activity is subject to prior mandatory consultations in the form of open public consultations, and the obligation to request the opinion of their relevant stakeholder group as well as cost–benefit analysis requirements.
Only after the adoption by the Commission do these standards gain binding effect, hence, ESMA's activity in rule making can be fairly described as a "rule preparer[73]".

At the same time, the procedural requirements governing the endorsement process significantly constrain the Commission's ability to depart from the draft initially submitted by ESMA. While the Authorities' rule-making powers may appear insufficient when assessed from the perspective of financial market needs in a context of systemic crisis, from an institutional and "agencification" standpoint those powers are nonetheless remarkably extensive[74].

2.2.2. Soft law measures

In addition to drafting technical standards, ESMA also has the power to issue guidelines, recommendations, opinions and Q&As addressed to national competent authorities and financial institutions, aimed at establishing consistent, efficient, and effective supervisory practices.

By definition, soft-law measures are not binding, but in these measures ESMA exercises a margin of discretion.

Just like technical standards, the exercise of these soft-law powers is framed by specific procedural requirements. Although formally non-binding, guidelines and recommendations cannot be treated as purely optional. The founding regulations expressly provide that competent authorities and financial

[72] *Ivi*, fifth subparagraph.
[73] Vèron, N., (2025), p. 25.
[74] Busoic, M, (2014). Rule-Making by the European Financial Supervisory Authorities: Walking a Tight Rope, European Law Journal, Vol. 19, No. 1, January 2013, pp. 112.

institutions must make "every effort" to comply with them[75]. To reinforce this obligation, guidelines and recommendations can require financial institutions to report, in a clear and detailed manner, whether and how they are complying[76]. National competent authorities are similarly required, within two months of the issuance of a guideline or recommendation, to notify the Authority whether they comply or intend to comply. Where they do not comply or do not intend to comply, they must provide a reasoned justification (this is known as the "comply-or-explain mechanism[77]"). In cases of non-compliance, national supervisors are therefore placed under an obligation to account for their conduct to the Authority. The likelihood of compliance is further enhanced by the possibility of public disclosure of non-compliance: this institutionalized mechanisms of public accountability are known as the "naming and shaming[78]" effect. The Authority is required to report annually to the European Parliament, the Council, and the Commission on the guidelines and recommendations it has issued, indicating which competent authorities have failed to comply and explaining how the Authority intends to ensure compliance in the future[79]. In this way, reputational pressure is explicitly used as a compliance-inducing strategy, giving actual substance to instruments that are formally non-binding, producing a "standardization effect[80]".

2.2.3. Supervisory powers

ESMA's supervisory powers are designed to ensure the convergence of supervisory outcomes across the European Union, rather than merely facilitating cooperation between national authorities.

Their core purpose is to guarantee that EU financial market rules generate uniform results in practice, and not simply uniform rules "on the books[81]". Supervision is understood in a functional sense, as ensuring the adequate implementation of EU law, which necessarily involves operational decisions concerning how supervision is organized, how discretion is exercised, and how regulatory priorities are enforced on a day-to-day basis.

The need for such powers arises from a structural imbalance within EU financial governance: while the EU has progressively centralized control over the financial rule-book, supervision has

[75] Regulation (EU) No 1095/2010 (ESMA's Founding Regulation), Art. 16(3).
[76] I*bid*.
[77] Simoncini, M. (2020), I poteri quasi-normativi delle agenzie europee: Le decisioni della European Securities and Markets Authority (ESMA)." *Osservatorio sulle fonti* 13, no. 3, p.1549.
[78] Simoncini, M. (2018), Administrative Regulation Beyond the Non-Delegation Doctrine A Study on EU Agencies, Hart Publishing, p. 184.
[79] Regulation (EU) No 1095/2010 (ESMA's Founding Regulation), Art. 16(4).
[80] Simoncini, M., (2018), p. 72.
[81] Moloney, N., (2023), EU Securities and Financial Markets Regulation, Fourth Edition, Oxford EU Law Library p. 17.

traditionally remained national (through the National Competent Authorities), leading to divergent supervisory practices that undermine market integration, financial stability, and mutual trust among Member States. ESMA's supervisory mandate is therefore intended to reduce fragmentation in supervisory outcomes, address coordination failures exposed by the financial crisis, and discipline national discretion where it threatens the consistent application of EU law.

This overarching objective of supervisory convergence is pursued through three interrelated and increasingly intrusive lines of action: coordination, convergence of supervisory practices, and direct supervision.

First, ESMA exercises a broad coordination function, aimed at managing cross-border supervisory interaction without formally replacing national authorities[82]. This role is particularly prominent in crisis situations, where ESMA is empowered to promote a coordinated EU response, facilitate and verify information exchange, monitor market developments and systemic risks in cooperation with the European Systemic Risk Board, and support crisis management, respectively under Articles 18 and 31–32 of the ESMA Regulation. Coordination also extends to normal market conditions, notably through ESMA's role in stimulating the delegation of supervisory tasks between national competent authorities (Art. 28), its participation in and oversight of colleges of supervisors (Art. 21), and its mediation powers in cases of disagreement between national authorities (Art. 19). These tools are largely facilitative and procedural.

Secondly, ESMA is tasked with promoting convergence of supervisory practices, understood as shaping how supervision is actually conducted at national level[83]. This dimension targets the operational core of supervision by aligning supervisory cultures, standardizing decision-making processes, and reducing national divergence in the application of EU law. Key instruments include ESMA's power to issue opinions and guidance to national competent authorities (Art. 29.1a), the organization of training programmes for supervisors (Art. 29.1e), and the conduct of peer reviews assessing national supervisory practices and capacities (Art. 30). In addition, ESMA's use of binding technical standards, where these affect supervisory processes rather than purely substantive rules, and its extensive information-gathering powers allow it to monitor closely how EU law is applied in practice[84]. Although these tools are formally non-binding, they exert significant constraining effects on national supervisory discretion by setting benchmarks for acceptable supervisory behavior.

[82] Regulation (EU) No 1095/2010, Art. 8(1)b.
[83] *Ivi*, Art. 29 "*Common Supervisory Culture*" states that "The Authority shall play an active role in building a common Union supervisory culture and consistent supervisory practices, as well as in ensuring uniform procedures and consistent approaches throughout the Union".
[84] *Ivi*, Art. 35.

Thirdly, ESMA has direct supervisory powers, which represent the most intrusive element of its mandate. These are binding powers for which the legal basis is found in Art.17 and 18 of ESMA's founding regulation. Here, ESMA can act directly as supervisor itself rather than merely coordinating or steering national authorities. Direct supervision happens in regards to some entities or activities, in a limited number of capital market segments designated by successive EU laws.

The earliest and most developed example of direct EU-level supervision concerns credit rating agencies, which fall under ESMA's exclusive supervisory competence pursuant to Regulation (EU) No 513/2011. In this context, ESMA is responsible for the registration and authorization of all credit rating agencies operating in the Union (Art. 17 and 18), the continuous monitoring of their compliance with organizational, governance, and methodological requirements (Art. 23b), the conduct of on-site inspections, and the adoption of supervisory and sanctioning decisions where breaches of EU law are identified (Art. 23d). This model of centralized supervision was subsequently extended to other market infrastructures with a similarly cross-border character. Under Regulation (EU) No 648/2012 (EMIR), ESMA directly supervises all trade repositories[85], including their registration (Art. 58 and 59), data quality controls (Art. 61), and compliance with reporting and transparency obligations (Art. 73).

Direct supervisory powers have also been conferred on ESMA in relation to specific benchmark administrators under Regulation (EU) 2016/1011, particularly where benchmarks are deemed critical or of significant cross-border importance (Art. 20). In this setting, ESMA's role includes authorization, supervision of governance arrangements and methodologies, and intervention where benchmark integrity or market stability is at risk (Art. 34).

From 2019 onwards, ESMA's direct supervisory mandate was significantly expanded into new and strategically sensitive market segments. Regulation (EU) 2019/2099 extended ESMA's powers to systemically important third-country central counterparties (Tier-2 CCPs), granting it enhanced monitoring, prudential, and intervention competences to protect EU financial stability (Articles 25(2b), 25f–25h).

Regulation (EU) 2023/2631 entrusted ESMA with the supervision of external reviewers of European Green Bonds, aiming to ensure the credibility, independence, and methodological robustness of sustainability assessments (Art. 22 and 23). In 2024, ESMA's role was further strengthened through Regulation (EU) 2024/3005, which conferred direct supervisory powers over ESG rating providers (Art. 6, 7 and 9), and Regulation (EU) 2024/791, which expanded its authority over data reporting

[85] See recital 10 of Regulation (EU) No 648/2012.

services providers[86], reflecting the EU's growing reliance on centralized supervision in data- and sustainability-driven market segments.

Furthermore, under the ESMA Regulation, ESMA may adopt binding decisions where National Competent Authorities breach EU law (Art. 17), intervene in emergency situations to override or replace national supervisory action (Art. 18), and, in limited circumstances, substitute itself for national authorities to ensure compliance[87].

Across these sectors, ESMA's direct supervisory powers are fully binding and operational. They typically include the power to grant or withdraw authorization, require information, conduct investigations and on-site inspections, issue supervisory measures, and impose sanctions. By centralizing supervision in carefully circumscribed areas, these powers aim to ensure uniform enforcement of EU financial law, reduce regulatory arbitrage, and address the limitations of nationally fragmented supervision in markets that are structurally European or global in scope[88].

Taken together, the analysis of ESMA's mandate and powers reveals a deliberately calibrated institutional design. ESMA is neither a general market regulator nor a fully centralized supervisor. Instead, it operates primarily as a coordinator of national supervision, equipped with tools aimed at fostering convergence, consistency, and mutual trust within a decentralized enforcement system. As seen, only in carefully circumscribed market segments has the Union conferred upon ESMA direct and binding supervisory authority.

This architecture reflects a constitutional compromise[89]. As established in the introduction of this dissertation, debate remains over the "constitutional" nature of the EU as such. Within EU legal scholarship and case law (the *Meroni case* itself, C-9/56 and C-10/56), however, the term "constitutional" has acquired a specific, functional meaning when applied to the *Meroni* doctrine: it denotes the structural rules that define institutional competences, safeguard the balance of powers among EU institutions, and set limits on how authority may legally be delegated and exercised. I use the term "constitutional" in this sense when referring to the *Meroni* doctrine, because the limits articulated in *Meroni* are understood as safeguarding the structural allocation of powers within the

[86] See recital 4 of Regulation (EU) 2024/791.
[87] Art. 17(6) of ESMA's founding regulation states that when a competent authority does not comply with ESMA's decision within the time period specified, ESMA may adopt a decision addressed directly to a financial market participant requiring it to take the necessary action to comply with its obligations under Union law.
This is the "substitution" mechanism: ESMA bypasses the non-compliant national authority and directly addresses the regulated entity itself, effectively replacing the national authority's action.
[88] Lagarde, C. (2023). "A Kantian Shift for the Capital Markets Union". Speech at the European Banking Congress, Frankfurt, November 17.

EU legal order, rather than implying the existence of the EU as a state-like constitutional entity[90]. Within this framework, ESMA's institutional design must be read as an attempt to reconcile functional supervisory needs with these structural constraints. ESMA today can be therefore understood as a coordinator with islands of direct authority, rather than as a comprehensive European supervisor. This hybrid position is precisely what makes the current proposals to expand ESMA's powers constitutionally sensitive, and it sets the analytical baseline against which those reforms must be assessed.

2.3. The Meroni doctrine and the space of action of ESMA

The previous analysis revealed that whether in rule-making, supervisory convergence, or even in areas of direct supervision, ESMA's powers are framed by procedural constraints, Commission involvement, oversight mechanisms, or narrowly defined mandates given by EU law. Far from being accidental, this setting reflects a deeper constitutional constraint embedded in the EU legal order: the non-delegation (or Meroni) doctrine.

This section examines the Meroni doctrine as the central framework governing ESMA's space of action. It reconstructs its content, evolution, and contemporary interpretation, before assessing how it structures and limits the expansion of ESMA's powers in EU financial supervision. The Meroni doctrine is directly relevant to ESMA because it defines the limits under which powers may be entrusted to bodies created by secondary law. Since ESMA is an EU agency exercising regulatory and supervisory functions that affect market actors and national authorities, the legality of its mandate depends on whether the powers conferred on it remain sufficiently circumscribed, subject to clear criteria, and embedded within a framework of institutional control. Any expansion of ESMA's supervisory role must therefore be assessed against these non-delegation constraints, which are designed to preserve the institutional balance established by the Treaties.

Historically, modern legal systems have repeatedly confronted the same structural problem: how to implement complex public policies chosen by the legislature through administrative action that requires technical expertise, continuity, and insulation from short-term political pressures. In national

[90] See Scholten, M. and Van Rijsbergen, M. (2014), "The ESMA-Short Selling Case: Erecting a New Delegation Doctrine in the EU upon the Meroni-Romano Remnant", *Legal Issues of Economic Integration*, Volume 41, Number 4, pp. 389-406. The authors discuss Meroni as part of the guarantees that safeguard the "*constitutional* set up in the EU" (p.404). See also Van Cleynenbreugel, P., (2014), "Meroni Circumvented? Article 114 TFEU and EU Regulatory Agencies, *Maastricht Journal of European and Comparative Law*, *21*(1), pp. 64-88. The author states: "Traditionally, *constitutional* boundaries on EU agency powers have been found within the framework of delegation of EU powers to supranational agencies as circumscribed by the Court's Meroni judgment." (p. 78).

legal orders, this tension has often been resolved through the creation of independent administrative agencies, entrusted with the execution and supervision of regulatory regimes while operating at arm's length from elected institutions. These bodies are typically technocratic and functionally specialized, designed to translate legislative choices into effective administrative outcomes.

A similar functional necessity has emerged within the European Union. As noted at the beginning of this chapter, EU agencies are bodies of secondary law, created to perform technical, executive, and supervisory tasks in policy areas where effective implementation exceeds the administrative capacity of the core EU institutions. Their rise is not accidental but reflects the increasing complexity of EU governance and the progressive expansion of regulatory action in highly integrated markets such as financial services. In this sense, the "agencification" of EU administration mirrors developments long observed at the national level.

At the same time, the EU legal order is founded on the separation of powers as a constitutional principle, albeit in a form adapted to a non-state polity. Legislative, executive, and judicial functions are distributed among EU institutions according to the Treaties, and no institution may assume powers beyond those conferred upon it[91]. This structural constraint is particularly relevant when administrative authority is exercised by bodies that are not explicitly mentioned in the Treaties, such as EU agencies.

In the EU context, the transfer of authority from one institutional actor to another can occur only under strict conditions. Powers may be conferred on EU institutions by the Member States through the Treaties, but functions may only be delegated between Union actors in a manner that preserves the institutional balance established at constitutional level. Delegation is therefore not a neutral technical operation; it raises fundamental questions about legality, accountability, and democratic control.

This distinction between conferral and delegation is central. Conferral operates vertically: Member States, as the authors of the Treaties, allocate competences to the Union and define the powers of its institutions[92]. Delegation, by contrast, operates horizontally within the EU legal order: it concerns the transfer of tasks or powers from an institution that holds Treaty-based authority to another body,

[91] Art. 5(2) and 13(2) TEU. Case C-70/88, *Parliament v Council (Chernobyl)*, EU:C:1990:217, para. 22 confirmed institutional balance as a constitutional principle.

[92] This allocation reflects a principal–agent structure typical of international organizations, in which the Member States act as the principals and EU institutions as the agents entrusted with exercising conferred powers. From this perspective, the principle of conferral underscores the Union's foundational ontology as an organization derived from international agreement rather than as a fully federal state, notwithstanding the depth of integration achieved in certain policy fields. Indeed, the European Union is a hybrid, *sui generis* constitutional entity that presents characteristics of both an international organization and a federal polity.

typically created by secondary legislation, for the purpose of implementing Union law. While conferral defines *whether* the Union may act, delegation determines *how* that action may be exercised and by whom.

The constitutional safeguard governing this horizontal redistribution of authority is the principle of institutional balance, which complements the principle of conferral[93]. Together, these principles structure the EU's version of the separation of powers. Conferral functions as an *ultra vires* doctrine[94], limiting action beyond Treaty mandates, while institutional balance regulates the internal allocation and exercise of conferred powers among Union actors.

Indeed, it has been argued that the principle of institutional balance has proven inadequate in addressing the discretionary nature of administrative powers, particularly when compared to Montesquieu's classical conception of the separation of powers[95]. This limitation has complicated the Union's ability to conceptualize and structure delegation to bodies not originally envisaged by the Treaties.

As Chiti observed, the root of the difficulty in conceptualizing and structuring delegation to non-Treaty bodies lies in the EU's lack of a structured theory of administrative power: unlike national legal systems, where courts have progressively developed doctrines to define and constrain administrative discretion, EU law lacks a fully articulated general theory of administrative powers[96]. The author argues that despite the expansion of EU administrative action, EU law has not developed a comprehensive doctrinal framework capable of systematically conceptualizing administrative powers, leaving the treatment of discretion fragmented and context-specific: "EU administrative law has not really clarified the status of discretionary power and the role to be played by accountability regimes. This compromises the capacity of European administrative law to steer power[97]". On EU administrative law in general, Chiti goes as far to say: "one could even say that the purpose of EU

[93]The Court has characterized inter-institutional cooperation through the principle of institutional balance, according to which each institution must exercise its conferred powers with due regard for the powers of the others: see C-70/88 *European Parliament v Council* (Chernobyl), para 22; C-403/05 *European Parliament v Commission*, para 49; ; C-133/06 *European Parliament v Council*, para 57. The Court has further clarified that the duty of sincere cooperation cannot modify or extend Treaty-conferred powers: see C-48/14 Parliament v Council, paras 57–58 and C-73/14 ITLOS (n 6) para 84.

[94] Simoncini, M., (2025), The separation of powers and the administrative branch in the European Union, International Journal of Constitutional Law, p. 3.

[95] *Ivi*, p. 4.

[96] See Chiti, E. (2016), Is EU Administrative Law Failing in Some of Its Crucial Tasks? European Law Journal, Vol. 22, No. 5, pp. 576-596.

[97] Ivi, p. 577.

administrative law has not been recognized by European legal scholarship as an issue deserving autonomous critical consideration[98]".

In this regard, Simoncini has argued: "The theoretical development of administrative discretion, which largely took place at the national level with courts laying out guiding principles and defining the boundaries of administrative powers, has yet to occur at the EU level[99]".

In the absence a theoretical framework[100], administrative action has often been understood in a narrow executory sense, rather than as involving interpretation, prioritization, and the practical shaping of policy[101]. This constrained understanding generates uncertainty about how much discretion may lawfully be entrusted to administrative actors outside the core institutional framework, and under which conditions[102].

It is against this background that the Court of Justice assumed a central role. In response to the Treaties' silence on the nature and limits of administrative delegation, the Court progressively delineated those limits through its jurisprudence. It developed a non-delegation doctrine designed to prevent institutions from divesting themselves of essential responsibilities or transferring Treaty-based powers in a way that would undermine institutional balance.

Importantly, this doctrine does not amount to a categorical prohibition on delegating tasks to administrative bodies. Rather, it imposes conditions intended to ensure that EU institutions do not effectively replace themselves as decision-makers by transferring broad discretionary authority. The Court has articulated these limits in the *Meroni* judgment[103], which addresses the constitutional constraints applicable to powers entrusted to bodies established by secondary law.

It is within this framework that ESMA's mandate must be situated. The Authority's institutional design reflects a continuous effort to reconcile functional demands for centralized, expert supervision

[98] *Ivi*, p. 588.
[99] Simoncini, M., (2025), The separation of powers and the administrative branch in the European Union, International Journal of Constitutional Law, p.6
[100] *Ibid.*
[101] *Ivi*., p. 5.
[102] See 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 Volume 41, Number 4, pp. 389-407. The authors argue that even after the *Short Selling* case (C-270/12), which softened the original *Meroni* doctrine by permitting a degree of discretion subject to sufficiently circumscribed criteria and limitations, "…the classification of powers that EU agencies can be given in general remains unclear."
[103]Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community (Case 9-56 and 10/56).

with legal limits on the transfer of discretionary authority. ESMA's evolution sits precisely at the intersection between functional necessity[104] and legal constraint[105].

Understanding how the Court has formulated and refined these limits is therefore indispensable for assessing both ESMA's current role and the legality of any future expansion of its supervisory powers.

2.3.1. The *Meroni* and *Romano* Cases: Delineating the Outlines of the Non-Delegation Doctrine…through its "Mellowing"

The foundational precedent emerged from *Meroni & Co. v. High Authority* (Cases 9/56 and 10/56), where the Court of Justice examined the High Authority's [106]delegation of powers under the Treaty establishing the European Coal and Steel Community (ECSC) to two bodies governed by Belgian private law, the so-called "Brussels agencies". These agencies were entrusted with responsibility for operating the financial mechanism to ensure regular scrap metal supply in the common market. The Court ruled this delegation unlawful because it involved discretionary powers so extensive and lacking adequate control mechanisms that it constituted a substantive abdication by the High Authority of its task under Article 8 of the ECSC Treaty to ensure the achievement of Treaty objectives[107]. In other words, the delegation resulted in a transfer of powers beyond the High Authority's responsibilities under the ECSC framework.

In sanctioning the illegitimacy of this delegation, the Court established several conditions for lawful delegation that remain valid today. First, any delegation of powers must be explicit and compatible

[104] On "functional necessity", see Majone, G. (1994), The Rise of the Regulatory State in Europe' (1994) 17 *West European Politics* 77, p.82. He argues that functional pressures, especially market integration and credibility needs created regulatory problems that Member States alone could not manage, so Agencies arose as technocratic solutions.
[105] About this tension, see Pelkmans, J. and Simoncini, M., (2014), "Mellowing Meroni: How ESMA can help build the single market", CEPS Commentary, pp. 1-6, arguing that, notwithstanding the functional necessity of greater centralization through EU agencies in order to ensure the effective functioning of the single market, progress has been persistently obstructed by legal and political resistance. In particular, the authors identify the Meroni doctrine as a central legal constraint that has operated as a "chilling" (if not "killing") factor, stalling or significantly slowing attempts to endow EU agencies with meaningful powers, even where such centralization is explicitly justified and economically indispensable. See also Moloney, N. (2011). "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, pp. 41-86, arguing that ESMA's rulemaking powers (in high contrast with its supervisory powers) have often been under-ambitious and institutionally cautious, precisely reflecting Meroni's restrictive understanding of delegation.
[106] The High Authority was the executive body of the European Coal and Steel Community. It was essentially the forerunner of what is now the European Commission.
[107] Joined Cases 9/56 and 10/56, *Meroni & Co., Industrie Metallurgiche SpA v High Authority*, EU:C:1958:7, pp. 152–154.

with the principle of conferral (the delegating authority cannot delegate more powers than it possesses). The Court emphasized the necessity requirement: delegation must be necessary for the delegating authority to fulfill its tasks, thereby conforming to the principle of proportionality.

Furthermore, the exercise of powers by the delegate must occur under the same procedural conditions to which the delegating authority would have been subject. This includes the obligation to provide reasons for decisions, to refer to mandatory opinions collected, to publish annual reports on activities carried out, and to submit them to judicial review.

At the heart of the matter lies the principle that delegation must not entail a transfer of responsibility, and thus of broad discretionary powers, from the delegating to the delegated body unless the Treaty so provides. On this point, the Court distinguished the consequences of delegation depending on whether it concerns "clearly defined executive powers, the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority[108]" or "a discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy[109]." In the first case, delegation cannot significantly alter the consequences arising from the exercise of the powers it confers; in the second, by substituting the choices of the delegated body for those of the delegating authority, delegation produces a genuine shift of responsibility.

In doing so, the Court distinguished administrative implementation responsibilities from the political power to establish priorities and hierarchies of interests in regulation, with the intention of anchoring administrative powers to the principle of legality. This distinction between technical and political competences helped preserve the institutional balance established by the Treaties and prevented shifts of responsibility from delegating authorities to delegated agencies in the decision-making process.

The content of the Meroni doctrine was further developed in the *Romano* case (Case 98/80), where the Court of Justice explicitly excluded the possibility that an administrative body not recognized in the then Treaty establishing the European Economic Community (EEC) could issue acts with normative nature, allowing it only to adopt non-binding recommendations. Here, the Council had delegated powers to an administrative body established within the EEC framework through secondary legislation. The grounds for invalidity differed from Meroni: the problem was not delegation to bodies beyond the Treaty's scope, but rather delegation to a body other than the one designated by the EEC Treaty (the Commission) thereby prejudicing its prerogatives.

[108] Case 9/56 *Meroni*, p. 152.
[109] Case 10/56 *Meroni*, p. 173.

Nevertheless, the underlying issue was logically the same: the discretionary nature of the delegated powers altered the Treaty-granted responsibilities of the delegating authorities and affected the role of the delegated agencies within the legal framework. This is why legal scholarship has come to regard the *Meroni* and *Romano* rulings as part of a unified doctrinal framework[110], with the general non-delegation principle emerging as a standard, transcending the specificities of the distinct circumstances in said rulings.

By limiting agencies' rulemaking powers and explicitly limiting them within the scope of the non-delegation principle, the Court ensured that the power structure established by the Treaties remained unchanged. This safeguards the constitutional architecture of the Treaties and the controllability of public powers: European agencies cannot hold regulatory powers.

Materially, however, this has meant that EU agencies, "unlike national authorities and administrations, have been largely unable to carry out administrative regulatory tasks[111]". Based on this case law, EU agencies have essentially been prevented from performing administrative normative activities as national authorities do[112].

Yet, this formal exclusion of autonomous rulemaking has not prevented the parallel development of "quasi-normative[113]" or factually normative powers through which EU agencies, and ESMA in particular, participate in market regulation in highly technical sectors. What has emerged is not an open departure from Meroni, but a *de facto* functional transformation of its effects. Agencies increasingly shape regulatory outcomes through instruments that are formally non-binding but practically difficult to disregard[114].

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[110] Chiti, E., (2009). 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies', 46, Common Market Law Review, 46, Issue 5, pp. 1395-1442.

[111] Simoncini, M., (2025) p. 14.

[112] What Simoncini M., (2025, p.18), drawing on a concept rooted in Weberian bureaucratic theory and further elaboration by Fisher on models of administrative constitutionalism (Fisher, E., Risk Regulation and Administrative Constitutionalism, 2007), defines as a "transmission-belt model of EU administration, designed not to formulate rules but to enforce them". See Majone, G., (2005), *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (1st ed.). Oxford University, p. 93 where, in regard to Meroni limits, the author argues: "…the only formula that seems to be acceptable to the Brussels authorities is an oxymoron: a regulatory agency without regulatory power".

[113] Chamon, M. (2016), *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration*, Oxford University Press, p.49.

[114] Simoncini, M., (2021), p. 1491, she explains that EU legislation often requires agencies' complex technical assessments that "cannot be easily bypassed or ignored," and may impose reasons-giving costs when deviation from soft law measures occurs. See Chiti, E., (2013), p. 96 "…And the ESAs may issue guidelines and recommendations to national authorities and financial institutions with a view to establishing consistent and effective supervisory practices and to ensuring the uniform application of EU law. These guidelines and recommendations are not legally binding. Yet, the competent authorities and financial institutions 'shall make every effort to comply with those guidelines and recommendations' and are called to provide reasons for non-compliance." Hence, the 'softness' of these measures is, in practice, more apparent than real.

The first channel through which this *de facto* transformation manifests itself is soft law and standardization. As previously mentioned in chapter 2.2.2., ESMA's guidelines, recommendations, opinions and Q&As are formally non-binding instruments. Nonetheless, in highly technical and integrated markets, these measures function as tools of regulatory standardization[115]. National competent authorities are expected to comply or to publicly explain deviations, and market operators adjust their behaviour in light of supervisory expectations shaped by ESMA's interpretative guidance. Through these mechanisms, soft law produces convergence of regulatory practices across the Union without formally altering the distribution of legislative powers. What appears legally as coordination often operates in practice as the definition of common regulatory standards, allowing ESMA to exercise a form of quasi-rulemaking that remains formally compatible with *Meroni* while functionally approaching normative activity[116].

A second and more direct channel is adjudication, particularly where ESMA acts as a direct supervisor endowed with binding decision-making powers. In specific areas defined by secondary legislation (such as the supervision of credit rating agencies or trade repositories), ESMA may adopt legally binding individual decisions addressed to private actors. Here, the agency is no longer merely coordinating national authorities but exercising genuine public authority at Union level: when ESMA prohibits or restricts certain financial activities under its binding decision-making powers, it affects market access[117]. Although these powers are framed as technical and circumscribed, they involve the application of complex regulatory standards and the resolution of conflicts of interest with significant market implications. This form of administrative adjudication brings ESMA functionally close to the exercise of executive power traditionally associated with the Commission or national authorities, thereby stretching the classical understanding of agencies as bodies limited to strictly defined executive tasks under tight institutional control.

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[115] Simoncini, M. (2018). Administrative Regulation Beyond the Non-Delegation Doctrine A Study on EU Agencies, Hart Publishing, p. 12, "…soft law standardisation creates legally not-binding but pragmatically compelling effects on sector operators and national administrations".

[116] On soft law measures as instruments implementing administrative tasks in a substantially normative way, see Simoncini, M., (2015). The Erosion of the Meroni Doctrine. The Case of the European Aviation Safety Agency (EASA), 21 Eur. Pub. L. 309. See also Moloney, N., (2013). *The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences*, European Law Journal 19, pp.118–146. Moloney demonstrates that ESMA's guidelines and recommendations, although formally non-binding under Art. 16 of the ESAs' Founding Regulations, operate as "strong" soft law through comply-or-explain obligations, reporting requirements, and naming-and-shaming mechanisms. These instruments generate *de facto* convergence of supervisory and regulatory practices across Member States, effectively shaping common standards while leaving the formal distribution of legislative powers untouched. As a result, ESMA engages in a form of quasi-rulemaking that remains formally compatible with Meroni but functionally approaches normative regulatory activity.

[117] In this sense, limiting market access can be considered a normative choice, a means of policymaking because it determines *ex ante* who may participate in the market and under which conditions, thereby shaping market structure, competitive dynamics, and risk allocation rather than merely applying pre-existing technical standards.

On this note, scholarship has expressed concerns about the expanding scope of ESMA's direct supervisory role have. Particularly, Moloney argues that, in contrast to its tightly constrained rulemaking powers, ESMA's supervisory competences have moved the Authority "too high up the spectrum towards EU intervention[118]", specifically through the standardization of supervisory practices and the expansion of direct supervision[119]. Local supervision, in her account, functions as an important safety valve within the EU financial system, yet this valve risks being obstructed by ESMA-driven convergence and operational centralization. From this perspective, it is supervision, not rulemaking, that most clearly illustrates how post-crisis institutional practice has stretched the limits of the Meroni settlement.

The third channel through which a *de facto* erosion[120] of Meroni is visible concerns the procedural limits within the Union rulemaking process, where ESMA participates alongside the Commission. While ESMA cannot formally adopt binding regulatory acts of general application, it plays a central role in drafting technical standards and providing highly detailed regulatory input. As seen before, the Commission retains legal responsibility for adopting the final measures, yet it is required to justify any departure from ESMA's drafts. This procedural architecture creates a strong structural incentive for the Commission to follow the agency's technical assessments, embedding ESMA's expertise directly into binding Union law. In this way, ESMA influences the content of legislative and quasi-legislative acts not through autonomous rulemaking, but through procedurally entrenched participation that narrows the Commission's effective room for maneuver.

Taken separately, each of these practices can be presented as compatible with the formal limits of *Meroni*: soft law is non-binding, supervisory decisions are individual rather than normative, and rulemaking authority formally remains with the Commission. Taken together, however, they reveal a different picture. ESMA contributes to the creation, interpretation and enforcement of regulatory standards through instruments that are not labelled as legislative delegation but that nonetheless shape the regulatory environment in a decisive way.

Through these dynamics, ESMA performs a quasi-normative function that responds to sectoral regulatory needs without overtly breaching the *Meroni* prohibition on the delegation of discretionary rulemaking powers. The doctrine is thus not overturned but circumvented in practice, as regulatory

[118] Moloney, N., (2011), 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, p. 178.
[119] Ivi, see also Véron, N., (2025), Breaking the deadlock: A single supervisor to unshackle Europe's capital markets union, Peterson Institute for International Economics Working paper, p. 26.
[120] Simoncini, M., (2015), The Erosion of the Meroni Doctrine: The Case of the European Aviation Safety Agency, European Public Law, p. 309 et seq.

influence is channelled through soft instruments, procedural leverage, and networked supervision rather than through autonomous legislative acts.

This functional transformation is also reflected in how legal scholarship classifies EU agencies. Paul Craig, for instance, distinguishes between information and coordination agencies, quasi-regulatory agencies, and decision-making agencies, placing ESMA in the latter category due to its capacity to adopt binding decisions in specific contexts[121]. Similarly, Griller and Orator classify agencies along a spectrum from ordinary and preparatory bodies to genuine decision-making agencies, again placing ESMA with the European Union Aviation Safety Agency (EASA) at the more interventionist end of the scale[122]. Although neither taxonomy recognizes fully fledged "regulatory agencies" with general rulemaking powers at EU level, both acknowledge that certain agencies exercise forms of authority that go well beyond mere information gathering or coordination. ESMA's position in these classifications confirms its hybrid character: formally constrained by *Meroni*, yet functionally engaged in regulatory determination.

These developments have led to the theorization of a Meroni doctrine under which rule-making is exercised *de facto* through formally non-binding instruments[123] (such as guidelines, standards and recommendations). Discretion is channeled via instruments that, although legally soft, are functionally authoritative and difficult to disregard in practice[124].

The *Short Selling* case (Case C-270/12) formalizes the idea of a "mellowed[125]" Meroni. With this ruling, the erosion that was already occurring *de facto* gained *de jure* recognition[126].

[121] Craig, P., (2018). *EU Administrative Law*. 3rd. ed. Oxford: Oxford University Press, 2012, p. 150.
[122] Griller, S. and Orator, A. (2010), "Everything under control? The "way forward" for European agencies in the footsteps of the Meroni doctrine", European Law Review, 35(1), p. 6.
[123] See Craig, P., (2018), *EU Administrative Law*, 3 edn., Oxford University Press, p. 164. The author refers to EASA's certification specifications as behaviour-shaping product requirement rules "…that are in effect complex, highly detailed *regulatory provisions* regarded as binding by the industry, even though they do not have the force of law".
[124] Simoncini, M., (2015), The Erosion of the Meroni Doctrine. The Case of the European Aviation Safety Agency (EASA), 21 Eur. Pub. L. 309; Simoncini, M., (2023), Op-Ed: "Live and Let Die?" The Meroni Doctrine in 2023, EU Law Live (Sept. 26, 2023), https://eulawlive.com/op-ed-live-and-let-die-the-meroni-doctrine-in-2023-by-marta-simoncini/.

[125] Pelkmans, J. and Simoncini, M., (2014), 'Mellowing Meroni: How ESMA Can Help Build the Single Market" Regulatory Policy, CEPS Commentaries no. 1.
[126] Simoncini, M., (2025), The separation of powers and the administrative branch in the European Union, *International Journal of Constitutional Law*, Volume 23, p. 14. Also see Simoncini, M., (2023) Live and Let Die?," supra note 115.

2.3.2. The *Short Selling* case and the Crystallization of a "Mellowed" Meroni

The *Meroni-Romano* framework remained largely unchallenged for decades, creating considerable uncertainty about the permissible scope of EU agencies' powers. This uncertainty culminated in *United Kingdom v. European Parliament and Council* (Case C-270/12), commonly known as the ESMA *Short Selling* case, where the Court of Justice was called upon to address the delegation doctrine directly in relation to an EU agency operating under the post-Lisbon treaty framework.

The case arose from the United Kingdom's challenge to Article 28 of Regulation No 236/2012 on short selling and certain aspects of credit default swaps. This provision granted ESMA the power to adopt legally binding decisions of general application prohibiting or restricting short selling in specific circumstances. Notably, these decisions could override measures previously taken by national supervisory authorities, representing a significant shift of regulatory authority to the supranational level. The UK advanced four main arguments: that the delegation violated the Meroni doctrine by conferring excessive discretionary powers on ESMA; that it breached the Romano prohibition on agencies adopting acts having the force of law; that it was incompatible with Articles 290 and 291 TFEU, which establish the framework for delegated and implementing acts; and that Article 114 TFEU provided an insufficient legal basis for such a delegation[127].

In addressing these challenges, the Court fundamentally reshaped the delegation doctrine, though it maintained the fiction that it was merely applying Meroni rather than departing from it. The Court's reasoning rested on two pillars that distinguished the contemporary situation from the circumstances that gave rise to the original constraints.

First, the Court emphasized the altered accountability framework under the post-Lisbon treaties. Unlike the Brussels agencies in Meroni, which were governed by Belgian private law and whose acts could not be challenged before the Court of Justice, ESMA was established by the EU legislature as a Union entity. Crucially, Article 263 TFEU now explicitly provides for judicial review of acts adopted by Union bodies, offices, and agencies, including acts of general application intended to produce legal effects on third parties. This constitutional recognition, the Court reasoned, fundamentally changed the conditions under which agencies exercise their powers, rendering them compatible with the rule of law and institutional balance. The Court thereby dismissed the applicability of Romano, noting that the prohibition on agencies adopting acts "having the force of

[127] Art. 114 TFEU states that the Union shall adopt "measures […] which have as their object the establishment and functioning of the internal market".

law" was premised on the absence of judicial remedies, a concern no longer relevant given the current treaty framework[128].

Second, and more substantively, the Court held that ESMA's powers operated within a sufficiently circumscribed legislative framework. While acknowledging that Article 28 of Regulation No 236/2012 conferred powers involving discretion, the Court emphasized that this discretion was limited by various conditions and criteria. ESMA could act only when a threat to the orderly functioning and integrity of financial markets existed and when national authorities had failed to address that threat adequately. Moreover, ESMA was required to consider specific factors when adopting measures, including whether the measure could achieve its objectives without producing other detrimental effects on market efficiency. Procedurally, ESMA had to consult the European Systemic Risk Board and notify relevant national authorities, and its measures were limited to three months unless renewed. The Court concluded that these constraints ensured ESMA did not enjoy "a very large measure of discretion" and that its powers remained amenable to strict judicial review in light of objective criteria.

What the Court accomplished, though it avoided stating so explicitly, was a fundamental reformulation of the Meroni dichotomy. Rather than maintaining the strict distinction between permissible "clearly defined executive powers" and prohibited "discretionary powers implying a wide margin of discretion[129]," the Court effectively created a new category: limited discretionary powers exercisable within a defined legislative framework subject to judicial review. This represents a recognition that the binary classification in Meroni (rooted in the institutional realities of the 1950s), no longer adequately captured the functional requirements of contemporary EU governance, particularly in technically complex regulatory domains requiring specialized expertise.

The Court further addressed the UK's argument regarding Articles 290 and 291 TFEU, which establish specific procedures for delegating powers to the Commission. The Court held that these provisions did not create an exhaustive framework precluding the conferral of powers on agencies. ESMA's decision-making powers, the Court reasoned, involved the deployment of specific technical and professional expertise in response to particular market situations and did not correspond to the situations defined in Articles 290 and 291 TFEU[130]. This interpretation suggested that agencies

[128] Simoncini, M. (2025), The separation of powers and the administrative branch in the European Union, International Journal of Constitutional Law p. 15.
[129] Case 9/56 *Meroni*, p. 152; Case 10/56 *Meroni*, p. 173.
[130]"…the power foreseen in the contested art.28 does not correspond to any of the situations defined in arts 290 and 291 TFEU. As a result, the EU legislator, by inscribing art.28 in Regulation 236/2012, did not undermine the system as set up under arts 290 and 291 TFEU". See Chamon, M., (2014). The empowerment of agencies under the Meroni doctrine

occupy a distinct functional space within the EU's institutional architecture, exercising powers qualitatively different from those delegated to the Commission through the mechanisms established by the treaties.

Finally, concerning the legal basis, the Court upheld the use of Article 114 TFEU, which authorizes measures for the approximation of national laws to establish and ensure the functioning of the internal market. The Court affirmed its broad reading from the earlier ENISA judgment[131], holding that the EU legislature enjoys a large margin of discretion in choosing the most appropriate harmonization method, including the creation of bodies with decision-making powers. The Court found that Article 28 of Regulation No 236/2012 satisfied the requirements of Art.114 TFEU: it comprised measures for the approximation of divergent national provisions on short selling, and it had as its object the proper functioning of the internal market given the proliferation of incongruent national measures adopted during the financial crisis.

The ESMA Short Selling judgment thus "mellowed[132]" Meroni by recognizing that delegation may involve discretion when exercised by agencies possessing specialized expertise, operating within a legislative framework that establishes clear conditions and criteria, and subject to effective judicial review. In other words, the Court held that so long as EU agencies exercise regulatory tasks within the priorities set and policy choices established by EU legislative acts, and so long as their discretion is circumscribed by objective criteria amenable to judicial review, neither a significant transfer of responsibilities nor a factual exercise of legislative powers takes place. The essential elements of policy must be defined by the legislative authority, but agencies may be entrusted with the technical implementation of those policies even where implementation requires making contextual judgments and choices.

Nevertheless, the judgment left significant questions unresolved. Most fundamentally, the Court maintained the Meroni dichotomy between political and technical tasks without developing a clear theoretical framework for distinguishing legislative from administrative discretion. By characterizing

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and article 114 TFEU: comment on United Kingdom v Parliament and council (short-selling) and the proposed single resolution mechanism. European Law Review, 39(3), p. 390.

[131] Case C-217/04, *The United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*, 2006 (ENISA) ECR I-3771. Here the Court accepted that delegating certain implementing or supervisory tasks to EU bodies can itself be a legitimate harmonization measure. See 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, no. 4, p. 400. The authors note that the European Network and Information Security Agency (ENISA), unlike ESMA, "may gather information and at a maximum give technical advice if requested, but has no powers to adopt legally-binding decisions". Therefore, "What the Court has done in the ESMA-short selling case is that it has extended the scope of Article 114 TFEU (and hence its ENISA ruling) to include the possibility to create EU agencies with the power to take legally-binding decisions".

[132] See Pelkmans, J. and Simoncini, M. (2014) 'Mellowing Meroni: How ESMA Can Help Build the Single Market" Regulatory Policy, CEPS Commentaries no. 1.

ESMA's powers as technical rather than political (based largely on the high degree of expertise required and the complexity of financial markets) the Court avoided dealing with the substantive question of when discretionary choices constitute policy-making in effect, if not in form. The procedural and substantive constraints on ESMA's discretion, while more extensive than in Meroni, still leave considerable room for judgment calls that shape regulatory outcomes and affect competing interests. Whether determining that a "threat" exists, that national responses are "inadequate," or that a measure will not produce "detrimental effects" involves purely technical assessments or inherently political choices remains unclear[133].

Moreover, the Court's approach raises deeper questions about the nature of the power relationship between the EU legislature and agencies. Is the conferral of powers on agencies properly understood as "delegation" at all, or does it constitute something closer to original "conferral" by the Treaty-making and legislative authorities? If agencies are exercising powers not previously held by the legislature itself, particularly when these powers involve day-to-day regulatory oversight and market intervention, then the framework of delegation may not adequately capture the constitutional significance of agency empowerment[134]. This ambiguity matters because delegation traditionally assumes that the delegating authority retains ultimate responsibility and could reclaim the delegated powers, whereas conferral might suggest a more definitive allocation of competences within a differentiated institutional structure. The lack of a comprehensive Treaty-based framework governing agency creation, empowerment, and accountability underscores this conceptual uncertainty and raises legitimacy concerns about the ad hoc evolution of the EU's administrative architecture.

Overall, the *Short Selling* case laid down a revised, softened non-delegation doctrine: the conferral of powers to adopt legally binding measures is permissible where such powers are (1) clearly and precisely defined, (2) exercised within a framework of sufficiently specific conditions and criteria that constrain discretion, including procedural safeguards such as notification requirements and the

[133] See Maciariello, E., (2019), *EU Agencies and the Issue of Delegation: Conferral, Implied Powers and the State of Exception*, European Papers, Vol. 4 (2019), pp. 739–742, noting that the criteria governing ESMA's intervention powers in *Short Selling* involve broad evaluative judgments that blur the line between technical assessment and political discretion.

[134] See 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, no. 4, p. 389-407, where the authors argue that the *Short Selling* judgment constructs a new EU delegation doctrine whereby agencies may be entrusted with legally binding decisions of general application, including discretionary powers. They contend that this development cannot be adequately understood through the classic delegation paradigm inherited from *Meroni* and *Romano*, since agency empowerment increasingly amounts to an act of original conferral rather than delegation, and the discretion exercised by agencies may assume a quasi-legislative (normative) character. On this basis, they call for a clear, Treaty-based legal framework governing the conferral of powers on EU agencies.

temporary nature of the measures, and (3) subject to effective judicial review in the light of the objectives and limits laid down by the delegating authority.

The apparent liberalization of the delegation doctrine established in ESMA *Short Selling* faced a significant challenge in the aftermath of the *Banco Popular Español* resolution[135]. The case arose from the first deployment of the Single Resolution Mechanism (SRM) in June 2017, when the European Central Bank declared that Banco Popular Español, Spain's sixth largest banking group, was experiencing severe financial difficulties due to a critical liquidity crisis. On the following day, the Single Resolution Board (SRB) adopted a resolution decision transferring all shares and capital instruments of the bank to Banco Santander, symbolically for one euro, a decision ratified by the Commission within an hour. While account holders were protected, shareholders and creditors bore losses exceeding three billion euros. As shareholders questioned that the SRB was the actual decision maker, they prompted legal challenges that led the Court to reconsider the boundaries of agency discretion. In short, the shareholders and creditors claimed that the SRB had practiced factual and broad decision-making powers, while the Commission "simply rubber stamped the SRB's decision[136]". From the creditors perspective this represented a clear breaking from the Meroni doctrine.

The resolution procedure under Article 18 of the Single Resolution Mechanism Regulation (SRMR) involves a composite decision-making process. The SRB, in conjunction with the ECB, conducts an initial assessment determining whether a credit institution is "failing" or "likely to fail", whether private sector measures are viable, and whether resolution serves the public interest[137]. Subsequently, within 24 hours from the transmission of the resolution scheme by the SRB, the Commission must endorse or reject it regarding its discretionary aspects, with potential Council involvement for final adoption[138]. Crucially, the SRB prepares the resolution scheme but cannot adopt a final decision without institutional involvement. This framework was designed explicitly to comply with Meroni's prohibition on transferring responsibility, as confirmed by recitals 24 and 26 of the SRMR.

The applicants challenged whether the SRB, possessing wide-ranging discretionary powers and operating under severe time constraints that limited meaningful Commission review, had become the

[135] Within the resolution of Banco Popular, the General Court selected five "pilot cases": Tatiana Pérez (Case T-481/17), Del Valle (Case T-510/17), Eleveté (Case T-523/17), Algebris (Case T-570/17), and Aeris (Case T-628/17), to address the majority of legal issues.
[136] Simoncini, M. (2025), *Eroding Meroni: The Fate of the Delegation to EU Agencies. STALS* p. 4.
[137] The conditions are satisfied if the entity meets one or more of the situations listed in Art. 18 SRMR.
[138] Art. 18(7) SMRM.

effective decision-maker in violation of Meroni[139]. The central legal question concerned whether the SRB's resolution scheme constituted a challengeable act under Article 263 TFEU, which turns on whether an act produces independent legal effects capable of affecting the interests of natural or legal persons.

The General Court initially held that the resolution scheme was indeed challengeable, reasoning that the Commission's endorsement did not merely rubber-stamp the SRB's decisions[140]. The General Court emphasized that Commission representatives participate as permanent observers in SRB meetings with access to all documents, enabling continuous assessment of the SRB's discretionary margins. Drawing a distinction between the SRB's technical competence and the Commission's discretionary authority, the General Court concluded that this informal participation constituted sufficient procedural control to ensure informed assessment of discretionary aspects[141]. Therefore, even though the Commission's endorsement was necessary for the scheme to enter into force, the resolution scheme itself produced independent legal effects warranting judicial review.

The Court of Justice reversed this decision on appeal in its June 2024 judgment[142]. Emphasizing that Article 18 SRMR was grounded in the Meroni doctrine, the Court observed that resolution decisions have considerable impact on financial stability and Member States' fiscal sovereignty, requiring adequate involvement of EU institutions to respect the principles of delegation[143]. Critically, the Court rejected the General Court's distinction between technical and discretionary aspects of the resolution scheme. It held that such a distinction could not be drawn for purposes of determining the challengeable act, as the Commission's endorsement was essential not merely for the scheme's entry into force but for fixing its content definitively[144]. Since Articles 7 and 18 SRMR do not confer on the SRB the power to adopt acts producing independent legal effects, only the Commission's endorsement decision (not the SRB's resolution scheme) constitutes a challengeable act under Article 263 TFEU[145].

The implications of *Banco Popular* are profound. The judgment restored core principles of the original *Meroni* decision that had seemingly "eroded" following the *Short Selling* case, particularly regarding the prohibition on transferring responsibility from institutions to agencies. While *Short*

[139] The Commission approved the scheme just 77 minutes after having received it. It was argued that in such a short time, the Commission could not have seriously assessed it. See OJ 2017 L 178, p. 15.
[140] See par. 229 of the decision.
[141] Brescia Morra C. and F. Annunziata F., (2024), The Banking Union and the decisions of the CJEU. Towards a complete legal order? Report for the European Parliament, p. 16.
[142] C-551/22 P.
[143] See par. 127 of T-510/17.
[144] See par. 83 and 127 of Case C-551/22.
[145] See par. 124, 126 of T-510/17.

Selling suggested that agencies could exercise discretionary powers so long as they operated within circumscribed legislative frameworks subject to judicial review, *Banco Popular* clarified that when decisions involve genuine policy discretion (particularly affecting financial stability and Member States' fiscal sovereignty), they remain within the exclusive competence of EU institutions. The Court's refusal to accept a technical-discretionary distinction for allocating decision-making authority represents a significant retrenchment from the flexible approach adopted in *Short Selling*.

Most fundamentally, *Banco Popular* highlights the continuing tension in distinguishing technical expertise from political discretion. The General Court's attempt to separate technical aspects (assigned to the SRB) from discretionary aspects (reserved for the Commission) proved unworkable because, as the Court of Justice recognized, resolution decisions necessarily involve both dimensions inseparably. This undermines the theoretical foundation of *Short Selling*'s approach, which assumed that highly technical regulatory decisions could be safely delegated to expert agencies because their technical nature inherently limited discretion. *Banco Popular* suggests that where decisions have significant political and economic consequences (even if they require technical expertise to implement) the institutional balance enshrined in the Treaties requires that final decision-making authority rest with accountable institutions rather than specialized agencies[146].

Overall, the Court signaled its determination to preserve the constitutional architecture of EU governance even as functional pressures drive the expansion of agency powers. What is clear is that the straightforward path toward agency empowerment suggested by *Short Selling* has encountered significant obstacles, and the distinction between permissible technical discretion and impermissible policy discretion remains contested and uncertain.

The Court's application of Meroni principles continued to evolve in subsequent judgments addressing different aspects of the SRB's powers. In *García Fernández and Others v. Commission and SRB* (C-541/22 P, decided October 4, 2024), the Court reaffirmed the core holding of the Banco Popular appeal: where the Commission endorses a resolution scheme, the Commission assumes the responsibilities conferred on it by the Treaties[147]. This confirmation underscored that the Court's restrictive interpretation in *Banco Popular* was not an isolated response to the specific circumstances

[146] C-551/22 P Commission v SRB, Paras 80-81: states the architecture "avoid[s] a transfer of responsibility" because the Commission/Council are responsible for the final assessment of discretionary aspects involving balancing objectives/interests. Paras 88-89: because endorsement is decisive, "it is the Commission, and not the SRB, which must answer for that resolution action before the EU judicature."

[147] C-541/22, para 97-98. See Gollier, J.M. and Morbee, K. (2024), EU resolution framework, revival of the Meroni doctrine in the judgment of the ECJ of 18 June 2024 – C-551/22 P, Review of European Administrative Law, https://realaw.blog/2024/12/06/eu-resolution-framework-revival-of-the-meroni-doctrine-in-the-judgment-of-the-ecj-of-18-june-2024-c%E2%80%91551-22-p-by-jean-marc-gollier-katrien-morbee/.

of that case but rather reflected a broader commitment to maintaining institutional balance within the resolution framework.

Far more significant, however, is the Grand Chamber's recent judgment in *ABLV Bank AS v. Single Resolution Board* (C-602/22 P, December 11, 2025), which introduces a crucial distinction that refines the Court's understanding of *Meroni* in the banking resolution context. The case arose from the 2018 collapse of ABLV Bank, a Latvian lender that suffered catastrophic liquidity problems following allegations by U.S. authorities concerning money laundering. After the ECB determined that the bank was failing or likely to fail, the SRB (determining that resolution was not necessary in the public interest) adopted decisions[148] declining to adopt a resolution scheme for both ABLV Bank and its Luxembourg subsidiary. The bank challenged these negative decisions, raising a fundamental question that had haunted the Banking Union's resolution framework: while the SRB clearly possessed the power to resolve a failing bank by adopting a resolution scheme, did it have autonomous power to formally decide *not* to resolve[149]?

The Court answered affirmatively, confirming that the SRB possesses the power to adopt non-resolution decisions (decisions declining to place a failing bank into resolution) and critically, that such decisions do not require endorsement by the Commission or Council[150]. The Court distinguished these "negative" powers from the "positive" power to adopt resolution schemes, exempting the former from the procedural requirements that *Meroni* imposes on the latter[151]. This creates what can be characterized as a paradox: the SRB is now politically dependent when it saves a bank (requiring Commission endorsement under *Banco Popular*), but sovereign when it allows one to fail.

The Court's reasoning rested on the nature and consequences of the two types of decisions. When the SRB decides not to resolve a failing bank, responsibility for managing the failure returns to national authorities under ordinary insolvency procedures[152]. This negative decision does not involve the exercise of the wide margin of discretion that characterizes positive resolution decisions, which can profoundly affect financial stability and Member States' fiscal sovereignty. Negative decisions, while

[148] Decisions SRB/EES/2018/09 and SRB/EES/2018/10 were adopted by SRB pursuant to Article 18(5) SRMR.
[149] See C-602/22 P, para 18. ABLV contended that while the SRMR grants the SRB authority to adopt a resolution scheme, it contains no explicit provision authorizing it to issue a decision *declining* to resolve an institution. In creating this 'negative decision' power, ABLV maintained, the SRB acted *ultra vires*.
[150] *Ivi*, para 75.
[151] *Ivi*, para 97, 101 and 103.
[152] *Ivi*, para 83 and 103. See Budinska, B. (2025), Op-Ed: "Another Piece of the Puzzle of the NonDelegation Doctrine? AG Biondi's Opinion in ABLV Bank v. SRB (C-602/22 P)", EULaw Live, https://eulawlive.com/op-ed-another-piece-of-the-puzzle-of-the-non-delegation-doctrine-ag-biondis-opinion-in-ablv-bank-v-srb-c-602-22-p/. She notes "…Advocate General Biondi takes it from there arguing that the technical discretion exercised by the SRB when deciding whether to resolve a bank differs from the political discretion exercised when deciding how to resolve it, which justifies the lack of involvement of EU institutions in the former assessment".

certainly significant for affected stakeholders, do not implicate the same policy considerations that Meroni seeks to preserve for EU institutions[153]. The Court thus held that such decisions fall within the SRB's autonomous decision-making competence without triggering the enhanced institutional involvement required for positive resolution schemes.

The implications of *ABLV Bank* extend beyond the immediate resolution context. The judgment demonstrates that the Court is refining rather than abandoning *Meroni*, developing a more nuanced framework that distinguishes among different types of agency powers based on their substantive characteristics and institutional consequences. By differentiating negative from positive powers, the Court signals that not all discretionary decisions by agencies require the same level of institutional oversight: the determining factor is whether the decision involves policy choices of sufficient magnitude to impact the institutional balance that *Meroni* protects.

Whether this functional distinction will extend beyond the resolution context remains uncertain. The *ABLV Bank* judgment suggests that where agencies are called upon deciding *whether* to activate special procedures or allow normal processes to operate, their autonomy may be greater than when they affirmatively deploy exceptional powers[154]. This could have implications for other agencies whose mandates include both positive interventions and decisions to refrain from acting (such as ESMA), though the Court was careful to ground its analysis in the specific provisions of the SRMR[155]. The tension between the Court's restrictive stance in *Banco Popular* and its more permissive approach in *ABLV Bank* illustrates the ongoing difficulty in articulating clear boundaries for agency discretion within a legal framework that lacks explicit guidance on administrative power.

The Court of Justice's doctrine on delegation (*Meroni*/*Romano*) continues to rest on the constitutional imperative that EU institutions cannot transfer Treaty-conferred powers in a way that abdicates their responsibility or alters the institutional balance. *Meroni v. High Authority* (1957) and *Commission v. Romano* (1981) established the core principle that agencies may only exercise clearly defined executive powers of a technical nature, not broad discretion, and may never adopt acts "having the force of law." Delegation must be explicit, necessary, proportionate, procedurally equivalent (reasons, consultation, reporting, judicial review), and must not transfer responsibility from the institution that holds the power under the Treaties.

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[153] C-602/22 P, para 101: "It follows that the scope of the discretionary assessments that must be carried out by the SRB in order to decide not to adopt a resolution scheme is necessarily more restricted than the scope of the assessments that must be carried out by the SRB in order to adopt a resolution scheme." Also see para 102.
[154] Lupinu, P.M., (2025), Op-Ed "The Power to Say 'No': The Court of Justice Secures the SRB's Gatekeeper Role in ABLV Bank v. SRB (C-602/22 P), EULaw Live, https://eulawlive.com/op-ed-the-power-to-say-no-the-court-of-justice-secures-the-srbs-gatekeeper-role-in-ablv-bank-v-srb-c-602-22-p/.
[155] *Ibid.*

This classical formulation was mellowed in *United Kingdom v. European Parliament and Council* (ESMA Short-Selling, C-270/12) where the Court tolerated limited discretionary powers for ESMA, provided they operated within a detailed legislative framework, were constrained by objective criteria, subject to judicial review, and did not determine fundamental policy choices, effectively introducing a category between technical execution and prohibited policymaking. The Court argued that the post-Lisbon architecture (judicial review under Article 263 TFEU) reduced the need for a strict Meroni binary.

However, *Banco Popular Español* and the related *García Fernández* appeal (C-541/22 P) reaffirmed the protective core of *Meroni*: where decisions have significant policy impact (affecting financial stability and Member State interests), the agency cannot be the ultimate decision-maker. Only the institutional act (e.g., the Commission's endorsement) is challengeable, underscoring that responsibility for high-stakes policy must remain with accountable institutions.

The recent *ABLV Bank* judgment (C-602/22 P) further refines rather than rejects *Meroni*: it distinguishes "negative" powers (decisions not to act) as autonomous for agencies, since they do not involve policy choices with Treaty-level consequences, from "positive" powers (decisions to act) that must remain subject to institutional endorsement.

These developments of the case law teach us that the interpretation of Meroni is neither static nor formally abandoned, but functionally recalibrated, as "EU Courts continue to clarify the non-delegation doctrine […] in its deconstruction and reconstruction[156]". It is precisely against this recalibrated understanding of delegation that the following chapter assesses the Commission's 2025 reform proposal on ESMA's supervisory powers.

Throughout this chapter, ESMA's powers have been mapped and situated within the constraints set by the Meroni doctrine. This provides the necessary baseline for Chapter 3, which will evaluate whether the Commission's proposed expansion of ESMA's powers remains within the Meroni limits or risks upsetting the institutional balance established by the Treaties.

Chapter 3. Assessing ESMA's new powers against the Meroni doctrine

[156] Chamon, M., (2022), The non-delegation doctrine in the Banco Popular cases, Review of European Administrative Law, https://realaw.blog/2022/10/28/the-non-delegation-doctrine-in-the-banco-popular-cases-by-merijn-chamon/.

The previous chapters have established both the context and the legal framework within which the European Commission's proposal to enhance ESMA's supervisory powers must be assessed.

The present chapter moves from context to assessment. Taking the doctrinal framework reconstructed in Chapter 2 as its analytical lens, it examines whether and how the Commission's proposed enhancement of ESMA's powers fits within the limits imposed by the Meroni doctrine.

In the first chapter, it was shown that the idea of a Capital Markets Union has long been present in the European integration project and that the reasons why it has now become significantly more pressing were set out in detail. What distinguishes the current phase from earlier CMU initiatives is that supervisory integration has moved from the periphery to the center of the policy debate. The inadequacy of nationally fragmented supervision is no longer framed as a technical inconvenience, but as a structural obstacle to market integration, financial stability, and competitiveness.

The renewed calls for supervisory centralization must therefore be understood as proposals that would significantly recalibrate the constitutional position of ESMA within the EU legal order. When ECB President Christine Lagarde suggested the creation of a "European SEC[157]" through an extension of ESMA's direct supervisory mandate, she was effectively advocating a transition from coordinated supervision to centralized regulatory authority. Such a shift would not simply enhance administrative efficiency; it would alter the distribution of responsibility between Union and national authorities in a manner directly relevant to the Meroni constraints outlined above.

The subsequent policy reports by Enrico Letta and Mario Draghi institutionalized this direction of travel. While the Letta Report framed the strengthening of ESMA in incremental terms, advocating a gradual expansion of direct supervisory competences[158], the Draghi Report articulated a far more transformative vision: ESMA should evolve from a coordinator of national regulators into the single common regulator for EU securities markets[159]. Read through the lens of the Meroni doctrine, this proposal is not neutral. It implies a structural reconfiguration of discretion, enforcement authority, and institutional balance.

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[157] Lagarde, C., (2023), A Kantian Shift for the Capital Markets Union. Speech at the European Banking Congress, Frankfurt, November 17. The Securities and Exchange Commission (SEC) is the primary federal regulatory authority overseeing securities markets in the United States. It possesses rulemaking authority, meaning it can develop, propose, and adopt binding rules of general application governing securities markets, without needing another institution to endorse or veto its proposals before they take effect.

[158] Letta, E., (202), Much More Than a Market. Report to the European Council, https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf, p. 65.

[159] Draghi, M., (2024), The Future of European Competitiveness. Part A: A Competitiveness Strategy for Europe. Report to the European Commission, 97e481fd-2dc3-412d-be4c-f152a8232961_en, p. 65.

The relevance of these interventions for the present analysis is therefore not political but constitutional. They reveal that the current reform debate is not confined to technical adjustments of supervisory tools, but contemplates a qualitative shift in ESMA's role. The question is thus whether such a transition—from convergence coordinator to centralized regulator—remains compatible with the limits on delegation articulated in Meroni and refined in subsequent case law.

Taken together with the analysis developed in Chapter 1, these interventions define the political and institutional environment in which the Commission's 2025 proposal must be situated. The proposal does not emerge as a technocratic adjustment, but as a response to a consolidated diagnosis: that the effectiveness of the freedom of capital, and of CMU more broadly, is now seen to depend on the existence of stronger, more centralized forms of supervision.

Against this backdrop, the Commission's reform package proposes a targeted yet significant reconfiguration of supervisory competences within the European System of Financial Supervision. The proposal rests on the premise that "for certain significant and cross-border entities in the areas of trading and post-trading, and for entities in new areas like crypto-asset service providers, pooling supervision at EU level can promote market integration and more efficient functioning of the capital markets. For large asset management groups and investment funds, stronger convergence and coordination of supervision at EU level will remove barriers and increase cross-border activities. Across the board, the initiative aims to strengthen the use and effectiveness of the supervisory convergence tools of the European Securities and Markets Authority (ESMA), and introduce new tools, thereby supporting a single market for financial service[160]". Clearly, the Commission emphasizes that stronger convergence and coordination of supervision at EU level are necessary to remove remaining barriers to cross-border activity.

Across these sectors, the initiative aims to strengthen both the use and the effectiveness of ESMA's supervisory convergence tools and to introduce new instruments, thereby supporting the emergence of a genuinely single market for financial services. Legally, the proposal is grounded in Article 114 TFEU and is framed as consistent with the principles of subsidiarity and proportionality. The Commission explicitly argues that national action alone cannot overcome the structural barriers created by divergent supervisory practices, given the diversity of Member States' legal frameworks, supervisory traditions, and market structures[161].

[160] European Commission, COM(2025) 943 final 2025/0383, Proposal for a regulation […] as regards the further development of capital market integration and supervision within the Union", p. 3.
[161] *Ivi*, p. 5

The reform package identifies two core supervisory deficiencies. First, supervision remains predominantly national, resulting in fragmented enforcement and divergent applications of EU law that hinder cross-border activity[162]. Second, the tools available at EU level to ensure supervisory convergence are limited in scope, unevenly used, and often lack enforceability[163]. Peer reviews and infringement procedures are acknowledged as insufficient to correct these systemic divergences[164].

To address these issues, the Commission considered three policy options: maintaining the *status quo*; strengthening ESMA's supervisory convergence tools while transferring direct supervision of the most significant infrastructures and all crypto-asset service providers to ESMA; or establishing full EU-level supervision over all infrastructures, asset managers, and CASPs. The impact assessment ultimately endorses the second option as the preferred and proportionate solution, combining enhanced convergence tools with carefully circumscribed transfers of direct supervisory authority[165].

This chapter does not assess the proposal from a policy-efficiency perspective. Instead, building on the analytical framework developed in Chapter 2, the chapter examines how the Meroni doctrine continues to structure the permissible scope of ESMA's empowerment, notwithstanding its "mellowed" interpretation in the Court's case law.

Methodologically, the analysis proceeds along the three supervisory trajectories that structure the Commission's proposal on the enhancement of ESMA's supervisory powers. First (Section 3.1), it examines the extension of direct supervisory powers over specific market segments. Second (Section 3.2), it assesses the reinforcement of supervisory convergence tools. Third (Section 3.3), it analyzes the proposed model of coordinated EU-level supervision of large cross-border asset managers and investment funds. Lastly, Section 3.4 explicitly answers the research question of this dissertation.

For each trajectory, the chapter assesses the rationale of the proposed measures, the nature and degree of discretion they entail, and the safeguards designed to prevent a transfer of responsibility prohibited by Meroni. The aim is not to argue that the proposal breaches the doctrine, but to show how Meroni continues to shape and constrain the design of ESMA's new powers, delimiting the space within which supervisory centralization can lawfully occur.

This chapter is expected to yield three main analytical results. First, it demonstrates that the Commission's 2025 reform proposal does not seek to overturn the Meroni doctrine, but instead

[162] *Ivi*, see part 3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENT, Ex-post evaluations / fitness checks of existing legislation, p. 8.
[163] *Ibid.*
[164] *Ivi*, p. 8.
[165] *Ivi*, p. 10.

operates within its contemporary, recalibrated interpretation by carefully structuring ESMA's new powers around predefined conditions, procedural safeguards, and differentiated supervisory models. The analysis is expected to show that, while the proposal expands ESMA's operational role, it does so by channeling discretion rather than eliminating constitutional constraints, thereby preserving institutional responsibility at Union level. Second, the chapter clarifies how different categories of supervisory powers interact differently with the non-delegation doctrine: direct supervision of narrowly defined market segments, enhanced supervisory convergence tools, and coordinated oversight of large cross-border actors each engage Meroni in distinct ways and reveal varying degrees of tolerated administrative discretion. Finally, the chapter is expected to contribute to the broader academic debate on EU agency empowerment by illustrating that Meroni today functions less as a rigid prohibition and more as a design principle, shaping the architecture, intensity, and procedural embedding of supervisory powers. In this sense, the chapter's findings are expected to support the broader thesis of this dissertation: that contemporary EU financial governance evolves through incremental legal accommodation rather than formal doctrinal rupture, with ESMA's empowerment reflecting an adaptive, legally constrained response to integration pressures rather than a departure from the Union's constitutional equilibrium.

3.1. Direct Supervisory Powers in New Sectors (Trajectory 1)

This first trajectory represents the most salient component of the Commission's 2025 reform package: the partial replacement of national competent authorities (NCAs) with ESMA as primary supervisor for selected market actors. Unlike supervisory convergence tools (which discipline or steer national supervision), direct supervision changes the allocation of executive power in the European System of Financial Supervision (ESFS): for certain entities, the Commission proposes ESMA to become the authority that authorizes, monitors ongoing compliance, investigates, and enforces through binding measures and sanctions[166].

In the Commission's framing, the rationale is functional and integrative: for "certain significant and cross-border entities in the areas of trading and post-trading, and for entities in new areas like crypto-asset service providers, pooling supervision at EU level can promote market integration and more efficient functioning of the capital markets[167]". This is not merely "more coordination", but a targeted

[166] *Ivi*, Article 2 – Amendments to the European Market Infrastructure Regulation.
[167] *Ivi*, p. 3.

move towards EU-level supervision where the relevant markets are structurally cross-border (or inherently non-territorial, as in crypto).

From the perspective of this dissertation, the key analytical question is how far this "vertical shift" can go without colliding with the Meroni doctrine's core concern: preventing a transfer of discretionary power so broad that it amounts to an abdication of responsibility by the institutions empowered under the Treaties.

Methodologically, this section proceeds sector-by-sector, examining the three areas in which the Commission proposes to confer new direct supervisory powers on ESMA: 3.1.1. Central Counterparties (CCPs), 3.1.2. Central Securities Depositories (CSDs), and 3.1.3. Crypto-Asset Service Providers (CASPs). These three sectors form the core of trajectory 1, as they involve a move from coordinated national supervision toward forms of direct Union-level oversight. The analysis then draws out the general "Meroni-relevant" features of trajectory 1: vertical substitution of national authorities, the conferral of binding powers over private actors, and the management of administrative discretion through legal design.

3.1.1. Central Counterparties (CCPs)

In order to appreciate the relevance of the shift the Commission proposes, it is necessary to briefly clarify what CCPs are and why they occupy a central position in financial markets. A central counterparty (CCP) is a financial market infrastructure that interposes itself between the two parties to a financial transaction. When two market participants conclude a derivatives contract or certain securities transactions, the CCP becomes the buyer to every seller and the seller to every buyer[168]. By doing so, it assumes counterparty risk and manages it through margin requirements, default funds and other risk-control mechanisms. CCPs therefore concentrate and mutualize risk within the financial system. Their failure would have systemic consequences, as demonstrated during and after the 2008 financial crisis[169]. For this reason, CCPs are subject to detailed prudential and organizational requirements under the European Market Infrastructure Regulation (EMIR), particularly in Titles IV and V, which govern their authorization, capital, margining, management and interoperability[170].

[168] Banque de France, (2018), Payments and Market Infrastructures in the Digital Era. See Chap. 11, p. 167,
[169] See European Commission, Recovery and resolution of central counterparties (CCPs), https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/financial-markets/post-trade-services/recovery-and-resolution-central-counterparties-ccps_en.
[170] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories [2012] OJ L 201/1 (EMIR), Titles IV–V.

The Commission's proposal amends EMIR to introduce a new supervisory model for "significant CCPs[171]", under which ESMA becomes responsible for authorization and ongoing supervision[172]. The Commission's explanation is explicit: new Articles 22a–22c are inserted in EMIR "to give ESMA direct supervision over significant CCPs[173]", including the procedure for determining significance and the powers attributed to ESMA. Article 12 of EMIR is amended to empower ESMA to impose penalties[174], and a new Annex V enumerates the infringements for which ESMA may impose fines[175].

This reform represents a structural shift from the existing, current college-based model of supervision. Under the current framework, CCPs are primarily supervised by national competent authorities within supervisory colleges in which ESMA participates and coordinates[176]. Under the Commission's proposal, colleges are abolished for significant CCPs and procedural steps are adjusted to reflect ESMA's new position as competent authority[177]. Provisions that previously required ESMA to issue opinions to national supervisors are removed in cases where ESMA itself becomes the supervisor. The institutional logic is thus transformed: ESMA moves from a coordinating role within a network to direct operational responsibility.

Substantively, the new model confers on ESMA ongoing compliance responsibility. ESMA must ensure, on a continuous basis, that significant CCPs comply with the provisions of EMIR specified in the new Article 22c(2)[178], including the core prudential and organizational requirements contained in Titles IV and V of EMIR[179]. Supervision is therefore not episodic but permanent and risk-based, involving constant assessment of governance arrangements, margin models, liquidity risk management and operational resilience[180].

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[171] European Commission, COM(2025) 943 final 2025/0383, Article 2 – Amendments to the European Market Infrastructure Regulation Supervision of significant CCPs.
[172] *Ibid*.
[173] *Ibid*.
[174] *Ibid*.
[175] *Ibid*.
[176] Regulation (EU) No 648/2012 (EMIR), Arts. 17–18; see also ESMA, *Guidelines on cooperation between authorities under Articles 17 and 23 of EMIR*, ESMA/2013/1645. Specifically, Article 18 EMIR requires the establishment of a college composed of the relevant national competent authority (NCA) of the CCP, ESMA, the competent authorities responsible for the supervision of clearing members, and relevant central banks, among others. ESMA's role within the college is coordinative: it participates in college meetings and may issue opinions, but authorization and ongoing supervision remain with the NCA of the Member State where the CCP is established.
[177]European Commission, COM(2025) 943 final 2025/0383, See Art. 2 (Amendments to the European Market Infrastructure Regulation) where it states that Artt. 14, 17 18, 20 of EMIR "are adapted to abolish colleges for significant CCPs and to adjust the various procedures to account for ESMA's new role, for example by removing the need for ESMA opinions when significant CCPs are involved and to cater for the abolition of the CCP Supervisory Committee".
[178] "New" because it is the Commission's proposal to amend the old Art.22a of EMIR.
[179] European Commission, COM(2025) 943 final 2025/0383, see Article 22c: Powers of ESMA over significant CCPs under this Regulation.
[180] *Ivi*, Articles 22a–22c where the Commission envisions to enhance ESMA's direct supervisory powers in compliance with EMIR core provisions.

The proposal also grants ESMA extensive supervisory powers. These include the ability to request information from CCPs[181] and, where relevant, from third parties to whom activities have been outsourced[182]; to conduct investigations[183]; to carry out on-site inspections[184]; and to adopt supervisory measures where infringements are identified[185]. ESMA may order a CCP to bring an infringement to an end, to take corrective measures, or to modify certain practices[186].

In addition, ESMA is endowed with sanctioning capacity. It may impose fines for the infringements listed in Annex V to EMIR[187], subject to parameters defined in the legislative text, including turnover-based ceilings and the consideration of aggravating or mitigating circumstances[188]. The enumeration of sanctionable conduct in Annex V is accompanied by a mechanism allowing the Commission to amend the list by delegated act[189]. The sanctioning framework thus combines operational enforcement discretion at agency level with legislative control over the definition of infringing conduct.

Despite this significant centralization, the model does not entirely displace national authorities. The proposal creates a category of "relevant authorities for significant CCPs[190]", which includes the national competent authority of establishment, supervisors of major clearing members, supervisors of trading venues and linked central securities depositories, and central banks of issue, including the European Central Bank for the euro[191]. These authorities are integrated into the supervisory architecture through structured cooperation mechanisms[192]. The text introduces consultation duties vis-à-vis central banks of issue for specific assessments and decisions, accompanied by strict timelines, including for emergency situations[193]. The systemic dimension of CCP activity, particularly where settlement in central bank money is involved, therefore remains institutionally recognized.

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[181] *Ivi*, Article 22c(3) letter c.
[182] *Ibid.*
[183] *Ivi*, Article 1: Amendments to Regulation (EU) No 1095/2010 (ESMA's founding Regulation). Here the Commission proposes to add Art. 39: On-Site Inspections to ESMA's founding Regulation.
[184] Ibid.
[185] *Ivi*, Article 22c(3)(e) "adopt a decision imposing fines, where a significant CCP has… committed one of the infringements listed in Annex V…". also see Art.2, saying that art. 12 of EMIR is amended to give ESMA the power to impose penalties. A new Annex V is also introduced to provide a list of infringements for which ESMA can impose fines.
[186] *Ibid.*
[187] *Ivi*, 22c(3) letter e.
[188] *Ibid.*
[189] *Ivi*, Art. 22(c) para 6.
[190] *Ivi*, Art. 22(d).
[191] *Ivi*, letters a-e.
[192] *Ivi*, Art. 23 letter e.
[193] *Ivi*, Art. 22(e) 1-2. Article 22e establishes a mandatory consultation mechanism whereby, before finalizing direct supervisory assessments or adopting binding decisions under Articles 41, 44, 46, 49, 50 and 54 of EMIR in relation to significant CCPs, ESMA must consult the relevant central banks of issue. Those central banks may submit their views within ten working days of receiving the draft decision, a period that is shortened to twenty-four hours in emergency situations. Where ESMA chooses not to reflect amendments proposed by a central bank of issue, it is required to state its reasons in writing, thereby ensuring transparency and accountability in the decision-making process.

Finally, the proposal gives Member States the option to designate ESMA as competent authority also for less significant CCPs[194]. This possibility signals a willingness to facilitate further centralization where politically and functionally appropriate, without mandating a blanket transfer of supervisory competences across the Union.

The reform of CCP supervision (regarding significant CCPs) constitutes a paradigmatic instance of vertical substitution. Supervision of a private market infrastructure is no longer primarily a national administrative task exercised under harmonized EU rules; rather, ESMA becomes the operational supervisor. The shift is not merely one of coordination or convergence, but of primary supervisory competence.

This is precisely why CCP supervision is particularly sensitive from a Meroni perspective. Supervising a CCP entails ongoing prudential assessment, forward-looking risk evaluation and, where necessary, intrusive intervention in governance and risk-management structures, as recognized both in the structure of EMIR Titles IV and V[195] and in the broader literature on EU financial supervision: as Moloney's analysis of ESMA's supervisory powers shows, post-crisis financial supervision is characterized by risk-based, outcome-oriented assessment requiring supervisory judgement and evaluative engagement with firms, rather than mere verification of formal rule compliance[196]. The reform of CCP supervision thus constitutes a paradigmatic instance of vertical substitution: supervision of a private market infrastructure ceases to be primarily a national administrative task exercised under harmonized EU rules and becomes a matter of primary supervisory competence exercised at Union level.

The transfer of such functions to an EU agency therefore raises the classical Meroni concern: whether the delegation entails discretionary powers of such breadth that they amount to a shift of responsibility for broad discretionary economic and prudential assessments.

Under the classical Meroni formulation, the decisive issue is not whether ESMA acts vis-à-vis private entities (as seen in Section 2.2.3. ESMA already exercises powers of direct supervision in

[194] *Ivi*, art. 22(c): "a Member State may designate ESMA as the competent authority for one or more less significant CCPs established in its territory".
[195] Regulation (EU) No 648/2012 (EMIR), Titles IV and V. These provisions require CCPs to maintain "adequate" margin methodologies (Art. 41), "sufficient" financial resources and default fund contributions (Art. 42), robust liquidity risk controls (Art. 44), and governance arrangements ensuring sound and prudent management, while interoperability arrangements must not undermine the smooth functioning of financial markets or financial stability (Art. 54). ESMA must therefore assess the adequacy, sufficiency and systemic implications of risk models and organizational arrangements of CCPs, rather than merely verify formal compliance with fixed quantitative thresholds.
[196] See Moloney, N. (2011), "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, pp. 179–184.

circumscribed fields) but whether the powers conferred involve wide discretionary choices lacking sufficient constraints and control, thereby transferring political responsibility away from Treaty institutions[197]. This dissertation argues that the proposal for significant CCPs can be read as an attempt to structure and contain discretion rather than to eliminate it.

First, ESMA'a discretion on CCP superivsion is channeled through pre-defined legal objects and duties. Article 22c(2) links ESMA's supervisory responsibility to enumerated EMIR provisions, especially Titles IV and V[198]. ESMA is not granted a general mandate to pursue "financial stability" in the abstract; rather, it must ensure compliance with specific legal requirements laid down by the legislature[199]. This design reflects what throughout this dissertation has been called a "mellowed Meroni[200]" strategy. Discretion exists, but it operates within a dense legislative framework that specifies the regulated domain, the supervisory tasks and the compliance benchmarks.

Secondly, discretion is embedded in procedural structures. The Commission's proposal emphasizes consultation with central banks of issue and other relevant authorities, including in defined circumstances and under strict time limits[201]. Proceduralization serves a constitutional function. It reduces the likelihood that supervisory judgement becomes autonomous policy choice and instead frames it as an administrative decision subject to structured deliberation, reason-giving and potential contestation.

Thirdly, ESMA's sanctioning powers are constrained through enumeration. Annex V to EMIR specifies the infringements that may give rise to fines, and the Commission retains the power to amend that list by delegated act[202]. This allocation preserves rule-definition within the institutional sphere of the legislature and the Commission, limiting ESMA's role to enforcement within a legislatively defined perimeter. In *Meroni* and *Romano*, the Court expressed concern about agencies exercising quasi-legislative authority[203]. By anchoring sanctionable conduct in a closed list, the proposal attempts to prevent such drift.

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[197] Case 9/56 and 10/56, *Meroni & Co. v High Authority* [1958] ECR 133, esp. 152–154; see also Case C-98/80, *Romano* [1981] ECR 1241, paras 20–21.
[198] European Commission, COM(2025) 943 final, new Art. 22c(2) amending EMIR, Titles IV and V.
[199] *Ivi*, Art. 22c(2) (Commission's proposal to amend obligations under Arts 7, 7e, 8, 14–17c, 20, 21, 24 and Titles IV–V EMIR).
[200] Pelkmans, J., and Simoncini, M., (2014), "Mellowing Meroni: How ESMA can help build the single market", CEPS Commentary, pp. 1-6.
[201] *Ivi,* Art. 22e proposing to amend EMIR (Consultation of Central Banks of Issue; 10 working days / 24 hours in emergency situations).
[202] *Ivi*, the Commission's proposal to amend Annex V of EMIR (list of infringements). See also Art. 22c(6) (delegated power to amend Annex V).
[203] Case 9/56 and 10/56, *Meroni* 152–154; Case 98/80, *Romano*, para 20.

Finally, direct supervision increases the importance of judicial review. ESMA's supervisory measures and sanctions would constitute reviewable acts under Article 263 TFEU[204]. In the post-Lisbon jurisprudence, particularly in *Short Selling*, the Court has indicated that the existence of objective criteria, circumscribed discretion and effective judicial protection mitigates concerns about agency empowerment[205]. At the same time, more recent case law in the banking resolution context, including *Banco Popular*, underscores the sensitivity of conferring on agencies the ultimate authority in decisions with high systemic and political stakes. The CCP proposal appears calibrated to avoid that threshold by framing ESMA's role as prudential-supervisory rather than macro-policy and by maintaining institutionalized consultation with central banks for systemically relevant decisions.

The proposed reform of CCP supervision operates at the outer boundary of what may be described as a "mellowed Meroni" framework. It undeniably grants ESMA substantial operational discretion over systemically important infrastructures. Yet it attempts to preserve constitutional balance by embedding that discretion within a dense legislative framework, by proceduralizing its exercise, by constraining sanctioning powers through enumerated infringements, and by maintaining multi-authority involvement and judicial review. The reform therefore illustrates how vertical centralization can be designed not in defiance of Meroni, but through an architecture that seeks to accommodate it.

The analysis now turns to Central Securities Depositories (CSDs), where the dynamics of supervisory centralization interact with Meroni constraints in a distinct configuration.

3.1.2. Central Security Depositories (CSDs)

A central securities depository (CSD) is a financial market infrastructure responsible for recording securities in book-entry form and for settling securities transactions. When shares or bonds are traded, the CSD ensures that the securities are delivered from the seller's account to the buyer's account against payment, often in central bank money[206]. In this sense, CSDs operate the "backbone[207]" of securities markets. They maintain the integrity of issuance, ensure accurate record-keeping of ownership, and provide settlement services that are indispensable for market confidence. Because

[204] Art. 263 TFEU; see also Art. 60 of Regulation (EU) No 1095/2010 (ESMA Regulation) on appeals and judicial review.
[205] Case C-270/12, *United Kingdom v Parliament and Council* (*Short Selling*), paras 41–53, 85–108.
[206] Regulation (EU) No 909/2014 provides a definition of CSDs, their role and scope. See Recital 3 and 4, see Artt. 2(1)(1), 2(1)(3), 3(2) and 5(1).
[207] Behar Nuñez, F. (2025), Understanding CSDs: The Backbone of Modern Securities Trading, https://www.six-group.com/en/blog/understanding-csd.html.

settlement finality and asset custody are foundational to capital markets, disruptions at CSD level can generate systemic consequences[208].

The Commission's proposal extends to CSDs the same structural logic already observed in the reform of CCP supervision. ESMA would become the competent authority for CSDs designated as "significant," while less significant CSDs would remain under national supervision[209]. At the same time, cooperation mechanisms between ESMA and national authorities would be reinforced, and Member States would be given the option to designate ESMA as competent authority even for less significant CSDs[210]. The reform therefore introduces a differentiated supervisory model, combining vertical substitution for a subset of infrastructures with continued decentralized supervision for others.

A central feature of the proposal is the emphasis on "clear and objective criteria[211]" for identifying significant CSDs. Significance is framed not as a discretionary policy judgement, but as the application of legislatively defined thresholds based on size and cross-border activity[212]. In particular, a CSD may be designated as significant if, over a defined reference period, it settles transactions above a specified value threshold within the Union[213]. Additional criteria relate to its importance in several host Member States and the scale of its cross-border activity[214]. The test thus combines objective numerical thresholds with factors reflecting systemic relevance and market integration. ESMA's role is limited to verifying whether these legislatively defined conditions are met and to publishing and maintaining the list of significant CSDs[215]: ESMA's task is simply to verify whether these conditions, as defined by the legislation, are met.

Finally, the proposal expressly addresses the monetary and systemic dimension of CSD activity. Since a large proportion of securities settlement occurs in central bank money and CSDs are interconnected with other infrastructures, including trading venues and CCPs, the text provides that ESMA must develop deep and comprehensive cooperation arrangements with the European Central Bank and other central banks of issue[216]. These arrangements are to include close involvement in daily supervision as well as in inspections and emergency situations[217]. The model thus recognizes that

[208] Banque de France, (2018), Payments and Market Infrastructures in the Digital Era. See Chap. 12 Central Securities Depositories, p. 189-213. https://www.banque-france.fr/system/files/2023-04/payments_market.pdf.

[209] European Commission, COM(2025) 943 final, Article 4: Amendments to Article 11 of Regulation (EU) No 909/2014 (Central Securities Depository Regulation CSDR).
[210] *Ibid.*
[211] *Ivi*, where the Commission proposes a new Article 11a amending art. 11 of CSDR.
[212] *Ibid.*, see 11a para 1, letter (a) and (b).
[213] *Ibid.*
[214] *Ibid.*
[215] *Ivi*, Art. 11a para 2.
[216] *Ivi*, Art. 11c para 2.
[217] *Ivi*, Art. 11c para 3, letters (a) and (b).

although supervisory competence may be centralized, monetary and systemic oversight remain embedded within the broader institutional framework of the European System of Central Banks (ESCB).

From a Meroni perspective, the reform of CSD supervision is particularly instructive because it illustrates how the Commission attempts to transform the doctrine from a rigid prohibition into a structuring principle of legislative design. The constitutional sensitivity does not lie solely in the fact that ESMA supervises private actors. Rather, it lies in the prior step of selecting which actors fall under EU-level supervision. The determination of supervisory authority is a structurally sensitive allocation of power. If left open-ended, it could be characterized as a policy choice of considerable significance, touching upon national regulatory autonomy and market structure.

The proposal seeks to neutralize this concern through quantification and formalization. The methodology for identifying significant CSDs is not left to ESMA's free choice. Instead, the regulation sets measurable thresholds and structured conditions, and ESMA's task is framed as determining whether a legal person satisfies those predefined criteria[218]. The distinction is meaningful. ESMA does not define significance; it applies a legislative definition. Its discretion is therefore technical rather than normative. In Meroni terms, this converts what might otherwise appear as broad policy discretion into an administrative assessment within a tightly circumscribed normative frame.

Moreover, the regime explicitly preserves the oversight functions of the members of the ESCB, situating ESMA's supervisory role within a broader institutional framework. In particular, central banks of issue remain involved in matters concerning settlement in central bank money. This confirms that ESMA does not operate in isolation. The preservation of this multi-authority structure reduces the perception that enhanced ESMA supervision fully replaces other constitutionally relevant actors in an area of significant systemic sensitivity.

Compared to the CCP reform, the CSD model relies even more heavily on *ex ante* formalization to justify vertical substitution. The strength of the argument for compatibility with Meroni rests precisely on the rigidity and clarity of the legislative criteria. The more tightly significance is defined by objective thresholds, the easier it becomes to characterize ESMA's role as the implementation of a

[218] European Commission, COM(2025) 943 final, where the Commission proposes a new Article 11a amending art. 11 of CSDR.

supervisory allocation already determined by the legislature, rather than as the exercise of autonomous policy-making by ESMA.

The reform of CSD supervision exemplifies a strategy of constitutional calibration. ESMA is entrusted with direct supervisory authority over infrastructures that are central to the functioning of EU capital markets. Yet the transfer of competence is framed through objective, quantifiable significance criteria, structured reclassification procedures and institutionalized cooperation with monetary authorities. The result is a model in which vertical substitution is justified not by an expansion of agency discretion, but by the formalization of jurisdictional triggers laid down in the legislative act itself. In this sense, the CSD proposal represents an even more refined attempt than the CCP reform to reconcile supervisory centralization with the constraints articulated in Meroni.

The analysis now turns to crypto-asset service providers (CASPs), where supervisory centralization happens through a more pronounced reconfiguration of competence.

3.1.3. All Crypto-Asset Service Providers (CASPs)

A crypto-asset service provider (CASP) is an entity that provides regulated services in relation to crypto-assets, such as custody, exchange services, trading platform operation, or other intermediary functions defined under the Markets in Crypto-Assets Regulation (MiCA[219]). MiCA was introduced to harmonize substantive requirements for crypto markets and to create a framework for authorization and conduct obligations[220]. In practice, however, the supervisory dimension remains decisive: the effectiveness of MiCA depends not only on uniform rules, but on consistent authorization standards, ongoing monitoring, and enforcement against market abuse and operational risks[221].

The Commission's proposal amends MiCA by transferring the authorization, monitoring and supervision of all CASPs from national competent authorities to ESMA[222]. The Commission proposes that definitions and the provisions of Titles V and VI (Articles 59–92 of MiCA) are amended so that ESMA becomes responsible for CASP supervision, including for provisions related to market abuse in the crypto sector[223].

[219] Regulation (EU) 2023/1114 (MiCA), Article 3(1) (definitions of "crypto-asset service" and "crypto-asset service provider"). See also Title V (Articles 59–75), setting out authorization and operational requirements.
[220] *Ivi*, see recitals 1–6 (objective of harmonization and legal certainty).
[221] *Ivi*, see Title VI (Articles 86–92) on market abuse provisions; also European Commission COM(2025) 943 final, recitals (91)–(94), emphasizing the need for centralized supervision to avoid fragmentation and ensure consistent enforcement.
[222] European Commission, COM(2025) 943 final, Recital (94).
[223] *Ivi*, Article 9 – Amendments to Regulation (EU) 2023/1114 (MiCA): Transfer of supervision of CASPs.

To operationalize this transfer, the proposal introduces a new section in Title VII of MiCA establishing ESMA's supervisory powers and competences (Articles 138a–138j) and adds a new Annex VII listing infringements of Titles V and VI for which ESMA may impose administrative fines and other measures[224].

The new supervisory framework confers on ESMA a comprehensive set of direct powers. ESMA would become responsible not only for granting and refusing authorization (*ex ante* control) to crypto-asset service providers, but also for their ongoing supervision[225] (*ex post* monitoring). It would be entitled to request information and documentation from CASPs and related persons[226], to investigate infringements of the rules on market abuse [227], and to carry out on-site inspections[228]. These powers enable ESMA to independently verify compliance rather than relying on national authorities.

Where infringements are identified, ESMA would be empowered to adopt binding decisions requiring a CASP to bring the breach to an end[229], to cease specific practices[230], or to implement corrective measures aimed at restoring compliance[231]. The Authority could also adopt more intrusive measures, including suspending the provision of particular crypto-asset services[232] or, in serious cases, withdrawing the authorization altogether[233]. In addition, ESMA would be able to impose enforceable administrative fines and periodic penalty payments for the infringements listed in Annex VII MiCA[234].

The Commission's proposal distinguishes between different types of entities providing crypto services. Financial institutions that are already authorized under other EU financial services legislation may continue to provide crypto services under the supervision of their existing competent authorities[235]. However, if the provision of crypto services becomes their main activity, they will be treated as CASPs and their supervision will transfer to ESMA[236]. In such cases, cooperation

[224] *Ibid.*
[225] *Ivi*, where the Commission proposes to amend Article 62–63 of MiCA, p. 341.
[226] *Ivi*, the Commission proposes to introduce a New Article 138c to MiCA (information powers), p. 345.
[227] European Commission, COM(2025) 943 final see Recital 97 (investigation powers) and Art. 9, with proposals to introduce New Articles 138a–138h to MiCA, p. 345.
[228] *Ibid.*
[229] Ivi, where the Commission proposes to introduce Articles 138a (general supervisory competence) and 138h (specific supervisory measures) to MiCA.
[230] *Ibid.*
[231] *Ibid.*
[232] *Ibid.*
[233] *Ivi*, the Commission proposes to introduce Art. 138h to MiCA and to amend Art. 64 MiCA (withdrawal of authorisation framework).
[234] *Ivi*, Commission's proposal to introduce Art. 138i to MiCA (Disclosure, nature, enforcement and allocation of fines and periodic penalty payments of ESMA).
[235] *Ivi*, see recital 95.
[236] *Ibid.*, see the Commission's proposal to introduce Art. 143a to MiCA (Transitional measures related to ESMA).

agreements will regulate how the original authorities support ESMA[237]. The proposal also expressly excludes credit institutions from this transfer, on the grounds that they are already subject to centralized supervision within the EU banking framework[238].

From a Meroni standpoint, the CASP reform is simultaneously the most sweeping and the most "legally engineered" part of trajectory 1. It is the most sweeping because it centralized supervision not only for a subset defined by significance, but for an entire category of market actors. The absence of a significance threshold might be seen as expanding ESMA's executive role beyond exceptional systemic entities into a general supervisory authority for a sector.

At the same time, the proposal attempts to make this centralization "Meroni compliant" by intensifying legal framing and procedural constraints. First, ESMA's powers are grounded in MiCA's detailed authorization and conduct framework, and the reform is implemented through specific amendments to the definitions and Titles V and VI (Articles 59–92 of MiCA) coupled with a dedicated new set of supervisory provisions (Articles 138a–138j). This legislative density matters under Meroni because it supports the characterization of ESMA's role as the application and enforcement of a defined regulatory framework rather than the exercise of an open-ended mandate to pursue "market integrity" or "financial stability" by autonomous policy choice.

Secondly, the proposal constrains sanctioning discretion through the use of an annex-based infringement list and a structured administrative fining regime[239]. Annex VII enumerates the infringements, and the new provisions provide for fines that are administrative in nature, are publicly disclosed subject to stability and proportionality constraints, and are allocated to the Union budget[240]. The architecture echoes a recurring Meroni-sensitive point: to the extent that sanctioning powers are granted to an agency, the "rule-definition" component must remain anchored in legislative and Commission competences, while the agency's role is framed as enforcement within that perimeter.

Thirdly, the proposal embeds ESMA's action in a network of cooperation and transitional arrangements. ESMA is empowered to exchange information and cooperate with Member State and third-country authorities, as well as with EBA, and transitional provisions are designed to manage

[237] *Ivi,* recitals 95-96. The the Commission's proposal to introduce Art. 138f to (MiCA) (Cooperation of ESMA with other authorities).
[238] *Ivi*, see recital 96: "As there is already a centralized system of banking supervision in the Union in the form of the Single Supervisory Mechanism, ensuring integration and consistency in the supervision of the activities of credit institutions, there should be no transfer of supervisory powers where the entity providing crypto-asset services is a credit institution".
[239] *Ivi*, Commission's proposal to introduce Art. 138i to MiCA.
[240] *Ivi*, Art. 138i para 4.

file transfer and continuity in authorization[241]. In Meroni terms, proceduralizing and cooperation do not eliminate discretion, but they contribute to accountability, contestability, and reason-giving structures that reduce the risk of discretion becoming unconstrained policy-making.

Finally, the carve-out[242] for credit institutions and the treatment of other authorized financial entities functions as a constitutional boundary marker. By avoiding a transfer where an integrated supervisory framework already exists (banking supervision) and by requiring cooperation agreements where supervisory responsibilities overlap, the proposal signals a concern to avoid competence collisions and to preserve systemic coherence across supervisory regimes.

The CASP proposal is the most comprehensive example of vertical substitution within the 2025 package, because it centralized supervision for an entire sector without a significance threshold. Yet it also reflects an explicit attempt to internalize Meroni-type constraints through legislative densification and procedural design. ESMA's role is framed as the implementation of MiCA's detailed authorization and conduct regime, reinforced by a dedicated supervisory chapter, enumerated infringements, structured sanctioning, and transitional and cooperation arrangements. In this sense, the proposal does not eliminate ESMA's discretion, but seeks to make it administratively bounded and institutionally reviewable, thereby positioning the centralization of crypto supervision within the outer limits of a "mellowed Meroni" approach.

Trajectory 1 has shown that the Commission's reform pursues vertical substitution in selected sectors, transforming ESMA from coordinator into direct supervisor of certain market actors. This represents the most sensitive form of centralization, as it entrusts the agency with binding and discretion-bearing powers. Yet the legislative design attempts to contain that discretion through objective criteria, dense rulebook provisions, procedural safeguards and judicial review, thereby operating within a "mellowed Meroni" framework.

Trajectory 2 follows a different logic. Rather than reallocating supervisory authority, it strengthens ESMA's convergence and coordination tools over national supervisors, raising a distinct question about the reshaping of supervisory authority without formal centralization.

[241] *Supra* note 232.
[242] *Supra* note 233.

3.2. Enhanced Supervisory Convergence (Trajectory 2)

If trajectory 1 concerned vertical substitution—ESMA replacing national authorities as the direct supervisor of selected market actors (CCPs, CSDs, CASPs)—trajectory 2 follows a different institutional logic. Here, the reform does not primarily reallocate supervisory authority over firms. Instead, it strengthens ESMA's powers to discipline, steer and correct the exercise of supervision by national competent authorities (NCAs). The focus shifts from supervision of certain market segments to supervision of supervisors.

The proposal enhances ESMA's convergence toolkit through a set of interrelated measures. First, under a new Article 17aa, ESMA may require an NCA to formally seek its opinion where serious supervisory shortcomings or failures in the application of Union law are identified[243]. This transforms what was previously a largely voluntary or cooperative exchange into a potentially obligatory consultation mechanism. Secondly, ESMA is empowered to require corrective action by NCAs, obliging them to remedy identified supervisory deficiencies[244]. Thirdly, the binding mediation mechanism under Article 19 of ESMA's Regulation[245] of ESMA's Regulation is strengthened: ESMA may initiate mediation on its own initiative and, in defined circumstances, is required to do so[246]. Fourthly, the proposal formalizes "collaboration platforms" under a new Article 19a, which ESMA establishes and steers in cross-border situations, with the capacity to facilitate structured cooperation and dispute resolution[247]. Finally, amendments concerning mutual recognition and recovery of administrative fines (Articles 28a–28b) aim to make enforcement decisions operational across

[243] European Commission, COM(2025) 943 final, Article 1 – Amendments to ESMA Regulation. Here the Commission proposes to introduce Art. 17aa to ESMA's Founding Regulation (Regulation No 1095/2010). See new Art. 17aa. "Article 17aa gives ESMA a new power in the area of supervisory convergence to require a competent authority to seek its opinion in cases where a peer review or investigation has identified serious supervisory failures. Furthermore, ESMA will have the power to require prompt and effective corrective actions to be taken to address supervisory shortcomings. The aim of this new safeguard measure is to allow ESMA to act in cases where products or entities would be granted access to the EU market without adequate supervision or where supervisory arbitrage would undermine the passport system", see p. 14.

[244] *Ibid*.

[245] The current mechanism under ESMA's Regulation is reactive and voluntary at the outset: NCAs must request binding mediation powers. See Regulation EU EU 1095/2010, Art. 19

[246] European Commission, COM(2025) 943 final. The Commission proposes to amend Art.19 of ESMA Regulation in a way that ESMA may initiate mediation on its own initiative. In other words, ESMA no longer needs to wait for a formal request from NCAs before activating the mediation procedure, see Art. 1 of the Proposal.

[247] *Ivi*, see Art. 1 – Amendments to ESMA Regulation "Article 19a introduces collaboration platforms between competent authorities, that will enhance cooperation and supervision of cross-border activities…these platforms will facilitate information exchange, propose solutions and promote a culture of collaboration. ESMA will have the power to resolve any disputes". See Art. 19a of the Proposal, para 1: "…the Authority may, on its own initiative or at the request of one or more of the relevant competent authorities, set up and coordinate a collaboration platform to strengthen the exchange of information, propose solutions and to enhance collaboration between the relevant competent authorities".

borders, thereby reducing the possibility that divergent national enforcement undermines uniform application of Union law[248].

Taken together, these measures represent a qualitative shift in the nature of supervisory convergence. The current architecture of the ESMA is built on a network model: ESMA coordinates, issues guidelines and recommendations, facilitates peer reviews, but primary responsibility for day-to-day supervision remained firmly national[249], despite the defined market segments that fall under its direct supervision (Section 2.2.3). The enhanced powers move beyond coordination and towards structured oversight. ESMA is no longer limited to promoting consistency; it may intervene where national supervision is deemed deficient and require corrective measures. In this sense, trajectory 2 introduces an element of hierarchical steering within the European System of Financial Supervision.

This transformation is constitutionally significant even though it does not involve direct supervision of private actors. ESMA's new powers are directed at public authorities. The agency supervises how supervision is exercised. The discretion at stake is therefore not primarily prudential judgement over market infrastructures or firms, but administrative discretion in the application and enforcement of Union financial law. Yet this enhanced supervisory role has tangible effects. By requiring consultation, mandating corrective action and initiating binding mediation, ESMA acquires the capacity to shape how NCAs interpret and apply Union rules. The reform thus strengthens the Union-level center within what was originally conceived as a decentralized enforcement system.

From a Meroni perspective, the constitutional question is different from the one raised by trajectory 1. The classical concern in Meroni was the delegation of discretionary powers to bodies outside the institutional framework in a manner that shifted political responsibility. In trajectory 2, ESMA does

[248] *Ivi*, the Commission proposes to introduce new Articles 28a and 28b to ESMA's Regulation, "Articles 28a and 28b provide for a mechanism to be set up for the mutual recognition of administrative fines and assistance with their recovery in a cross-border context. The aim is to make it easier to enforce the rules in the single market, in contrast to the current situation, in which recovering fines in another jurisdiction is very complex or even impossible", p. 14 of the Proposal. See Art.28a and 28b, in short, Articles 28a and 28b introduce an EU mutual recognition mechanism for administrative fines, under which a final fine imposed in one Member State becomes directly enforceable in another through a standardized digital request, without additional recognition formalities. ESMA is tasked with facilitating and overseeing this mutual assistance framework and may trigger Article 17 (breach of Union Law) or Article 19 (mediation) procedures where cooperation is unjustifiably refused.

[249] The original European System of Financia Supervision architecture was structured as a composite network model in which ESMA exercised coordination, convergence and oversight functions, while primary supervisory responsibility remained with national competent authorities. See Moloney, N., (2023), *EU Securities and Financial Markets Regulation* (3rd edn), p. 101: "Supervision remains a national, NCA-based competence, reflecting myriad factors including legal and constitutional complexities; political reluctance to cede sovereignty over supervisory decisions with potential fiscal implications; national technocratic/regulator resistance; and functional challenges relating to the supervision at EU-level of a vast population of financial market actors. The EU supervisory framework is, in consequence, intricate and multi-layered, being designed to ensure the NCA-based scheme can capture and manage pan-EU activity and contain related risks".

not directly regulate private parties; it disciplines Member State authorities in their implementation of Union law. The issue is therefore whether this constitutes a delegation of wide discretionary authority that escapes sufficient control, or rather an internal reorganization of administrative enforcement within the Union legal order.

Several features of the proposal suggest that the enhanced convergence tools are designed to remain within the boundaries of permissible delegation. ESMA's intervention powers are triggered by defined circumstances, such as serious supervisory failures or breaches of Union law[250]. ESMA would not enjoy an open-ended mandate to reconfigure national supervisory strategies according to its own policy preferences. Its corrective powers are linked to compliance with existing Union legislation. In this respect, ESMA's role can be characterized as ensuring the effective application of law already adopted by the legislature, rather than generating new normative standards.

Moreover, binding mediation and collaboration platforms remain embedded in a procedural framework. They do not displace national authorities as supervisors, but require them to engage within a structured Union-level process[251]. Even the mutual recognition and recovery of fines mechanism is framed as facilitating enforcement of existing national decisions across borders, not as transferring sanctioning competence wholesale to ESMA[252]. The legislative act thus attempts to confine ESMA's discretion to the domain of legal compliance and coordination, rather than macro-level policy choice.

At the same time, it would be reductive to treat trajectory 2 as neutral. The cumulative effect of these measures is to reposition ESMA within the supervisory hierarchy. The power to require consultation and corrective action introduces an asymmetry between ESMA and NCAs that goes beyond peer coordination. The possibility for ESMA to initiate binding mediation on its own initiative, and to steer structured collaboration platforms, signals a move towards a layered administrative system in which national discretion is increasingly subject to Union-level oversight. Even if formally justified as ensuring uniform application of Union law, such powers reshape the balance between decentralized execution and central steering.

The Meroni doctrine does not prohibit all forms of hierarchical organization within the Union administration. However, it requires that discretionary authority be sufficiently framed and that political responsibility remain anchored in the institutions established by the Treaties. In trajectory 2, the legislature seeks to satisfy this requirement by defining the triggers and scope of ESMA's

[250] *Supra* note 238.
[251] *Supra* note 243.
[252] *Ibid.*

intervention powers and by maintaining judicial review of ESMA's decisions. The enhanced convergence tools are therefore less likely to be characterized as an impermissible transfer of policy-making discretion than the direct supervisory powers analyzed in trajectory 1. They can plausibly be understood as mechanisms to secure uniform enforcement of Union law within a multilevel administrative system.

In conclusion, trajectory 2 does not centralize supervision in the sense of replacing national authorities with ESMA. Instead, it strengthens ESMA's capacity to oversee and discipline national supervision. The reform thus represents a shift from coordination to hierarchical steering, without formal vertical substitution. Constitutionally, it occupies a different space from trajectory 1: less "radical" in terms of delegated discretion over private actors, but potentially transformative in its reconfiguration of the internal balance of supervisory authority within the European Union.

3.3. Cross Border Asset Management (Trajectory 3)

If trajectory 2 strengthened ESMA's capacity to discipline national supervisors across sectors, trajectory 3 moves in a more targeted and structurally innovative direction. It does not formally transfer supervisory competence from national authorities to ESMA, nor does it reinforce horizontal convergence tools. Instead, it establishes a coordinated EU-level supervisory architecture for the largest cross-border asset management groups, centralizing analysis, risk monitoring and coordination functions at Union level while leaving formal decision-making powers with national competent authorities[253]. The reform thus operates through functional centralization without explicit vertical substitution.

Trajectory 3 concerns the supervision of large cross-border asset management groups and investment funds. Asset managers manage collective investment funds that pool capital from investors and allocate it across financial markets. These funds are frequently marketed across several Member States through the EU passporting system, which allows a manager authorized in one Member State (the home state) to distribute funds in other Member States (host states) without obtaining a new authorization[254]. While this "passporting system[255]" facilitates market integration, supervision

[253] European Commission, COM(2025) 943 final, section titled "Enhanced supervisory convergence – Asset management area", p. 379.
[254] See Directive 2009/65/EC (UCITS), Arts. 19–21 (home Member State authorisation and prudential supervision).
[255] Moloney, N., (2023). EU Securities and Financial Markets Regulation, Fourth Edition, Oxford EU Law Library, p. 442

remains institutionally fragmented: the home authority supervises the manager, while host authorities oversee marketing and distribution activities[256]. Under the current framework of Regulation (EU) No 1095/2010, ESMA's role is limited to supervisory convergence tools: issuing guidelines (Article 16), conducting peer reviews (Article 30), and settling disputes through binding mediation (Article 19). Day-to-day supervision, inspections and enforcement remain national[257].

The Commission's proposal seeks to address this structural fragmentation under the heading of "integrated supervision[258]." It introduces periodic group-wide supervisory reviews of the largest cross-border asset management groups, coordinated by ESMA together with relevant NCAs[259]. These reviews aim to produce a consolidated assessment of governance, risk exposures and compliance at group level[260]. In parallel, ESMA would conduct permanent EU-level risk monitoring through supervisory dashboards and indicators, aggregating data to identify emerging cross-border vulnerabilities[261]. The proposal also allows ESMA to initiate joint investigations, triggering coordinated supervisory action by teams composed of ESMA and national authorities[262]. Procedurally, passporting notifications for are centralized through an ESMA-managed platform[263], and ESMA's binding mediation powers are embedded more explicitly in cross-border asset management disputes[264].

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[256] See Directive 2009/65/EC (UCITS), Art. 93 (passporting and limited host-state powers over marketing); Directive 2011/61/EU (AIFMD), Arts 6–7 (home authorisation and supervision) and Arts 31–32 (cross-border marketing/management passport and restriction of host-state powers).

[257] While ESMA's role vis-à-vis asset managers is primarily one of supervisory convergence (exercised through guidelines (Article 16), peer reviews (Article 30), and binding mediation (Article 19) of Regulation (EU) No 1095/2010), it should be noted that ESMA's influence in the fund management space already extends beyond these tools in several respects. First, ESMA holds binding technical standard-setting powers under AIFMD (Directive 2011/61) and UCITS V (Directive 2014/91), giving it standard-setting authority over the sector. Second, Regulation (EU) 2019/1156 (BCDR) on cross-border distribution of funds conferred upon ESMA additional functions, including the maintenance of a central database of cross-border fund registrations and the power to issue opinions on marketing requirements imposed by national competent authorities. These existing competences provide the institutional baseline upon which the Commission's proposal examined in this section seeks to build, introducing a more structurally significant layer of group-wide coordination and risk monitoring that goes beyond the current framework.

[258] European Commission, COM(2025) 943 final, "More efficient and harmonised supervision is essential to integrate EU capital markets…"
"…pooling supervision at EU level can promote market integration and more efficient functioning of the capital markets.", see p. 3.

[259] *Ivi*, see A. Enhanced supervisory convergence – asset management, p. 379-380.

[260] *Ibid.*

[261] *Ivi*, see the Commission's proposed Amendments to Regulation (EU) 1095/2010 – Centralised data & analytics, see proposal to amend Art.8 and 35 of ESMA Regulation.

[262] *Ivi*, see sections *Enable integrated supervision* (p. 3 of the Proposal) and *Enhanced supervisory convergence* (p.379 of the Proposal). See in conjunction to proposal to introduce new Article 19a ESMA Regulation (collaboration platforms) and strengthened Article 19 (binding mediation).

[263] *Ivi*, see section Amendment to Regulation (EU) 2019/1156 – new Article 12. See also Article 17d and 17g of Directive 2011/61/EU (AIFMD), as amended by the Commission's proposal.

[264] *Ivi,* see p. 379–380 (Enhanced supervisory convergence – asset management); Article 17g of Directive 2011/61/EU (as amended by the proposal), referring disputes to ESMA under Regulation (EU) No 1095/2010; and Article 19 of Regulation (EU) No 1095/2010 (binding mediation).

Crucially, these measures do not transfer authorization or sanctioning powers to ESMA. National authorities retain formal competence over licensing, inspections and enforcement. What changes is the architecture within which those competences are exercised.

Although the mechanisms examined in this section are formally grounded in the reinforced convergence tools analyzed in Section 3.2 (Enhanced Supervisory Convergence), their functional effect differs. While Section 3.2 concerns ESMA's authority over national supervisors, the coordinated supervision of large cross-border asset managers introduces a permanent EU-level layer of group-wide risk assessment that reshapes the locus of supervisory judgment itself.

ESMA becomes the central coordinator of supervisory information and risk assessment for entities whose activities are inherently transnational. The logic of intervention is preventive and structural rather than corrective: ESMA does not primarily intervene because a national authority has failed, but because fragmented supervision is ill-suited to oversee integrated market actors.

This differentiates trajectory 3 from trajectory 2. The latter strengthens ESMA's general convergence toolbox (notably through Article 17aa corrective action powers, reinforced Article 19 mediation, collaboration platforms under Article 19a, and mutual assistance mechanisms under Articles 28a–28b). These instruments discipline national authorities horizontally across sectors. By contrast, trajectory 3 constructs a sector-specific coordination framework tailored to large cross-border asset managers, embedding permanent EU-level monitoring and review mechanisms within a defined market segment.

From a Meroni perspective, trajectory 3 raises a subtler constitutional question than trajectory 1 (which involves the direct delegation of supervisory powers over private actors such as significant CCPs, CSDs and CASPs). Here, formal competence remains national and ESMA does not acquire autonomous authority to authorize or sanction firms. Its role is framed by legislative provisions that specify the scope and modalities of coordination, and judicial review remains available for any binding acts it adopts (notably in mediation contexts). *Prima facie*, this configuration appears compatible with the Meroni doctrine, as it does not confer broad discretionary powers over private parties detached from legislative control.

Yet the systemic implications are more profound than they first appear. By centralizing group-wide analysis, ongoing risk monitoring and passporting coordination, ESMA acquires a system-level advantage point over European asset management markets. It constructs a consolidated supervisory perspective that no individual NCA can replicate in isolation. Even without formal competence transfer, this informational centrality enables ESMA to shape supervisory priorities, influence

interpretative approaches and identify structural vulnerabilities. The gravitational center of supervision gradually shifts toward the Union level.

The constitutional significance of trajectory 3 therefore lies in its indirectness. Rather than openly reallocating powers, the reform recalibrates the informational and coordinative foundations of supervision. ESMA emerges as the orchestrator of cross-border asset management oversight. In formal terms, national authorities remain the competent supervisors. In structural terms, however, supervisory authority is increasingly organized around the Union center.

3.4. To What Extent, and under Which Conditions, Does the Meroni Doctrine Constrain the Commission's Reform of ESMA's Supervisory Powers?

This dissertation set out to test the working hypothesis that the Commission's proposed reinforcement of ESMA's supervisory powers operates at the outer limits of a "mellowed" Meroni doctrine. The research question was not whether the reform expands ESMA's authority—it clearly does—but whether that expansion remains legally permissible under the constitutional constraints governing delegation to EU agencies. On the basis of the qualitative document analysis conducted across the reform package and interpreted through the lens reconstructed in Chapter 2, the answer is that the Meroni doctrine constrains the proposal to a substantial yet conditional extent. It does not preclude supervisory centralization, including forms of direct supervision, but it shapes the architecture of that centralization by imposing specific structural requirements.

First, the doctrine constrains the reform by preserving legislative primacy over essential policy choices. Across all three trajectories examined in Chapter 3, the definition of regulatory objectives, the determination of sectoral scope, and the specification of substantive obligations remain anchored in legislative acts adopted by Parliament and Council. ESMA's enhanced role is framed as the execution of those predefined objectives rather than their autonomous elaboration. This condition is decisive: the delegation would become problematic under Meroni only if ESMA were empowered to determine the substance of EU financial policy or to rebalance economic priorities independently of the political institutions. The proposal avoids this by embedding ESMA's powers within detailed regulatory frameworks that fix both the purpose and the limits of intervention.

Second, Meroni constrains the reform by requiring that any discretion conferred upon ESMA be structured and reviewable. The analysis of trajectory 1—direct supervision in selected sectors—

demonstrates that the most constitutionally sensitive expansions are accompanied by dense legislative drafting. Jurisdiction is triggered by objective thresholds or clearly delineated categories; supervisory tasks are tied to exhaustively defined rulebooks; sanctioning authority is limited to enumerated infringements subject to capped and structured fining regimes. Procedural safeguards, consultation duties, transparency requirements, and full judicial review before the Court of Justice remain intact. The conferral of operational autonomy is therefore coupled with mechanisms designed to prevent arbitrary or policy-driven discretion. Under the mellowed Meroni framework identified in Chapter 2, such structured administrative discretion is compatible with the Treaties.

Third, the doctrine constrains the reform through the preservation of institutional balance within the European System of Financial Supervision. In trajectory 2, where ESMA's powers over national competent authorities are strengthened, the risk lies in transforming coordination into hierarchical policy control. The proposal responds by linking ESMA's intervention powers to defined breaches of Union law or specified supervisory deficiencies. Enhanced convergence tools are framed as mechanisms to ensure uniform application rather than to redefine supervisory strategy. In trajectory 3, the centralization of analytical and coordinative functions at Union level is achieved without formal transfer of licensing or sanctioning authority, thereby preserving the formal allocation of competences while enhancing EU-level oversight. In each case, the expansion is calibrated so that ultimate responsibility does not shift away from Treaty-based institutions or dissolve the composite administrative structure.

The extent of Meroni's constraint is therefore neither symbolic nor absolute. It does not freeze the institutional evolution of EU supervision, nor does it prohibit the Union from responding to market fragmentation and competitiveness concerns through stronger agency powers. However, it does delimit how far and in what manner that strengthening may proceed. The proposal is permissible only under cumulative conditions: (i) that essential regulatory choices remain legislatively determined; (ii) that ESMA's discretion be framed by objective criteria and capable of judicial control; and (iii) that institutional balance within the Union's administrative architecture be preserved.

The findings of this study thus confirm the initial hypothesis. The Commission's reform does not represent a rupture with the Meroni doctrine. Rather, it reflects its contemporary operation as a structuring principle that channels supervisory integration through legislative densification and procedural embedding. The doctrine continues to constrain the expansion of ESMA's powers, but it does so by shaping their legal design rather than by blocking their development. In this sense, the permissible enhancement of ESMA's mandate depends not on the absence of discretion, but on its

containment within a framework that maintains legislative primacy, accountability, and institutional equilibrium.

Conclusion

This dissertation meant to examine whether, and under which conditions, the Commission's proposed expansion of ESMA's supervisory powers remains compatible with the limits imposed by the Meroni doctrine. Situated at the intersection of capital market integration, administrative governance, and EU law, the study sought to determine whether the reform of ESMA reflects a lawful recalibration of its supervisory authority or risks exceeding the boundaries of permissible delegation under the Treaties.

The working hypothesis guiding this research was that the Commission's proposal does not amount to a rupture of the Meroni framework, but rather represents an attempt to operate at the outer edge of a "mellowed" non-delegation doctrine, expanding ESMA's operational autonomy while embedding it within safeguards designed to preserve institutional balance. The qualitative document analysis conducted across the reform package supports this hypothesis.

Chapter 1 established the structural context within which supervisory reform has emerged. By tracing the constitutional evolution of the free movement of capital and the gradual transformation of the Capital Markets Union into a competitiveness-driven project, it demonstrated that the push to strengthen ESMA is not an isolated institutional adjustment, but a response to persistent fragmentation in European capital markets. The incomplete realization of capital mobility, now framed as a structural weakness in global competition, has generated pressure for more centralized supervisory governance.

Chapter 2 situated ESMA within the EU administrative architecture characterized by "agencification" and reconstructed the Meroni doctrine as the key constraint governing the delegation of powers to non-Treaty bodies. It showed that Meroni does not impose a categorical prohibition on agency discretion, but rather conditions delegation on the preservation of legislative primacy, objective criteria, reviewability, and institutional balance. This "mellowed" interpretation provided the analytical lens through which the reform was assessed.

Chapter 3 then evaluated the proposed expansion of ESMA's supervisory powers across three trajectories: direct supervisory authority in selected sectors, strengthened supervisory convergence mechanisms, and coordinated EU-level oversight of cross-border actors. Taken together, these reforms undeniably intensify EU-level supervision, centralize binding powers over private actors in

strategically significant areas, and expand ESMA's operational discretion. Yet the analysis demonstrates that this discretion remains anchored in legislatively defined standards, framed by procedural safeguards, and subject to judicial review. Essential regulatory objectives continue to be determined by the Parliament and Council, and the reform does not transfer autonomous economic policy-making authority to ESMA.

The principal finding of this study is therefore that the Commission's proposal is compatible with the Meroni doctrine to a significant but conditional extent. It recalibrates supervisory responsibility within the Union and stretches the permissible boundaries of agency discretion, but it does not amount to a structural displacement of institutional balance or a transfer of essential political responsibility. Rather than undermining the architecture of the Treaties, the reform illustrates the adaptive capacity of EU administrative governance under a framework that tolerates structured, reviewable discretion in response to functional integration pressures.

Beyond its assessment, this study contributes to a broader understanding of how EU agencies evolve in contexts of market integration and geopolitical repositioning. It suggests that the Meroni doctrine continues to function not as an immovable barrier, but as a structuring principle that conditions institutional innovation. The expansion of ESMA's mandate reflects the Union's attempt to reconcile the demands of competitiveness and financial stability with constitutional safeguards rooted in institutional balance. In this respect, the dissertation contributes to ongoing debates on the evolution of EU administrative power and the dynamic relationship between integration and legal constraint.

At the policy level, the findings imply that further centralization of financial supervision at Union level is legally feasible, provided that legislative anchoring, objective criteria, and accountability mechanisms remain intact. The analysis also underscores that institutional design, including procedural embedding, consultation duties, and judicial review, plays a decisive role in maintaining compatibility with EU law when expanding agency powers.

It must, however, be recalled that the Commission's reform initiative remains a legislative proposal subject to approval by the European Parliament and the Council. Its adoption is not merely a technical matter, but a politically sensitive decision touching upon the distribution of supervisory authority within the Union. Member States appear divided on the desirability of further centralization. While some governments support a stronger ESMA as a means of enhancing market integration and European competitiveness, others have expressed reservations grounded in concerns over sovereignty

and the preservation of national supervisory autonomy[265]. These tensions reflect the structural dynamics identified in Chapter 1 and documented in the literature on financial integration and Member State preferences. By contrast, ESMA itself has publicly welcomed the proposed reinforcement of its mandate, presenting the reform as a necessary step toward more consistent supervision, reduced fragmentation, and enhanced credibility of the Capital Markets Union[266]. The ultimate shape of the reform will therefore depend not only on permissibility, but also on political negotiation.

The limitations of this dissertation should be acknowledged. First, the analysis is necessarily confined to the reform package as proposed and cannot anticipate amendments introduced during the legislative process. Second, the study focuses on formal legal design rather than on the practical implementation of expanded supervisory powers, which may raise additional questions regarding accountability and operational discretion. Third, while grounded in case law, the interpretation of the Meroni doctrine remains contingent on future judicial developments, particularly as EU agencies continue to evolve.

Future research could therefore explore the practical application of the reform once enacted, assess how courts respond to challenges against ESMA's enhanced powers, and examine whether similar dynamics arise in other policy areas characterized by increasing agencification. Comparative analysis with other Union bodies exercising direct supervisory authority could also deepen understanding of the evolving boundaries of permissible delegation in EU law.

Ultimately, this dissertation has shown that the strengthening of ESMA represents neither a constitutional rupture nor a purely technical adjustment. It is emblematic of the European Union's broader attempt to reconcile economic integration, geopolitical ambition, and administrative law. The Meroni doctrine remains central to this equilibrium. Far from freezing institutional evolution, it continues to shape the contours within which the Union adapts its governance structures to new economic and strategic realities.

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[265] Resistance from certain Member States, notably Luxembourg and Ireland, reflects structural concerns arising from their position as major EU fund domiciles. Centralization of supervisory powers in ESMA would significantly curtail national supervisory discretion in sectors that are economically strategic for these jurisdictions, thereby raising issues of regulatory autonomy and competitive positioning within the internal market. See Luxembourg Times (2025), https://www.luxtimes.lu/luxembourg/eu-proposal-over-financial-supervision-puts-luxembourg-on-collision-course-with-paris/110267556.html; see also Politico, (2025), https://www.politico.eu/article/eu-commission-plans-major-financial-markets-shakeup-in-bid-to-boost-investment/.

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