Europeanization of the Supervision of Competitive Markets

Annetje OTTOW*

Over the past two decades, the Member States have seen many different market regulators being set up under the influence of European law. Market liberalization has resulted in regulatory authorities being created for the purposes of monitoring the liberalization process and promoting competition. These play a key role in implementing and enforcing European rules. Although the work of these national regulatory authorities is based on the principles of institutional and procedural autonomy, European law has a major impact on their activities and how they operate. This 'Europeanization' is multifaceted and does not always manifest itself in the same way in the various regulatory authorities. In addition to the influence of European law at a national level (level 1), various European networks of national regulators (level 2) have also been set up over the years, and these are playing a role in the further harmonization, implementation, and enforcement of European law. A recent development has been the establishment of European regulatory authorities (level 3) alongside the national regulatory authorities and to which are being assigned European powers. These three different levels make the European regulatory landscape highly complex. An institutional structure for coordination has been created, as a result of which a mixed administration, with national and European elements, is now in operation. This article analyses this three-layered legal order in the area of market supervision.

1 SETTING THE SCENE: CENTRALIZATION VERSUS DECENTRALIZATION

The European system for supervising different sectors, as laid down in regulations and directives, is based on the principle that execution of this European legislation is primarily the responsibility of independent, national supervisors. For the purpose of this article, these economic supervisors can be divided into three categories. The *first* category comprises regulators for liberalized sectors. Independent national regulatory authorities have often been created by the Member States in order to implement the relevant European sectoral market

* Ms A.T. Ottow is a Professor of Public Economic Law at the Europa Institute of Utrecht University and Member of the board of OPTA, the independent Dutch Post and Telecommunications Authority. She would like to thank Prof. G. Monti for the opportunity to present a draft of this article during the Competition Working Group of the European University Institute (Florence) on 9 Feb. 2011 and for his comments on the draft. The author would also like to thank Ms M. Verduijn, Lecturer at the Europa Institute, for her support in writing this article. Naturally, the author alone is responsible for the contents of this article.

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liberalization directives, such as in the communications and energy sectors. Their task is to supervise and regulate the relevant markets, and to this end, they need to be entrusted with various powers to regulate certain matters, including tariffs and access rights, as well as to settle disputes. Extensive *ex ante* regulatory powers are regarded as necessary to ensure what is referred to as the introduction and promotion of 'controlled competition' in markets where national monopolists – also referred to as incumbents – traditionally enjoyed exclusive rights and privileges to supply goods and services and to operate energy and communications networks. Even after the abolition of these formal rights, many incumbents continue to enjoy significant market power, not least because they own essential infrastructure, which cannot easily be replicated. This in turn means regulatory solutions are required to ensure competition in the market. The *second* category comprises the financial regulators, who have been assigned significant powers to ensure the stability of the financial markets and the protection of investors and consumers. Extensive European legislation has been introduced to integrate the national financial markets and to harmonize the national financial systems. The *third* category comprises more generally oriented economic supervisors. Instead of being entrusted with responsibility for a specific market, these parties deal with all markets but from a specific perspective. This category includes the national competition and consumer authorities. National institutions are entrusted with general competition tasks and, alongside ensuring compliance with national competition rules, also have the power to enforce European competition rules in all markets. The national consumer authorities have as their main task the duty to protect specific groups of consumers and are obliged to assist in the event of a cross-border infringement of the European rules on protecting consumer interests.

All these national authorities play a key role in applying European rules. As the parties responsible for overseeing the national markets, they have to ensure that the decisions they take result in European legislation being correctly applied. Indeed, national implementation practices are, to a large degree, 'coloured' by the specific features of the various national systems and the implementation practices of the national regulators. It is not only the powers assigned to the national regulators but also the applicable rules on decision-making, the powers of enforcement, and the supervisory practices that have a critical influence on the way in which national regulators perform the tasks entrusted to them. Although there are similarities between national practices, there are also major differences. In addition, these lead to disparities in the way the applicable European rules are implemented. In the absence of minimum or maximum harmonization standards,[1]

[1] On the harmonization of financial regulation, see, for example, G. Hertig, 'Regulatory Competition for EU Financial Services', *Journal of International Economic Law* (2000): 349–375.

this can result in a downward spiral, with disparities distorting competition within the internal market. From this perspective, this reliance on correct national implementation can be seen as a major shortcoming in the European legislative system.[2] Although the principle of autonomy is the guiding principle and European law respects the institutional and procedural structures of the Member States, secondary European legislation and European Court of Justice case law have, over the years, imposed requirements on the national structures in the various sectors. These requirements have had a substantial influence on and even restricted this national autonomy.[3] Under this principle of autonomy, however, national supervision is the rule and there is no automatic right to seek recourse to intervention via European structures.

The European legislator (and the European Commission) has introduced some innovative institutional tools in order to harmonize the supervision and enforcement practices at the national level. Different methods have been used in the various European Union (EU) regulations and directives to shape Europe's influence on market supervision at the national level. These methods can be categorized on a scale ranging from 'light' to 'heavy', depending on whether they involve little influence from Brussels (i.e., decentralization) or a high degree of influence (i.e., centralization). There is clearly a tension between the establishment of central control, on the one hand, and respect for the autonomy of the Member States, on the other hand. In the various liberalization directives, the European legislator has consistently sought to find a middle way between these two extremes. The solutions opt to vary from sector to sector and have been arrived at within differing political contexts and differing market conditions. Indeed, a whole range of hybrid forms have arisen, involving responsibilities being shared to differing degrees between the European Commission, new European regulators, and national regulatory authorities. Jans et al. refer to this phenomenon as a 'mixed administration'.[4] It results in a complex mix of European and national decision-making and enforcement procedures in the various fields of economic supervision. This article refers to it as 'Europeanization': the process of achieving

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2 Baldwin & Cave, *Understanding Regulation* (Oxford: Oxford University Press, 1999), 159.

3 For the European influence on the Dutch legality principle in the context of the European autonomy principle, see S. Lavrijssen & A.T. Ottow, 'The Legality of Independent Regulatory Authorities' in *The Eclipse of the Legality Principle in the European Union*, eds L.F.M. Besselink, F. Pennings & S. Prechal (The Hague: Kluwer Law International, 2010), 73. For the consequences of the energy directives for the position of national regulators, see Commission Staff Working Paper, Interpretative note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas, The Regulatory Authorities, Brussels, 22 Jan. 2010.

4 Jans et al., 2007, 53. In *Europees recht. Algemeen deel*, eds W.T. Eijsbouts et al. (Groningen: Europa Law Publishing, 2009), Ch. 10, this is now referred to as *gedeeld gezag* (shared authority), whereby powers are shared between the Union and the Member States (and other bodies).

greater influence by Europe on the set-up and structure of supervision.[5] In this article, this process is perceived from a *multilayer perspective*. Three levels of Europeanization are examined – (i) national regulators, (ii) networks of national regulators, and (iii) European regulators[6] – in the financial, energy, and telecommunications sectors and for the general regulatory authorities responsible for competition and consumer protection law. For these fields of economic supervision, this article aims to map the degrees of Europeanization and the differences between them. The various levels of Europeanization being applied in these areas, ranging from light to heavy, are examined. At all three levels, the central question is which national or European authority has the power to intervene: Which authority should perform supervision and enforcement? In other words, is control centralized and from Brussels or decentralized and at the level of the Member States? This issue of power is at the heart of this article.

2 LEVEL 1: NATIONAL REGULATORS

2.1 JURISDICTION RULES

In various regulations, the supervisory arrangements consist of a substantial degree of jurisdiction rules. In other words, rules determining which national regulator is authorized to act. This is the option chosen in the case of consumer protection and financial supervision. European competition law also provides jurisdiction rules for governing how responsibilities are divided between the European Commission and the national competition authorities. The provisions in these three areas are all discussed in this article.

2.1[a] *Regulation 2006/2004 (Consumer Protection)*

The lightest form of Europeanization can be seen in the field of consumer protection. Regulation 2006/2004 provides rules for cooperation and the division of responsibilities between national regulatory authorities (in this case, the

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5 The concept of Europeanization has been used on many occasions to indicate the influence of European law on national law. See, for example, Jans et al., 2007 and 2005 and J.A.E. Vervaele (ed.), *Compliance and Enforcement of European Community Law* (The Hague: Kluwer Law International, 1999).

6 Thatcher and Coen analyse this process from a European institutional perspective, seeing it as an evolutionary European design: M. Thatcher & D. Coen, 'Reshaping European Regulatory Space: An Evolutionary Analysis', *West European Politics* 31, no. 4 (July 2008): 806–836. For a governance perspective, see Ch.F. Sabel & J. Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the European Union', in *Experimentalist Governance in the European Union: Towards a New Architecture*, eds Ch.F. Sabel & J. Zeitlin (Oxford: Oxford University Press, 2010), 1–28.

consumer protection authorities).[7] In the event of a cross-border infringement of the European rules on protecting consumer interests, national regulatory authorities are obliged to provide mutual assistance. This cooperation is designed, among other things, to ensure compliance with European rules on dealing with unfair commercial practices,[8] air travel,[9] and the protection of privacy in the electronic communications sector.[10] The mutual assistance that the national regulators are required to provide can be in various forms. They may be required, for example, to exchange information[11] or to take enforcement measures.[12] A national regulator requested to provide information or to take enforcement measures is, in principle, required to comply with this request, acting on the basis of the applicable national law of the relevant consumer protection authority. Only in certain specific situations – if, for example, judicial proceedings have already been initiated in respect of the same intra-Community infringements and against the same sellers or suppliers – is a national regulator permitted to refuse to comply.[13] As well as the requirements to provide information and to take enforcement measures, the Regulation also imposes a more general obligation on the competent national regulatory authorities to coordinate their market surveillance and enforcement activities.[14]

Each Member State is required to designate the competent national body responsible for enforcing the legislation on protecting consumer interests.[15] These bodies must have the investigation and enforcement powers necessary to apply the Regulation,[16] while each Member State must also designate a liaison office responsible for coordinating application of the Regulation. The Commission meanwhile has to maintain a list of all the liaison offices and competent regulatory authorities in the Member States.[17] According to the Commission report of July

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7 Regulation (EC) No. 2006/2004 of the European Parliament and of the Council of 27 Oct. 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ 2004, L 364, 1–11.

8 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ 2005, L 149, 22.

9 Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 Feb. 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, OJ 2004, L 46, 1.

10 Directive 2002/58/EC of the European Parliament and of the Council of 12 Jul. 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ 2002, L 201, 37 (Art. 13 concerns consumer protection).

11 Articles 6 and 7 Regulation 2006/2004.

12 Article 8 Regulation 2006/2004.

13 Article 15, paras 2 and 3, Regulation 2006/2004.

14 Article 9 Regulation 2006/2004.

15 Article 4, para. 1, Regulation 2006/2004.

16 Article 4, paras 3 and 6, Regulation 2006/2004.

17 Article 5 Regulation 2006/2004. For the most recent list, see the Commission communication pursuant to Art. 5, para. 2, of Regulation (EC) No. 2006/2004 of the European Parliament and of the

2009, 327 requests for mutual assistance were made in 2007 and 392 in 2008. There are also regular 'alerts': one regulator notifying another regulator of a current investigation that may have consequences for the latter. In addition, there have been 'sweeps': combined action taken by two or more national regulatory authorities in respect of market supervision and enforcement and involving cross-border activities.

The cooperation system that has been put in place still contains a number of major defects. There is, for example, a high degree of reliance on national enforcement structures, with almost no harmonization having taken place at that level. This means that any lack of surveillance or enforcement instruments at a national level will mean a significant gap in the system of cooperation. In addition, the fact that various bodies may be responsible within a Member State for supervising different aspects of the European consumer protection directives makes coordination and the exchanging of information difficult. In practice, the way in which European legislation should be interpreted has also been subject to discussion, and this has further complicated the process of aligning national regulatory authorities' activities.[18]

2.1[b] *Home State Control (Financial Sector)*

Another variant of Europeanization is the system of *home state control*. The recast Banking Directive[19] is based on a system whereby a bank that has been licensed by a European Member State is permitted to establish a branch in another Member State without having to apply for a new license. The license issued by the home state operates as a 'European passport'.[20] The host Member State is not permitted to require national authorization for a branch of a credit institution that has already been granted a license in another Member State (Article 16 of the recast Banking Directive). The opportunities for supervision in the host Member State are also limited as the national regulator in the host country is only entitled to supervise the branch's liquidity (see Article 41 of the recast Banking Directive), while the competent regulatory authority in the home state is responsible for

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Council on cooperation between national authorities responsible for the enforcement of consumer protection laws, concerning the competent authorities and single liaison offices, OJ 2009, C 169, 1.

18 See the Report from the Commission to the European Parliament and to the Council on the application of Regulation (EC) No. 2006/2004 of the European Parliament and of the Council of 27 Oct. 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, Brussels, 2 Jul. 2009, COM(2009) 336 final.

19 Directive 2006/48/EC of the European Parliament and of the Council of 14 Jun. 2006 relating to the taking up and pursuit of the business of credit institutions (recast), OJ 2006, L 177, 1.

20 *De bevoegdheden van de Nederlandsche Bank inzake Icesave* (The authority of the Dutch Central Bank in the case of Icesave), research by A.J.C. de Moor-Van Vugt & C.E. du Perron for the Ministry of Finance, 11 Jun. 2009, 13 (hereinafter the 'Icesave Report').

prudential supervision of the credit institution as a whole (see Article 40 of the recast Banking Directive). This system has contributed greatly to the liberalization and internationalization of national financial markets. The European financial directives impose requirements on national supervision and set rules for harmonization.

This system stands or falls with the quality of the national supervisory system and is based on the assumption of mutual confidence between the regulators. National regulatory authorities are also highly reliant on *each other* as they base themselves on each other's supervision and need to be able to rely on the other party's quality and reliability. In addition, it is this aspect that forms a weak link in the chain of European supervision. As the credit crisis has demonstrated, confidence cannot automatically be assumed to be mutual and can result in an *enforcement deficit*, with too little supervision to ensure correct application of European rules. Various reports[21] compiled in response to the financial crisis have also highlighted that the system of *home state control*, which relies essentially on national supervision, is no longer 'fit for purpose' in a market that has become increasingly internationalized. The supervisory structures have proved unable to evolve in line with market dynamics and demand greater coordination and a more extensive cross-border approach.[22] The 'Icesave affair' is illustrative of this problem. The Icesave Report examines the extent of the powers that were available to the Dutch Central Bank (DNB) in respect of the Icelandic bank Icesave's (online) banking activities in the Netherlands. Icesave's head office was in Iceland, and the bank's activities in the Netherlands were performed through a branch. The reporters concluded that the system of the European passport and the Banking Directive[23] meant that the regulatory body in the host state (in this case, DNB) had only limited powers. As soon as the host state regulator deems measures to be necessary that extend beyond supervision of the branch's liquidity, it requires the cooperation of the regulatory body in the home state (in this case, the Icelandic regulator The Financial Supervisory Authority of Iceland (FME).[24] The report's conclusions included the view that the European system needed to be amended so as to allow regulatory authorities in the host state greater powers to intervene.[25] The Commission has since taken initial steps to amend the European system for supervising the financial sector (see section 4.4).

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21 *De Larosière report* (high-level group on financial supervision in the EU, chaired by Jacques de Larosière), Brussels, 25 Feb. 2009, and *The Turner Review: A Regulatory Response to the Global Banking Crisis* (London: Financial Services Authority, March 2009).

22 Communication from the Commission, European Financial Supervision, Brussels, 27 May 2009, COM(2009) 252 final, 2. Cf. De Larosière, 41 ('led to an erosion of mutual confidence among supervisors') and 72 ('distrust between supervisors').

23 Articles 29–37 recast Banking Directive (Directive 2006/48/EC).

24 Report on the Icesave affair (see n. 20), 31.

25 *Ibid.*, 69.

2.1[c] *Regulation 1/2003 (European Competition Law)*

The situation under generic competition law is different. In 2003, the introduction of Regulation 1/2003 resulted in a complete overhaul and modernization of EU competition law.[26] This regulation is based on the direct, decentralized application of European competition law by national competition authorities and national courts. Only in a few cases can Articles 101 (prohibition on practices that restrict or distort competition) and 102 TFEU (prohibition on the abuse of a dominant market position) be used by the European Commission itself. Regulation 1/2003 contains procedures for allocating cases between national regulatory authorities (i.e., horizontal coordination at the national level) and between national regulatory authorities and the Commission (i.e., vertical coordination between levels 1 and 3). These forms of coordination between regulatory authorities at national and European levels are designed to achieve uniform application of competition law.[27] The competition authorities in the Member States have to inform the Commission when acting under Article 101 or 102 TFEU.[28] To that effect, they must provide the Commission with the documents it requires and requests. Subsequently, the Commission is entitled to comment in writing on this information.[29] If uniform application of Articles 101 and 102 TFEU is seriously threatened, the Commission may itself opt to initiate proceedings, thus relieving the competition authority in the relevant Member State of its competence to act.[30] Likewise, if it receives a complaint under Article 101 or 102 TFEU, the Commission may reject the complaint on the grounds that a competition authority of a Member State is already dealing with the case.[31] The 2009 report

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[26] Council Regulation (EC) No. 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, OJ 2003, L 1, 1. For a Country Report on the functioning of Regulation 1/2003, see FIDE reports 2008, 'The Modernisation of European Competition Law, Initial Experiences with Regulation 1/2003', FIDE XXIII Congress (Linz, 2008). See also I. Maher & O. Stefan, 'Competition Law in Europe: The Challenge of a Network Constitution', in *The Regulatory State: Constitutional Implications*, eds D. Oliver et al. (Oxford: Oxford University Press, 2010), 178–200, and F. Cengiz, 'Multi-level Governance in Competition Policy: The European Competition Network', *European Law Review* 35 (October 2010): 660–677. For further reading on Regulation 1/2003, see G. Monti, *EC Competition Law* (Cambridge: Cambridge University Press, 2007), 404–409.

[27] Paragraphs 250, 251, and 260 Commission Staff Working Paper.

[28] Article 11, para. 3: The Member States' competition authorities shall inform the Commission without delay after commencing the first formal investigative measure; and para. 4: no later than thirty days before the adoption of a decision.

[29] Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004, C 101, 43–53, para. 46.

[30] Article 11, para. 6, Regulation 1/2003. See Case C-53/03, *Syfait et al. v. GlaxoSmithKline* [2005] ECR I-4609, para. 34.

[31] Article 13, para. 1, Regulation 1/2003.

on the functioning of Regulation 1/2003[32] and the accompanying working paper[33] were positive on these procedures. The Member States are complying with their duty to report and the Commission has made frequent use of the opportunity to submit observations.[34] This coordination process has been further strengthened by the establishment of a network of national competition authorities (see section 3.4).

2.2 Commission's right to intervene in national decision-making

2.2[a] *Communications Market*

Article 7 of the amended Framework Directive[35] includes a procedure entitling the European Commission and the newly established Body of European Regulators for Electronic Communications (BEREC – see section 4.2) to participate in the national regulators' decision-making process. Under Article 7.2 of the amended Framework Directive, national regulators are required to cooperate with each other, and with the Commission and BEREC, in a transparent manner. The Commission and BEREC also have a right to deliver an opinion on certain draft measures of the national regulators. This applies to measures relating to the defining of relevant markets, determining whether an enterprise has significant market power, and imposing, removing, or amending obligations in respect of enterprises with significant market power.[36] These measures must affect trade between the Member States (which is almost always assumed to be the case). The Commission also has a right to veto measures relating to the defining of a relevant market differing from markets defined by the Commission in a recommendation or to the designation of an enterprise with significant market power. In such cases, the Commission is authorized to require the relevant national regulator to withdraw the draft measure.[37]

The duty of notification, the right to deliver an opinion, and the right of veto were introduced in order to ensure consistent application of the provisions of the directives in all Member States. Preventive (*ex ante*) control of national regulators'

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32 Communication from the Commission to the European Parliament and the Council, Report on the Functioning of Regulation 1/2003, Brussels, 29 Apr. 2009, COM(2009) 206 final.

33 Commission Staff Working Paper accompanying the Report on the Functioning of Regulation 1/2003, Brussels, 29 Apr. 2009, SEC(2009) 574 final.

34 Paragraphs 256 and 257 Commission Staff Working Paper.

35 Directive 2002/21/EC of the European Parliament and of the Council of 7 Mar. 2002 on a common regulatory framework for electronic communications networks and services ('Framework Directive'), OJ 2002, L 108, 33–50, amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 Nov. 2009, OJ 2009, L 337, 37–69.

36 For a precise description, see Art. 7, para. 3, amended Framework Directive.

37 Article 7, para. 5, amended Framework Directive.

draft decisions is seen as the primary way to achieve consistent application. The right of veto represents an additional control tool for the Commission, alongside its right to deliver an opinion. The cases reported to Brussels to date and the Commission's response to these notifications have demonstrated that the notification procedure provided for in Article 7 of the Framework Directive is by no means an empty shell. This procedure enables European influence on the national regulatory decision to take place, and an integrated – national and European – legal order has emerged. There are clear advantages in the European Commission's direct, procedural involvement in national decision-making. First, it achieves harmonization, with the national regulatory authorities being guided through the application and interpretation of the directives. This compares with the lack – in most cases – of direct guidance in the decentralized application of European directives.[38] The involvement of the Commission and BEREC avoids – at least to a certain extent – the possibility of national regulatory authorities each interpreting the powers available to them in their own way. The directives allow the national regulatory authorities considerable discretionary powers, while also containing a number of open standards that can result in differing interpretations and applications in national legislative and regulatory practices. The aim of this coordination procedure and the tools available to the Commission is, therefore, to achieve consistent, European regulatory practice. In this sense, introduction of similar procedures in other fields involving national regulators would be a logical step. At the same time, however, intervening in this way will complicate and delay national decision-making and may trigger parallel (i.e., national and European) appeals against decisions of the Commission and the national regulator.

2.2[b] *Energy Market*

National regulators have to notify Brussels in the event of certain decisions. In the case of the energy sector, the applicable provisions can be found in Regulation 714/2009[39] (for electricity) and Directive 2009/73/EC[40] (for gas). The notification procedure applies to decisions by national regulators on exemptions for capacity allocated to interconnectors (Article 17 in Regulation 714/2009) and

[38] In respect of this risk, see C. Hocepied & A. De Streel, 'The Ambiguities of the European Electronic Communications Regulation', in *The Round Table Expert Group on Telecommunications Law. Conference Papers*, eds E.J. Dommering & N.A.N.M. van Eijk (Amsterdam: Institute for Information Law, University of Amsterdam, 2005), 160.

[39] Article 17 Regulation (EC) No. 714/2009 of the European Parliament and of the Council of 13 Jul. 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No. 1228/2003, OJ 2009, L 211, 15–35.

[40] Article 48 Directive 2009/73/EC of the European Parliament and of the Council of 13 Jul. 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ 2009, L 211, 94–136.

the granting of a derogation from the requirement to allow access to, for example, transmission and distribution systems (Article 48 in Directive 2009/73/EC). National regulators have to report their final decisions in these respects to the Commission. Within eight weeks of receipt of such notification, the Commission may request the Member State or the national regulator to amend or withdraw the decision. In the case of the procedure provided for in Article 48 of Directive 2009/73/EC, the Commission itself is permitted to take a final decision if the Member State or designated regulatory authority fails to comply with the request. The procedures for exercising the powers conferred on the Commission via the designated committee are laid down in Council Decision 1999/468/EC. The Electricity Directive (Directive 2009/72/EC) also provides a specific procedure that allows the Commission or a national regulator to request the Agency for the Cooperation of Energy Regulators (ACER – see section 4.3) to deliver an opinion on another national regulator's compliance with adopted guidelines.[41] In the event of serious doubts, the Commission may examine the case further and request the relevant national regulator to repeal the decision.

This differs from the procedure laid down in Article 7 of the Framework Directive as, in this case, it is not a draft decision that is notified to the European Commission but instead a final decision to grant an exemption or derogation that has to be reported. In other words, the Commission's involvement is *ex post* and so not in the form of an opinion on or veto of the national decision-making procedure.[42]

3 LEVEL 2: NETWORKS OF NATIONAL REGULATORS

Over the years, national regulators have established different forms of cooperation in various sectors subject to economic supervision. This cooperation has mainly taken the form of networks, in which the national authorities participate and exchange information and experiences. An evolutionary process has taken place, where the networks start as a rather informal cooperation but develop over the years into a more institutionalized structure, in which the national members

[41] Article 39 Directive 2009/72/EC of the European Parliament and of the Council of 13 Jul. 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ 2009, L 211, 55–93.

[42] In the case of environmental regulations, a similar procedure is provided for in Art. 9 of Directive 2003/87/EC. Under this procedure, the Member State has to develop a national plan stating the total quantity of emission allowances. The plan must be notified to the Commission and the other Member States. Within three months of notification, the Commission may reject the plan, or any aspect thereof, on the grounds that it is incompatible with the Directive. Under Art. 9, para. 3 of Directive 2003/87/EC, the Member State may take a decision to allocate the emission allowances under Art. 11, para. 1 or 2 of Directive 2003/87/EC only if the proposed amendments to the plan are accepted by the Commission.

actively participate. As a result, these networks have been transformed into institutions organized on a more European scale.

The year 2010 was a year of major change in the European landscape of market supervision. Many existing European networks were replaced by new European bodies, which took over the tasks and functions of the networks. This was the case in the communications, energy, and financial sectors. As a result, many networks were abandoned, which resulted in a significant Europeanization shift towards level 3. This resulted in the following situation as at 1 January 2011:

Areas	2010	2011
Consumer protection	Consumer Protection Cooperation (CPC) Network	CPC Network
Competition law	European Competition Network (ECN)	ECN
Communications	European Regulators Group (ERG) for Communications Networks and Services	BEREC
Energy	European Regulators Group for Electricity and Gas (ERGEG)	ACER
Banking	Committee of European Banking Supervisors (CEBS)	European Banking Authority (EBA)
Securities	Committee of European Securities Regulators (CESR)	European Securities and Markets Authority (ESMA)
Insurance/pensions	Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS)	European Insurance and Occupational Pensions Authority (EIOPA)

The new European institutions are discussed in section 4 of this article. The networks that still exist – the CPC Network and the ECN – are discussed in the following sections. In the financial sector, the networks played an important role in the complicated structure known as the 'Lamfalussy process'. This process is also discussed in section 3 of this article so as to provide a better understanding of the revolution that took place in 2010 and involved the financial networks being replaced by European authorities.

3.1 Tasks and importance of the networks

All these networks are (or were) structured along similar lines, albeit one more informally than the other. Although the various networks have differing objectives,

their key aim is to facilitate the exchange of information between national regulators. Essentially, the tasks of the various networks can be divided into three categories: expertise, coordination, and peer review.

Their first task is the *bottom-up* role they play in contributing expertise to the European legislative process. They may be involved in establishing European rules by providing input for the Commission's drafting and amending of rules. In this way, they represent an important source of advice for the European Commission, specifically on complex matters of a technical nature. Examples of this include the involvement of the CEBS in drafting detailed implementing measures for directives via the 'Lamfalussy process'[43] (see section 3.3). Their second task is *horizontal* and involves aligning national application practices by devising uniform standards for applying European directives. In some cases, the networks have published joint reports and recommendations. The networks have been set up to facilitate coordination in the absence of centralized supervision. They keep each other advised of how European rules are being applied so as to identify or avoid inconsistencies between application practices. One of the main aims of these networks is alignment, with a view to achieving consistent application of European directives, not only in respect of cross-border activities but also in purely domestic situations within a Member State. This promotes harmonization of the national systems. In effect, these networks constitute the cement between the bricks of the national supervisory systems. The third role that these networks have is *transversal* and involves providing expertise for and commenting on each other's implementing practices. The Commission bases its compliance reports and benchmark reports regarding the implementation status of directives on input from the networks.[44] Another example is the obligation in the telecommunications sector to report draft decisions, not only to the European Commission and BEREC but also to fellow regulators from the other Member States. These fellow regulators then have the opportunity to comment under the provisions of Article 7 of the amended Framework Directive. In practice, very little use was made of this opportunity under the old framework. This, however, will have to change as BEREC will also be asked to advise on draft decisions of national regulators.

These networks have played (and continue to play) a vital role in the European harmonization process and constitute an important building block in the process of integrating the various markets. The way in which they work together is obviously complex, informal, and not always transparent,[45] with

[43] Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, 15 Feb. 2001.

[44] Such as the ERGEG's Status Reviews.

[45] S.A.C.M. Lavrijssen & L. Hancher, 'Networks on Track, from European Regulatory Networks to European Regulatory "Network Agencies"', *Legal Issues of Economic Integration* 1 (2009): 23–55.

national interests playing a role and the application of European directives not always proceeding smoothly.[46] Nevertheless, the harmonizing effect, whether formal or informal, that these networks have on national application practices should not be underestimated. National regulators look to each other in the event of new developments or to see how rules are being applied and follow the guidelines and recommendations issued within the network. The fact that national courts (at least in the Netherlands) take such recommendations into account when national regulators' decisions are reviewed for compliance confirms their influence.[47] At the same time, however, it has to be acknowledged that these networks cannot resolve all the inconsistencies and enforcement deficits. For that to be possible, they would have to have far more powers than is currently the case. The networks certainly contribute to reducing the deficit and to increasing the level of harmonization, but they cannot be expected to provide a structure for harmonization and European enforcement for which they are not equipped and for which they have not been assigned any powers (at least not direct powers). The networks are the result of the wish to achieve greater cooperation within the EU, in line with the obligation under Article 10 of the EC Treaty (now, after amendment, Article 4.3 of the EU Treaty) to work together loyally to facilitate achievement of the agreed Treaty objectives. They do not, however, constitute a comprehensive alternative to European supervision, as a well-functioning network requires three conditions to be met: (i) mutual trust and cooperation, (ii) professionalism, and (iii) a common regulatory philosophy.[48] In addition, as has been demonstrated in the case of the financial sector, these three conditions are not always met.

3.2 CPC NETWORK

As discussed in section 2.1.1, Regulation 2006/2004[49] provides various mechanisms for cooperation and coordination between national regulatory authorities in the field of consumer protection. This Regulation requires national regulatory authorities to grant each other mutual assistance in the event of an actual or potential cross-border infringement of the European rules designed to

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[46] See, for example, the critical comments in the report of CESR, Preliminary Progress Report, 'Which Supervisory Tools for the Securities Markets? An Analytical Paper by CESR', October 2004, Ref. No. 04-333f, 18.

[47] See, for example, CBB (Dutch Trade and Industry Appeals Tribunal), 2 Aug. 2002, *Electrabel et al. v. DTe, LJN*: AE6773.

[48] Monti, 418, and G. Majone, 'The Credibility Crisis of Community Regulation', *Journal of Common Market Studies* 38 (2000): 297–298.

[49] Regulation (EC) No. 2006/2004 of the European Parliament and of the Council of 27 Oct. 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ 2004, L 364, 1–11.

protect consumer interests. In order to channel this mutual assistance properly, Regulation 2006/2004 also establishes a network of national regulatory authorities. Within this network, a secure IT tool, the Consumer Protection Cooperation System (CPCS), has been created to facilitate the exchange of information. Until recently, however, many of the national regulatory authorities were not linked to the system, and this has made cooperation more difficult. The members of the network also exchange views on interpreting relevant legislation. The network needs, however, to develop its activities further and to increase its profile.[50] Given that the network has so far been used more as an IT network than as a real infrastructure for cooperation, it cannot be compared with the other networks discussed in this article.

3.3 Financial sector: CEBS, CEIOPS, and CESR networks[51]

These three financial sector networks were all structured along comparable lines. They played an important role in the 'Lamfalussy process',[52] a decision-making process adopted in 2001.[53] This process has set out to create an efficient mechanism for, on the one hand, achieving convergence of supervision practices in the European financial sector and, on the other hand, for ensuring that Community legislation on financial services represents a fast and flexible response to developments in the financial markets.

Under this process, financial regulation is passed at four levels.[54] *Level 1* of the Lamfalussy process comprises a framework directive issued under the normal legislative procedures provided for in Article 294 TFEU.[55] This framework directive sets out core principles, without going into any further detail. At *level 2*,

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50 See Commission Report (see n. 18), 8.

51 See the following new regulations: Regulation (EU) No. 1093/2010 of the European Parliament and of the Council of 24 Nov. 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/78/EC; Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 Nov. 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) amending Decision No. 716/2009/EC and repealing Commission Decision 2009/77/EC; and Regulation (EU) No. 1094/2010 of the European Parliament and of the Council of 24 Nov. 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No. 716/2009/EC and repealing Commission Decision 2009/79/EC; all three published in OJ 2010, L 331. Hereafter, for the sake of convenience, reference will be made only to Regulation 1093/2010, but the other two regulations follow the same structure.

52 Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, 15 Feb. 2001.

53 D. Alford, 'The Lamfalussy Process and EU Bank Regulation: Another Step on the Road to Pan-European Regulation?', *Annual Review of Banking and Financial Law* (2006): 397.

54 Communication from the Commission, Review of the Lamfalussy Process – Strengthening Supervisory Convergence, Brussels, 20 Nov. 2007, COM(2007) 727 final, 2.

55 In this legislative procedure, the European Parliament and the Council jointly decide on a proposal from the Commission.

the technical details are elaborated and the Commission proposes implementing measures. These proposals are submitted to the European Parliament and the Council of Ministers ('the Council') for approval. The Council is represented by comitology committees, comprising civil servants from the ministries of finance of the Member States. These committees have both a regulatory and an advisory role and represent three areas of the financial sector: pensions, banks, and insurance. At *level 3*, the 'level 3 committees' – CEBS, CEIOPS, and CESR – advise the Commission on the measures proposed at level 2. These committees contain representatives of the national regulatory authorities of each Member State and play an important role in consistent and uniform implementation of EU directives by helping to secure more effective cooperation between national regulatory authorities and contributing to the convergence of supervisory practices.[56] In doing so, the 'level 3 committees' operate a protocol that is designed to avoid possible disagreements between the committees. Although each of the 'level 3 committees' has such a mediation mechanism in place, the results are neither binding nor enforceable, with much depending on the degree of mutual trust and confidence existing between the national regulators. At *level 4*, the Commission enforces timely and correct transposition of EU legislation into national law and may take action against a Member State if transposition is not compliant with European law. While binding directives and regulations are issued at levels 1 and 2, the committees at level 3 issue guidelines, recommendations, and standards for applying European rules. These are non-binding (in other words, 'soft law')[57] and have only indirect effect – via the national application practice.

3.4 ECN

The members of the ECN comprise the competition authorities in the Member States and the Commission itself.[58] This network was established, following adoption of Regulation 1/2003, to assign responsibility for ensuring efficient application of Articles 101 and 102 TFEU between the national competition authorities themselves and between the national competition authorities and the

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[56] Such as CESR, Protocol on Review Panel of the Committee of European Securities Regulators, CESR/07-070b. The CESR Review Panel was established back in 2003. See Terms of reference for the Review Panel, CESR/03-061, and General Methodology for implementation reviews undertaken by CESR, CESR/04-711b in CEBS, Review Panel Protocol, 15 Oct. 2007, <www.eba.europa.eu/Review-panel/Introduction.aspx>.

[57] A.P.W. Duijkersloot, 'Principle of Legality and the "Soft Law" Regulation and Supervision of Financial Markets', in *The Eclipse of the Legality Principle in the European Union*, eds L.F.M. Besselink, F. Pennings & S. Prechal (The Hague: Kluwer Law International, 2010), 171.

[58] For a discussion of the network (also compared to the communications network), see M. de Visser, *Network-Based Governance in EC Law: The Example of EC Competition and EC Communications Law* (Oxford: Hart Publishing Ltd., 2009).

Commission.[59] The cooperation within the network is also designed to ensure that European competition rules are applied effectively and uniformly. Various powers are available to the national competition authorities to achieve these aims. They are required to inform each other of formal investigative measures.[60] Proceedings may be suspended or rejected if another competition authority is already dealing with the case.[61] The competition authorities of the Member States are also authorized to exchange information, whether such information is a matter of fact or of law and including confidential information, and to use such information as evidence.[62] In addition, national competition authorities can request each other to conduct certain inspections.[63] Although this network was originally set up for (virtual) notification purposes, it has since evolved into a form of structural cooperation, where details of European competition law, and indirectly also national competition law, are discussed and aligned.[64] It can be questioned whether ECN is in that respect acting *ultra vires* by extending its coordination activities towards more policy-making.

How should we view this new framework from a Europeanization perspective? Can the modernization of European competition law be regarded as decentralization and, therefore, developing in the opposite direction from level 3 to level 1, contrary to the other fields of market supervision? Two different views on the reshaping of European competition law have been expressed. The traditional view is that Regulation 1/2003 is a vehicle for cooperation and coordination with the national competition authorities and for shifting power to these authorities. Others, however, perceive the regulation as a tool of the Commission to reinforce its powers towards the national competition authorities. Rather than decentralizing the European competition policy, the Commission has, on the basis of Regulation 1/2003 and by the establishment of ECN, 'Europeanised' the national competition regimes.[65] In addition, these coordination rules have made it possible for the

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[59] Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004, C 101, 43–53, and the Joint statement of the Council and the Commission on the functioning of the network of competition authorities, <http://register.consilium.eu.int> (Document No. 15435/02 ADD 1). For further reading on ECN, see R. Smits, 'The European Competition Network: Selected Aspects', *Legal Studies of Economic Integration* 32 (2005): 175, 184–188; and Y. Svetiev, 'Networked Competition Governance in the EU: Delegation, Decentralization or Experimentalist Architecture?', *Sabel & Zeitlin* (2010): 79–120.

[60] Article 11, para. 3, Regulation 1/2003.

[61] Article 13 Regulation 1/2003. For the procedures for allocating powers between the national competition authorities and the Commission, see s. 2.1.3 of this article.

[62] Article 12 Regulation 1/2003.

[63] Article 22 Regulation 1/2003.

[64] The results of this cooperation include the ECN Model Leniency Programme: EC Leniency Programme, issued on 29 Sep. 2006 and available at <http://ec.europa.eu/competition/ecn/model_leniency_en.pdf>.

[65] S. Wilks, 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy', *Governance* 18, no. 3 (July 2005): 431–452. Monti, 421.

Commission to concentrate on serious cases and to leave the less important ones to the national competition authorities.[66] From this perspective, the developments in the area of European competition law are wholly in line with the Europeanization that has been seen in recent years in other fields of economic supervision.

4 LEVEL 3: EUROPEAN REGULATORS

4.1 INTRODUCTION

The Commission believes there is a need for regulators at a European level, given that there are still too many inconsistencies in national implementing practices and that further coordination is necessary. New European regulatory authorities are currently being put in place in the form of BEREC in the communications market,[67] ACER in the energy sector,[68] and EBA, ESMA, EIOPA, and ERSB in the financial sectors. How can this acceleration of the establishment of new European entities since 2009 be explained? The Commission has been pushing for greater harmonization in recent years, in parallel with the fine-tuning of the energy and communications legislative frameworks. In addition, new EU agencies have been created following the occurrence of crises,[69] as in the case of the new European financial bodies set up in response to the financial crisis. The co-incidence of these factors has consequently brought about a major change in the European landscape of market supervision. These new institutions are analysed in this section.

4.2 COMMUNICATIONS REGULATOR: BEREC

At the time of the telecommunications market being liberalized, the European Commission's ambition had been to set up a European regulator (the 'European Regulatory Authority') for centralized supervision of the market. This ambition, however, came up against strong opposition from the Council and the Member

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[66] Monti, 409, and H. Micklitz, 'Collective Private Enforcement in Antitrust Law – What Is Going Wrong with the Debate?', EUI Working Papers, LAW (2009), 8–9.

[67] Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 Nov. 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, OJ 2009, L 337, 1–10.

[68] Regulation (EC) No. 713/2009 of the European Parliament and of the Council of 13 Jul. 2009 establishing an Agency for the Cooperation of Energy Regulators, OJ 2009, L 211, 1–14.

[69] D. Curtin, 'Delegation to EU Non-majoritarian Agencies and Emerging Practices of Public Accountability', in *Regulation through Agencies in the EU: A New Paradigm of European Governance*, eds D. Gerardin et al. (Cheltenham/Northampton: Edward Elgar, 2005), 88–119.

States, and this led to the Commission abandoning its ambition.[70] The Member States and national regulators believed that further centralizing of supervision would fail to take proper account of the specific features of the national markets in the various Member States. They also felt that the national regulators were better placed to take these specific features of the national markets into account in their decision-making. Now, however, the time for further centralization is seen as ripe, although the process of reaching this stage has admittedly not gone entirely smoothly. After years of the national regulators working together within the ERG, ERG has now been converted into a European regulator in the shape of BEREC[71] so as to achieve greater Europeanization of supervision in this market. BEREC has been set up to advise the Commission on and help promote development of the communications market, as well as to serve as an interface between national regulators and the Commission. The Commission attended ERG meetings as an observer.[72]

BEREC's aim is to ensure consistent application of the EU telecommunications regulatory framework by promoting cooperation between national regulators and between national regulators and the Commission.[73] BEREC's responsibilities are solely of an advisory nature and it has no powers to take binding decisions. The communications directives contain various procedures for BEREC to deliver opinions to national regulators or the Commission.[74]

4.3 Energy regulator: ACER

ACER has been set up to help national energy regulators to perform their regulatory tasks and to coordinate their action at a Community level.[75] These were previously the objectives of the ERGEG, which was an independent advisory body set up to structure advice, coordination, and cooperation between national energy regulators and between those regulators and the Commission.[76] The Commission attended ERGEG meetings as an observer. As a result, however, of

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[70] For a discussion of this process, see P. Larouche, *Competition Law and Regulation in European Telecommunications* (Oxford: Hart Publishing Ltd., 2000), 415–423.

[71] Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 Nov. 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, OJ 2009, L 337, 1–10.

[72] The International Regulators Group also still exists (at least at the time of writing). The Commission does not, however, attend IRG meetings and the future of this network is unclear.

[73] Preamble to Regulation 1211/2009, para. 8.

[74] Article 3, para. 1, Regulation 1211/2009.

[75] Article 1 Regulation 713/2009.

[76] Commission Decision 2003/796/EC of 11 Nov. 2003 on establishing the European Regulators Group for Electricity and Gas, OJ 2003, L 296, 34–35. In addition, there is the informal Council of European Energy Regulators (CEER), which had strong links with the ERGEG.

the increasing internationalization of the energy markets, the Member States and national regulators perceived a need for more structured European cooperation. It was widely recognized within the sector that the original form of cooperation between regulators should be replaced by a Community structure with clear powers.[77] This difference in approach in the energy and communications markets is attributable to differences between these markets, with the energy market having a greater need for closer cooperation at a European level.

ACER issues opinions and recommendations to transmission system operators, regulators, and the European Parliament, the Council, and the Commission.[78] It can also take its own binding decisions on certain technical issues[79] and on issues in which the competent national regulatory authorities have been unable to reach agreement,[80] as well as on cross-border infrastructure[81] and certain exemptions and derogations.[82] ACER, therefore, has considerably more powers than BEREC.

4.4 Financial authorities: EBA, ESMA, and EIOPA

In response to the De Larosière report, the Commission took the steps needed to amend European financial supervision in its Communication of 27 May 2009.[83] The European Council President and the European Parliament reached provisional agreement on these proposals on 2 September 2010.[84] The three new authorities started operations on 1 January 2011.[85]

According to the Commission, the financial crisis demonstrated serious failings in cooperation, coordination, consistency, and trust between national supervisors. In order to remedy the failings in supervision revealed by the crisis, the European legislator has created a new supervisory framework, the European System of Financial Supervisors (ESFS), comprising the following pillars:

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77 Preamble to Regulation 713/2009, para. 3.
78 Article 4 Regulation 713/2009.
79 Article 7 Regulation 713/2009.
80 Article 8 Regulation 713/2009.
81 Article 7, para. 7, Regulation 713/2009.
82 Article 9 Regulation 713/2009.
83 Communication from the Commission, European Financial Supervision, Brussels, 27 May 2009, COM(2009) 252. For a discussion of these new regulations, see, for example, E. Ferran, 'Understanding the New Institutional Architecture of EU Financial Market Supervision', Draft, 20 Nov. 2010, <www.ssrn.com>.
84 Brussels, 6 Sep. 2010, 13179/10, EF 92, ECOFIN 499, SURE 39, CODEC 772.
85 See n. 51.

(i) European Systemic Risk Board (ESRB),[86] which will identify, monitor, and assess potential threats to financial stability arising from macroeconomic developments and from developments within the financial system as a whole ('macro-prudential supervision');

(ii) ESFS, comprising a network of national financial supervisors working with new European supervisory authorities (ESAs) to safeguard financial soundness at the level of individual financial institutions and protect consumers of financial services ('micro-prudential supervision').

In the new regulations, it was decided not to set up a centralized European regulator but instead to maintain supervision by national regulators at a national level, overseen by ESAs.[87] The primary task of the ESRB is to oversee macro-prudential supervision within Europe. The European Central Bank has been given a key role in this process. The Board will not be assigned any binding powers but will instead only be able to issue warnings and recommendations. The role that this new body actually gains will depend very much on application practice. In addition, whether it will genuinely have an influence in emergencies will depend on the body's informal authority, given that it has no formally binding powers. Overall, the new package provides for a complicated structure, which will require intensive coordination. It remains to be seen whether this new architecture is sufficiently robust to achieve the necessary changes.

The main outlines of the structures for the three regulations to establish the ESAs, namely EBA, EIOPA, and ESMA, are the same. The difference compared with the institutional structure operating before 2011 is that the European networks (the 'level 3 committees') have been converted into these ESAs, with substantial powers to take binding decisions. These new authorities have powers to:

(i) devise and propose technical standards (a single technical rule book), which will be put to the Commission for endorsement;[88]

(ii) issue guidelines for interpretation with which the national supervisory authorities will make every effort to comply in their decision-making;[89]

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[86] Regulation (EU) No. 1092/2010 of the European Parliament and of the Council of 24 Nov. 2010 on European macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, OJ 2010, L 331/1.

[87] For a discussion of the system, see N. Moloney, 'EU Financial Market Regulation after the Global Financial Crisis: "More Europe" or More Risks?', *Common Market Law Review* 47 (2010): 1317–1383, and Ferran, n. 83.

[88] Articles 10–15 Regulation 1093/2010.

[89] Article 16 Regulation 1093/2010.

(iii) facilitate and coordinate actions of national supervisory authorities in the event of emergencies;[90]
(iv) temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union;[91]
(v) take binding decisions in the event of disagreements between national supervisory authorities;[92]
(vi) support and guide the functioning of colleges of supervisors;[93]
(vii) give advice and deliver opinions to the Commission and the European Parliament, both in response to requests and otherwise;[94]
(viii) issue instructions to national supervisory authorities in the event of failure to comply with European obligations and, if these instructions are not complied with, to issue specific instructions to the relevant financial institution.[95]

Although the original idea had been to grant these supervisory authorities themselves powers to adopt binding technical standards, this was not included in the final text. These powers are now reserved for the Commission, which will adopt a single technical rule book at the instigation of the ESAs.[96] This binding single technical rule book represents a significant step towards far-reaching harmonization of essential standards and, therefore, of national implementing practices. This, in turn, will result in less divergence.

The regulations include significant and binding procedures for resolving disputes between national regulators and for decision-making in emergencies in order, for example, to prevent situations such as Icesave. It is the Council that first has to determine whether an emergency situation exists, in response to a request by the ESA, the Commission, or the ESRB.[97] Where the Council has adopted such a decision, and also in exceptional circumstances where coordinated action by national authorities is necessary in order to respond to adverse developments that may seriously jeopardize the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union, the ESA

90 Article 18, para. 1, Regulation 1093/2010.
91 Article 9, para. 5, in conjunction with Art. 1, para. 2 and Art. 18, para. 2 Regulation 1093/2010.
92 Articles 19 and 20 Regulation 1093/2010.
93 Article 21 Regulation 1093/2010.
94 Article 8, para. 2 under g, Regulation 1093/2010.
95 Article 17 Regulation 1093/2010.
96 Articles 10 and 15 Regulation 1093/2010, including a rather complex procedure for establishing the technical rules and standards.
97 According to Art. 18, para. 2, Regulation 1093/2010.

may adopt individual decisions requiring competent authorities to take the necessary action.[98]

4.5 EUROREGULATORS: COMPARISON OF TASKS AND POWERS

Looking at the structure and powers of these new European vehicles, the European regulatory networks would seem to have been placed in a more solid structure. There is, however, no centralized European control. In other words, the regulators are not real 'Euroregulators'. Lavrijssen and Hancher describe these new entities as 'network plus'.[99] Although the term 'regulators' is used in this article for the sake of convenience, it is very much the question as to whether these entities should actually be categorized as regulators, both in view of their governance structure (see section 4.5.1) and given their tasks and powers (see section 4.5.2).

4.5[a] *Governance Structure*

From a perspective of the governance structure chosen, it could indeed be asked what exactly the European dimension is. Power is and remains concentrated at the level of the national regulators as these bodies can substantially influence the European regulator at a Board level. This applies particularly in the case of BEREC, given that it has a Board of Regulators comprising one member from each Member State and this member is the head of the national regulatory body in the Member State.[100] A similar structure has also been adopted for the European financial authorities, where the Board of Supervisors consists of a significant degree of the heads of the national regulators (the members appointed by the European Central Bank and the Commission do not have voting rights). In the case of the energy regulators, the Commission and the European Parliament have more influence, given that they can directly appoint members (with voting rights) of the Administrative Board.[101]

Although these new entities do enjoy a certain degree of independence, the national bodies have a major influence on the new European regulators, thus transferring problems existing at a national level to the European level.[102] Given

[98] Article 18, para. 3, Regulation 1093/2010.

[99] Lavrijssen & Hancher.

[100] Article 4, paras 1 and 2, Regulation 1211/2009.

[101] Article 12 Regulation 713/2009. In addition, there is the Board of Regulators (see Art. 14), comprising representatives of the national regulators and the Commission (the latter again without voting rights). The relationship between these two bodies is not entirely clear from the Regulation.

[102] A differing view has been expressed by Chiti, who believes that these new authorities enjoy a certain degree of independence, specifically vis-à-vis producers, consumers, and political institutions such as the Commission. He does not, however, address the influence of national governments on these

the influence of the national supervisors, one could wonder how 'European' they will actually prove to be. This will have to be assessed in the light of their future performance. If this structure is compared with, for example, that of the European Data Protection Supervisor, referred to by the European Court in the *Commission v. Germany*[103] as a perfect example of complete independence, the question arises as to whether these structures are, in practice, sufficient to safeguard independence.

4.5[b] *Tasks and Powers*

The tasks and powers of the European dimension also need to be viewed in perspective. The tasks of the European bodies are primarily of an advisory nature and not very different from the advisory roles of the European networks of regulators. Admittedly, the advisory role is now more embedded, with the opinions given having quite some weight and having to be taken into proper account by the Commission. The tasks of BEREC in the communications sector are solely of an advisory nature and it has no authorization to take binding decisions. The advice it gives, however, is not wholly without obligation as the Commission 'shall take the utmost account' of any advice, recommendation, and guidelines.[104]

As discussed, however, some of these new European bodies – ACER and the ESAs – also have the right to issue binding decisions. The new financial regulators have various substantive and binding powers, with one of the major new binding instruments being what is referred to as the 'knight's move'. The ESAs have direct powers to issue a binding decision on a financial undertaking if a national regulator fails to take such action and thus infringes direct applicable[105] EU law, in this way *overstepping* the national regulatory authority. This represents an innovative and effective instrument, alongside the opportunity available to the Commission under Article 258 TFEU to initiate infringements procedures, for avoiding an enforcement deficit at a national level. This represents a significant move towards greater centralization.

However, there is more. In addition to this new instrument for individual cases, the new European regulation for supervising credit rating agencies provides for a real transfer of almost *all* supervisory powers from the national supervisors to

bodies. See E. Chiti, 'An Important Part of EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies', *Common Market Law Review* 46 (2009): 1395–1442.

103 C-518/07, *Commission v. Germany* [2010] ECR I-0000. See A.T. Ottow, 'Independence of National Supervisory Authorities', The Europa Institute Working Papers 02/10 (Utrecht, 2010).

104 Article 3, para. 3, Regulation 1211/2009.

105 Article 17, para. 6, Regulation No. 1093/2010. This power can only be exercised in respect of relevant requirements that are 'directly applicable to financial institutions'.

ESMA.[106] The result of this transfer is genuine centralization of the supervision of credit rating agencies. Until 1 July 2011, the supervision of these financial agencies was the responsibility of the national regulators (e.g., the Authoriteit Financiële Markten (AFM) in the case of the Netherlands), but the new regulation assigns full supervisory responsibility to ESMA. ESMA is to be given extensive powers, including the right to impose sanctions.[107] A similar centralization at a European level is expected to occur in other areas, such as in Over the Counter (OTC) derivatives, clearing, and settlements. In other cases, however, the European financial supervisors have only an advisory role.

4.5[c] *Meroni Issues*

The *Meroni* doctrine[108] is an important element to be considered when establishing European regulatory authorities and assigning tasks and powers to such bodies. The issue at stake in *Meroni* involved the Commission delegating its discretionary powers to a body established under private law.[109] The conventional view on the ruling in this case is that the Commission is not entitled to delegate powers involving a discretionary element to European bodies, such as the newly established European regulators. As far as the Commission's proposals to establish these new bodies in the various sectors are concerned, it can generally be stated that these 'Euroregulators' have powers of a purely technical and advisory nature and no regulatory tasks, let alone powers involving any element of discretion. The Commission has clearly been mindful – in the light of the *Meroni* case – not to grant any regulatory powers to the European financial authorities. Instead, they can only propose draft rules (such as technical standards) to the Commission, which can then decide whether to endorse them.[110] Similarly, it is only the Council and not the ESAs, as had originally been intended, that is authorized to take a decision in an emergency. The right to take an individual decision in respect of an individual financial institution may prove contentious as this could constitute the exercising of discretionary powers, and that would conflict with the ruling in the *Meroni* case.

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106 Regulation (EU) 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No. 1060/2009 on credit rating agencies, OJ 2011, L 145/30.

107 Article 36 Regulation 513/2011.

108 C-5/56, *Meroni* [1958] ECR 133.

109 See, for example, H. van Meerten & A.T. Ottow, 'The Proposals for the European Supervisory Authorities (ESAs): The Right (Legal) Way Forward?', *Tijdschrift voor Financieel Recht* 12, nos 1 and 2 (February 2010): 11–15, including the references.

110 See Arts 10–15 Regulation 1093/2010. The Commission can amend draft rules only in certain specific circumstances. The European Parliament and the Council may object to the Commission's endorsement of these standards (Art. 13).

An important question is whether greater transparency and accountability of the European authorities can resolve the problems identified in the *Meroni* case.[111] The requirement for independence needs to be matched by a requirement for sufficient transparency – in other words, a need for accountability.[112] This is to ensure that the various bodies are subject to proper control.[113] Important new provisions to guarantee proper control are included in most of the arrangements, albeit not always to the same extent.[114] Take, for example, the ESAs. The new regulations contain substantial procedures on transparency and accountability, which were not available when the Court of Justice ruled on the *Meroni* case. In the EBA Regulation, for example, it is not only the involvement of the European Parliament in several procedures that is foreseen.[115] The Union budgetary procedure is also applicable, while consultation procedures with important stakeholders have been included[116] and new appeal and judicial review mechanisms[117] have been introduced. All in all, the establishment of these new bodies cannot be compared with the situation in the *Meroni* case as sufficient safeguards have been put in place to compensate for the substantial independence of these authorities.

4.5[d] *Role of the Commission*

The Commission is clearly playing an important role in this process of Europeanization, also as the director of the new architecture that is being put in place. Furthermore, the Commission's influence on all these new structures is considerable. As well as attending meetings of the European networks as an observer, it is represented (as a voting or non-voting member) on the boards of the

111 A useful discussion of Meroni from an accountability perspective can be found at <www.eu-newgov.org/database/DELIV/D04D40_WP_Meroni_Revisited.pdf>.

112 See, for example, Curtin, 88–119; E. Vos, 'Reforming the European Commission: What Role to Play for EU Agencies?', *Common Market Law Review* 37 (2000): 1113–1134.

113 See, for example, Art. 15, para. 5 and Art. 16, para. 8, Regulation 713/2009 (ACER) and Art. 5, para. 5 and Art. 13 Regulation 1211/2009 (BEREC).

114 Recent research into European agencies has shown that although in many cases little fault can be attributed to the mechanisms of accountability, mistakes are sometimes made in the actual control activities by those responsible for supervising the European institutions. See M. Busuioc, 'European Agencies: Pockets of Accountability', in *The Real World of EU Accountability. What Deficit?*, eds M. Bovens, D. Curtin & P. 't Hart (Oxford: Oxford University Press, 2010); and M. Busuioc, *The Accountability of European Agencies: Legal Provisions and Ongoing Practices* (Delft: Eburon, 2010). See also M.L.P. Groenleer, *The Autonomy of European Union Agencies. A Comparative Study of Institutional Development* (Delft: Eburon, 2009).

115 Articles 34 and 50 Regulation 1093/2010, for example.

116 See, for example, Art. 10, para. 1 and Art. 37 Regulation 1093/2010, which introduce a new body (the Banking Stakeholders Group) that has to be consulted on important new technical standards and rules.

117 Articles 60 and 61 Regulation 1093/2010: appeal procedure with a Board of Appeal and to the Court of Justice.

European regulatory authorities, while also being able to intervene in decisions and draft decisions and having a role in adopting technical standards. In this way, it serves to a certain degree as a counterweight to the new European regulators, in part under the watchful eye of the Council and the European Parliament. For the Commission, the Euroregulators act as an important vehicle for obtaining greater control over national regulators, even though the influence that these national regulators have on the European bodies remains considerable. However, the issue of vesting powers in European bodies without the Commission being able to exercise any influence still remains a taboo subject.[118]

5 CONCLUSION: TENDENCY TOWARDS MORE CENTRALIZATION

How should we regard these new structures? The crucial question is whether these structures are sufficient, given the needs and features of the relevant markets and the cooperation structures already in place. In the case of the communications market, for example, the Commission already has considerable influence on decision-making at a national level (under the procedure provided for in Article 7 of the amended Framework Directive). The question also arises as to whether this sector actually needs a central control mechanism. Although most (but not all) of the players certainly operate very internationally, the markets themselves still have a largely national and sometimes even local focus. Knowledge and expertise of national regulators is, therefore, vital. The Commission had originally far more ambitious plans and wanted to concentrate more 'power' at a European level. For reasons of national politics, however, these proposals were scaled down significantly, and the result is clearly a political compromise.

The situation in the financial sector is very different. Against the background of the financial crisis, the proposals put forward by the European Commission would seem not to go far enough and there is a clear need for more centralized, European control. The current proposals are complex and will result in extensive problems of coordination and slow decision-making. Although genuinely independent supervision is needed at a European level, the legal basis provided by the treaties is, in effect, too narrow and the Commission is still bound by the restrictions imposed by the ruling in the *Meroni* case. The internationalization of the financial markets demands a more robust, genuinely centralized European supervisory architecture. European legislation recently introduced in relation to credit rating agencies has transferred almost all powers, including enforcement

[118] Chiti, 1434. This is also evident from the Communication from the Commission to the European Parliament and the Council, European Agencies – The Way Forward, Brussels, 11 Mar. 2008, COM(2008) 135 final.

powers, from the national supervisors to the European authority, ESMA. This transfer represents a break with the past and a major step towards real centralization. More powers can be expected to be shifted in the near future from level 1 to level 3, thus giving substantial powers to the new European financial authorities.

More attention needs to be devoted to the issue of independence from the Member States in order to prevent a focus on national interests, as well as to the issue of independence from the Commission and the Council as political bodies within the EU. The same applies – albeit to a slightly lesser degree – to the energy markets, where there is a need for substantial cooperation and where European solutions are needed to deal with the problems that the markets will have to contend with in the future.

As the above shows, there are many variants and degrees in the Europeanization of supervision. There is no single supervisory model being applied across all the various sectors. Instead, it is a slow process of growth,[119] although this process has significantly accelerated in the past two years. The European landscape of market supervision has changed dramatically. The question is whether the absence of a single supervisory model is actually a bad thing. My conclusion is that it is precisely the absence of a fixed model within Europe that allows the required degree of flexibility.[120] The question of whether a European regulator is necessary depends in part on the structure and features of the specific market. In a dynamic, highly internationally oriented market, the need for a European regulator of this nature would seem more obvious than in situations where markets are still very much nationally focused. In addition, the enforcement structure put in place needs to take account of the risks in the specific situation. If these risks are limited or arise primarily at a national level, opting for a European model would not seem the most obvious route to pursue. In such circumstances, the existing networks of national regulators provide sufficient cohesion for aligning national practices and for allowing national markets to function smoothly, with here and there a corrective mechanism from Brussels. To some extent, therefore, the arguments for complete centralization need to be viewed in perspective. At the same time, however, the absence of an effective European structure for those markets requiring central control, such as the financial markets, is clearly felt. In view of international developments and the risks involved, these markets require a higher degree of centralization. It is purely a question of time, therefore, before here, too, a new phase of Europeanization begins. In addition, the most recent legislation represents, in any event, a significant step forward.

[119] Thatcher & Coen, 2008.

[120] Chiti advocates a model in which the powers are assigned beyond the Commission's sphere of influence. See Chiti, 1438–1442.

Overview of Powers		
Level 1 – Commission vis-à-vis National Regulators		
Consumer protection	National regulatory authorities must notify the Commission of intra-Community infringements, enforcement measures (Articles 7.1 and 7.2 of Regulation 2006/2004), coordination of market supervision (Article 9.3 of Regulation 2006/2004), and reasons for rejecting a request for mutual assistance (Article 15.5 of Regulation 2006/2004). In some cases, the Commission is authorized to deliver an opinion under the procedure provided for in Article 19 of Regulation 2006/2004. Supervision is provided for via a system of 'home state control'.	
Financial sector	The Commission must be informed of any authorization granted or withdrawn (Articles 14 and 17.2 of the recast Banking Directive) and of any precautionary measures imposed (Article 33 of the recast Banking Directive). After consulting the competent regulatory authorities in the relevant Member States, the Commission may order the Member State to amend or withdraw these measures.	
Competition	National competition authorities have to notify the Commission if they take action pursuant to Articles 101 and 102 TFEU (Articles 11.3 and 11.4 of Regulation 1/2003). The Commission can respond to such notification by making observations or by relieving the competition authority in the Member State of its competence to deal with the case (Article 11.6 of Regulation 1/2003).	
Telecommunications	*Ex ante* supervision: The Commission is authorized to comment on national regulators' draft measures (Article 7.3 of the amended Framework Directive), while also having the right to veto certain draft measures (Article 7.4 of the amended Framework Directive).	
Energy	*Ex post* supervision: The Commission may request national regulators to amend or withdraw a decision (Article 17 of Regulation 714/2009 and Article 48 of Directive 2009/73/EC). If a Member State fails to comply with this request, the Commission itself is, in some cases, authorized to take a final decision.	
Level 2 – Networks of Regulators		
Financial sector	At level 2 of the Lamfalussy process, the Commission proposes implementing measures for a framework directive.	At level 3 of the Lamfalussy process, the CEBS, CEIOPS, and CESR advise the Commission on the proposed implementing measures.

Overview of Powers		
Competition	The Commission is authorized to relieve a national competition authority of its competence to act (Article 11.6 of Regulation 1/2003).	The national competition authorities (joined in the ECN) are authorized to inform each other of cases on which they are acting, to refer cases to each other, to exchange information for use as evidence, and to carry out inspections for each other (Articles 11, 12, 13, and 22 of Regulation 1/2003).
Consumer protection		The national regulatory authorities (as members of the CPC Network) are obliged to provide each other with mutual assistance. This may involve exchanging information (Articles 6 and 7 of Regulation 2006/2004) or taking enforcement measures (Article 8 Regulation 2006/2004).
Level 3 – European Regulators		
Telecommunications	The Commission must take the utmost account of advice, recommendations, guidelines, and so on (Article 3.3 of Regulation 1211/2009).	BEREC is authorized under various procedures in the communications directives to deliver opinions to national regulators and the Commission (Article 3.1 Regulation 1211/2009).

Overview of Powers		
Energy		ACER is authorized to give advice to transmission system operators, regulators, and the European Parliament, the Council, and the Commission (Article 4 of Regulation 713/2009). ACER is also authorized to take decisions on certain technical matters and decisions on which the national regulators have been unable to reach agreement, as well as to grant certain exemptions and derogations (Articles 7, 8, and 9 of Regulation 713/2009).
Financial sector	The Commission is authorized to endorse binding technical standards (Articles 10 and 15 of Regulation 1093/2010). The Council will take decisions in the event of an emergency (Article 18 of Regulation 1093/2010).	EBA, EIOPA, and ESMA are authorized to devise and propose technical standards (Articles 10 to 15 of Regulation 1093/2010), to take binding decisions in the event of disputes between national regulators (Articles 19 and 20), to support the colleges of supervisors (Article 21), and to give advice to the Commission and the European Parliament, both in response to requests and otherwise (Article 8). EBA, EIOPA, and ESMA can impose a binding decision on a financial institution if a national regulator continues to infringe European law by failing to take measures (Article 17).