ESMA Inspecting: The Implications for Judicial Control under Shared Enforcement

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The European Securities and Markets Authority (ESMA) has received considerable academic attention for its newly acquired regulatory powers and the issues of legitimacy and controls concerning its far-reaching powers. ESMA's supervisory tasks are not less impressive but they are underinvestigated. In light of the recent English judgment on the exercise of ESMA's inspection powers in the UK, this article focuses on the question of judicial control over inspection power of ESMA. It shows that judicial control has been established in principle. However, the existing legal framework based on different national procedures allows ESMA escaping judicial control by chance or on purpose. This article argues for the necessity of addressing the identified controlling gap by, for instance, eliminating the differences or conditioning inspection-related discretion and promoting judicial cooperation. Since EU and national enforcement powers have become increasingly shared, the system of control cannot remain completely separated, as it is the case today. How the EU supervisor is to be controlled should not be up to the EU supervisor to choose.

I. Introduction

The European Securities and Markets Authority (ESMA) has received considerable academic attention for its newly acquired regulatory powers, also thanks to the judgment of the Court of Justice of the European Union (CJEU), which upheld ESMA's regulatory powers.[1] Not less impressive are ESMA's supervisory powers. These however have been so far overlooked. This is unfortunate from two perspectives.

First, this topic could contribute to the already 'abundant literature'[2] on the proliferation of EU agencies and their powers, where the delegation of enforcement powers to EU agencies (European Aviation Safety Agency (EASA), European Fisheries Control Agency (EFCA), European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)) and relevant implications hereof are quite new and understudied issues.[3] ESMA is the

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1 M. Scholten & M.P.M. van Rijsbergen (2014a) 'The ESMA-short selling case: erecting a new delegation doctrine in the EU upon the Meroni-Romano remnants', *Legal Issues of Economic Integration*, 41 (4), pp. 389–406. M. Scholten & M.P.M. van Rijsbergen (2014b) 'The Limits of Agencification', *German Law Journal*, 15, pp. 1223-1256. M. Chamon, (2014) 'The empowerment of agencies under the Meroni doctrine 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), pp. 393-395. P. Iglesias-Rodríguez (2014), *The Accountability of Financial Regulators. A European and International Perspective*, Alphen aan den Rijn: Kluwer Law International; M. Busuioc (2013), 'Rule-making by the European Financial Supervisory Authorities. Walking a Tight Rope, *European Law Journal*, 19(1), pp. 111-125; N. Moloney (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(1), pp. 41-86.

2 E.I.L. Vos (2014), European agencies and the composite EU executive, in: M. Everson, C. Monda & E. Vos (eds.), *European Agencies In Between Institutions And Member States* (European Monographs, 85), Alphen aan den Rijn: Kluwer Law International, p. 13; M. Egeberg & J. Trondal (2011), 'EU-level Agencies: New Executive Centre Formation or Vehicles for National Control?', *Journal of European Public Policy*, 18(6), pp. 868 -887; E. Chiti (2009), 'An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies', *Common Market Law Review*, 46(5), pp. 1395–1442; D. Curtin (2007), 'Holding (Quasi-)Autonomous EU Administrative Actors to Public Account', *European Law Journal*, 13(4), pp. 523-541, to name but a few.

3 M. Scholten, 'Mind the Trend! The enforcement of EU law is moving to "Brussels"', conference paper presented at the International Conference on Public Policy (ICPP), July 2015, Milan, (www.icpublicpolicy.org/conference/file/reponse/1434098876.pdf) (last check January 2016); A.T. Ottow (2012), 'Europeanization of the Supervision of Competitive Markets', *European public law*, 18(1), pp. 191-221.

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strongest EU agency enjoying both regulatory and supervisory powers; the latter concerns all stages of enforcement (monitoring, investigating, sanctioning).[4] Its supervisory powers are direct, i.e., vis-à-vis private parties (not national supervisors).[5] ESMA *registers* credit rating agencies (CRAs) and trade repositories (TRs) and *monitors* whether they comply with EU law or not. When necessary, ESMA can *investigate* these companies and *impose fines* for violating EU law. ESMA's enforcement arsenal includes the competences to examine and take copies of any relevant records and materials, ask for oral explanations, summon and hear persons, require telephone and data traffic records, and interview persons. ESMA's strong enforcement powers enhance the already existing concerns about EU agencies' legitimacy and accountability. Since the EU Treaties do not regulate the enforcement power of the EU, the concern in terms of legitimacy is whether such powers can be lawfully regulated by the EU legislator, including given to actors which are again hardly mentioned in the Treaties (agencies). Concerning accountability, EU secondary law granting enforcement tasks to ESMA falls short on regulating who holds ESMA to account for its enforcement tasks and how. ESMA's accountability obligations derive from its founding regulation, which regulates largely ESMA's regulatory power, but not its supervisory powers.

Second, researching supervision by ESMA contributes to the growing literature on mixed administration of enforcement.[6] ESMA (next to two institutions, the Commission and the European Central Bank[7]) belongs to a relatively new type of EU supervisors, namely those who enjoy powers to carry out all earlier mentioned stages of direct enforcement.[8] However, these EU supervisors have to collaborate with national authorities, such as national supervisors and courts. In the mixed administration of enforcement, questions have arisen concerning the ability to afford legal protection and judicial control of decisions and actions taken by a mix of EU and national authorities (*Tillack* and *Borelli*). Has the strengthening of EU supervisors been accompanied with ensuring judicial control and legal protection for the parties under direct supervision by EU supervisors?

This article aims to contribute to the aforementioned strands of literature by addressing the underinvestigated question of judicial control over the *inspection power* of ESMA. ESMA's inspections take place at the national level and according to national law. Interconnection between EU and national legal orders complicates the issue of control. The article analyses the first application by ESMA to the Chancery Division of the England and Wales High Court requesting authorization to inspect premises of a TR.[9] The EU regulatory framework subjects ESMA's inspections to potential national procedural requirements. According to English law, ESMA had to apply for an authorisation from the judge to make an on-site inspection to a TR. The judge convened a hearing, which the trade repository could attend and where it could be heard, and after that granted the

4 G. Rowe (2009), Administrative supervision of administrative action in the European Union, in: H. Hofmann & A. Türk (eds.), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, Edward Elgar Publishing, pp. 136-167. W. Duk (1999), *Recht en Slecht: Beginselen van Algemene Rechtsleer*, Ars Aequi Libri.

5 With an exception of the Commission in the field of competition law, EU institutions and agencies supervise the transposition and application of EU law by national authorities, not by companies and individuals.

6 J. Jans, S. Prechal, & R. Widdershoven (2015), *Europeanisation of Public Law*, Europa Law Publishing. M. Eliantonio (2014), 'Judicial review in an integrated administration: the case of "composite procedures"', *Review of European Administrative Law,* 7(2), pp. 65-102. H. Hofmann (2009), 'Composite Decision-Making Procedures in EU Administrative Law' in: H. Hofmann & A. Türk (eds.), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, Edward Elgar Publishing, pp. 136-167. A. Türk (2009), 'Judicial review of integrated administration in the EU', in: H. Hofmann & A. Türk (eds.), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, Edward Elgar Publishing, pp. 218-256; G. Della Cananea (2004), 'The European Union's Mixed Administrative Proceedings', *Law and Contemporary Problems*, 68, pp. 197-217.

7 Concerning the ECB, on the basis of Article 4 and Chapter III of the SSM Regulation (1024/2013), it is *inter alia* exclusively competent to authorise and to withdraw authorisations of credit institutions (registration), to ensure compliance with prudential requirements (monitoring), to take early intervention measures, to conduct on-site inspections, to assess acquisitions and qualify holdings (investigation), as well as to impose pecuniary penalties on credit institutions, financial holding companies, or mixes financial holding companies under its supervision should they be found to contravene the applicable acts of Union Law (sanctioning). The Commission's enforcement powers are similar but may differ from sector to sector where it may share some of the enforcement powers with EU agencies (e.g. EASA, EFCA and EMA).

8 This article is a part of the ongoing project of Renforce on 'verticalization of enforcement' and accountability. There, we have analysed all EU policy areas to conclude that only three entities in the EU enjoy powers to exercise all stages of direct enforcement.

9 The case can be found at www.bailii.org/ew/cases/EWHC/Ch/2015/1085.html, Case No: HC-2015-001218, (last check January 2016).

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authorization. In light of this example, we opine that judicial control over ESMA's inspection power has been established in principle. However, since national procedural requirements are allowed to differ, ESMA may (purposely) escape such a control. Furthermore, ESMA's discretion concerning inspection-related issues is not conditioned. The negative implications include forum shopping by ESMA and by the financial market participants.[10]

In this light, the inspection procedure of ESMA also provides some insights for the accountability literature concerning the question of how legal accountability can work in a multi-level legal order. Operations before the national court form a 'meantime' accountability check by the national judge over the EU supervisor before the actual action (inspection) takes place. This example is valuable in terms of showing how at least a part of the accountability of an EU supervising agency can be organised in a multi-level legal order, which is so far an under-studied domain.[11]

We start by introducing ESMA's supervisory powers as well as the stages of its supervisory process (II). Then, we discuss the issue of judicial control over inspection powers in light of the recent English judgment concerning the inspection phase of ESMA's supervisory procedure (III). Section IV analyses judicial control over ESMA's inspection power. Section V concludes the article. Along with legal texts, policy documents and academic scholarship, the analysis of this article builds upon a traineeship experience conducted at ESMA between January and June 2015.

II. ESMA Supervising

1. Powers and Legal Framework

The aftermath of the 2008 financial crisis saw the creation of ESMA, together with the other two financial agencies,[12] which have been established in 2010 to contribute to a consistent application of Union legislation and to the establishment of high-quality common regulatory and supervisory standards and practices. ESMA's objectives include establishing a sound, effective and consistent level of financial regulation and supervision and preventing regulatory arbitrage and promoting equal conditions of competition (Article 1 of its founding regulation No 1095/2010). ESMA is the only EU agency with direct enforcement powers vis-a-via private parties (not national supervisors). The legal framework includes its founding regulation[13] (the 'ESMA Regulation') as well as other EU instruments: Annex I of 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 (also known as EMIR) and Annex III of Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies (also known as the CRA Regulation/CRAR). These regulations give ESMA the ultimate responsibility to deal with the registration/authorization and supervision of TRs and CRAs respectively.[14]

Stages and possibilities

How does ESMA supervise? Four stages can be distinguished and are depicted in the below figure.



The first stage is *registration* of TRs and CRAs, which ESMA will subsequently monitor. Concerning trade repositories, in March 2013, ESMA first received applications for registration. In November 2013, ESMA assessed the compliance of the applications with the requirements set out in EMIR. In December 2013, it registered six TRs.[15] Registration by ESMA means that the TRs can be used by EU counterparties to derivative transactions to fulfil their trade reporting obligations under EMIR.[16] The regis-

10 M. Luchtman & J. Vervaele (2014), 'European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office)', *Utrecht Law Review*, 10(5), p. 142.

11 Y. Papadopoulos (2007), 'Problems of democratic accountability in network and multilevel governance', *European Law Journal*, 13(4), pp. 469-486.

12 European Banking Authority (EBA) and European Insurance and Occupational Pensions Authority (EIOPA).

13 Participation in and coordination of colleges of supervisors (article 21), identification and management of systemic risk and the development of resolution structures, in cooperation with the ESRB (articles 22–27), promotion of a common supervisory culture (article 29), peer review (article 30), supervisory coordination (article 31), market assessment (article 32), and information-gathering (article 35).

14 Communication from the Commission, *European Financial Supervision,* Brussels, 27 May 2009, COM(2009) 252 final, p. 11.

15 See www.esma.europa.eu/supervision/trade-repositories/list-registered-trade-repositories (last check January 2016).

16 Case No: HC-2015-001218, para 3.

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tration and certification of CRAs has been a responsibility of ESMA for a longer time, so the list of the registered CRAs is longer: as of this writing, 38 registered and four certified CRAs.[17] ESMA registers or certifies new entities upon application.

The second stage is *monitoring* the registered entities on compliance with EU law. ESMA currently has one special department who controls them. This is the Supervision Department in which individual officers are responsible for monitoring individual companies on a daily basis. CRA policy work is integrated into the Investors & Issuers Department, while TR policy work sits within the Markets Department.[18]

The third stage is *investigation*, which potentially consists of two steps.[19] First, ESMA teams perform supervisions and investigations. They may request information in accordance with Article 61/23b, carry out general investigations in accordance with Article 62/23c, or conduct on-site inspections in accordance with Article 63/23d EMIR/CRAR. Second, if these supervisory teams, as part of their investigations in a given case, find serious indications for the infringements listed in Annex I or III of EMIR/CRA-regulation respectively, they inform the Executive Director. The latter appoints, by decision, a person within ESMA as independent investigation officer (IIO) to further investigate the matter (Articles 64(1)/23e(1) EMIR/CRAR). The IIO is a member of the Legal, Cooperation and Enforcement Department within ESMA, but has not been involved directly or indirectly in the supervision or the registration process of the TR or CRA concerned. He thus performs his functions independently from ESMA's Board of Supervisors.[20]

The IIO investigates the alleged infringements, taking into account any comments submitted by the persons who are subject to the investigations. He reviews and examines whether the evidence is conclusive. Where further investigations are necessary or appropriate, he may use the same powers as ESMA's supervisors,[21] such as requesting information and inspecting CRAs' or TRs' business premises.[22]. The IIO decision to request information, to carry out a general investigation or to inspect is appealable for the TR or CRA concerned at the Board of Appeal, which is a joint body of the three ESAs (Article 60(1) of the ESMA Regulation). The TR or CRA also has the possibility to bring proceedings before the CJEU in order to contest a decision taken by the Board of Appeal (Article 61(1) ESMA Regulation).

In the case of an on-site inspection, ESMA officials may carry it out without prior announcement, but are required to inform the competent authority of the Member State concerned (Articles 61 to 63 EMIR and Articles 23b to 23d CRAR). Instead of carrying out an on-site inspection itself, the IIO or ESMA can also request national supervisory authorities to carry out inspections on its behalf or to assist the ESMA officers carrying out an inspection. The IIO will make findings on the commission of infringements and may recommend measures or fines to be imposed for those infringements. The affected party will be given the opportunity to make submissions on the IIO's findings. He will duly consider such submissions before submitting any findings and the file on which they are based to ESMA's Board of Supervisors.[23]

The final stage is *reporting* and *sanctioning*. On the basis of Articles 64(2) EMIR and 23e(2) CRAR, the IIO submits a complete file with his findings to the Board of Supervisors of ESMA[24] and must notify that fact to the persons subject to investigation. The Board first takes a decision on the completeness of the file and then assesses whether it agrees with the IIO's findings. The Board subsequently determines a reasonable time within which the affected party shall make written submissions, reviews these submissions, and may invite relevant persons to attend an oral hearing. Ultimately, the Board takes a final decision in which it decides whether the person under investigation has committed one or more infringements listed in Annex I or Annex III EMIR/CRA-Regulation. The Board's decision also lays down which supervisory measure(s) it will take.

17 www.esma.europa.eu/page/List-registered-and-certified-CRAs (last check January 2016)

18 See the recently updated organigramme: www.esma.europa.eu/about-esma/esma-in-short/esma-organigramme (last check January 2016)

19 ESMA refers to these two phases as 'supervisory investigation' and 'IIO investigation', see: www.esma.europa.eu/supervision/enforcement (last check February 2016)

20 Articles 64(1) EMIR and 23e(1) CRAR.

21 Articles 64(2) EMIR and 23e(2) CRAR

22 www.esma.europa.eu/supervision/enforcement (last check February 2016).

23 Ibid.

24 The Board of Supervisors is composed of ESMA's Chairperson, the heads of the national public authority competent for the supervision of financial market participants in each Member State, one representative of the Commission, one representative of the ESRB, and one representative of each of the other two European Supervisory Authorities.

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Supervisory measures vary from, amongst others, requiring the trade repository or credit rating agency to end the infringement and possibly imposing periodic penalty payments; to imposing fines; to issuing public notices; and as a last resort, to withdrawing the registration of the trade repository or credit rating agency (Articles 73 EMIR and 24 CRAR.). In the case of CRAs, the Board of Supervisors may also temporarily prohibit the credit rating agency from issuing credit ratings with effect throughout the Union, until the infringement has been brought to an end (Article 24(1)(b) CRAR) and suspend the use, for regulatory purposes, of the credit ratings issued by the credit rating agency with effect throughout the Union, until the infringement has been brought to an end (Article 24(1)(c) CRAR). The TR or CRA concerned has the right to appeal the Board of Supervisor's decision taking supervisory measures and/or imposing fines at the ESA Board of Appeal. It also has the possibility to bring proceedings before the CJEU in order to contest a decision taken by the Board of Appeal. Hence, both the IIO's inspection decision and the ESMA Board of Supervisor's decision to fine are appealable.

So far, ESMA has completed two investigations,[25] which resulted in issuing a public notice only[26] or in combination with a fine (€30,000, €64,000 and €1.38 million)[27] In these investigations, ESMA did not use on-site inspections requiring authorization by a national judge, which it did in the case discussed later.

III. Judicial Control over Administration; ESMA before the English Judge

1. Judicial Control in the Mixed Administration in the EU

Administration should be procedurally and substantively accountable before the courts. This idea has been central to the rule of law.[28] "The remedy against an overbearing, improper or corrupt government is the organisation of 'checks and balances', of institutional countervailing powers."[29] Courts are given the power to request that account be rendered over particular aspects: administration has to provide relevant information about its actions to the court, court hearings provide the possibility for justifications and discussion, and the court judgment establishes the consequences.[30] While legal accountability is considered as "the most unambiguous type of accountability, as the legal scrutiny will be based on detailed legal standards <...> or precedent,"[31] the EU mixed administration poses challenges to it.

The European judicial architecture was, in principle, "designed to follow the logic of a system of executive federalism."[32] In such a system, general and abstract rules would be adopted at the EU level, while the implementation and application of those rules would be the responsibility of the Member States. At the national level, national laws and procedures would apply, which is preserved from the national sovereignty perspective realised via the principle of national procedural autonomy (*Greek Maize*[33]). Private parties would be entitled to question the validity of EU law or national law which transposes EU law in the national courts against the national authorities, which had applied them. In addition, in case the Commission was entrusted with the application of EU rules, individuals would be given direct access to the European Court to contest their validity if the standing requirements were met.[34] The principle of effective judicial protection requires that individuals have the opportunity to enforce all rights conferred on them by Union law before a court.[35]

However, the development of the EU legal order has led to a more complex system of EU administrative governance.[36] It is characterised by intensive co-

25 The low number of conducted investigations could be explained by the fact that ESMA is a young agency (since 2011 in operation). Its first priorities have been internal organization and the completion of a single rulebook. Supervisory convergence is among its new targets (for 2016-2020).

26 www.esma.europa.eu/sites/default/files/library/2015/11/2014-544_-_decision_supervisory_measure_articles_23e_and_24_of_regulation_1060-2009.pdf (last check January 2016).

27 www.esma.europa.eu/sites/default/files/library/2015/11/2015-1048.pdf (last check January 2016).

28 P. Craig (2012), EU administrative Law, Oxford University Press, p. 251.

29 M.A.P. Bovens (2007), 'Analysing and Assessing Accountability: A Conceptual Framework', *European Law Journal*, 13(4), p. 463.

30 Ibid.

31 Ibid, p. 456.

32 Türk (2009), supra fn 6, p. 218.

33 Case 68/88 Commission v Greece (Greek Maize) [1989] ECR 2965, para 24.

34 Türk (2009), supra fn 6, p. 218.

35 R. Ortlep and R. Widdershoven, 'Judicial protection', in: J. Jans, S. Prechal and R. Widdershoven (eds.), *Europeanisation of Public Law*, Europa Law Publishing, p. 333.

36 Türk (2009), supra fn 6, p. 218.

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operation between administrative actors from the national and EU levels.[37] The involvement of national administrations in the decision-making processes of the EU and the participation of EU actors in the implementation of EU law in the national legal systems have added to the difficulties which individuals already face within the current judicial architecture.[38] On top of that, shared enforcement has been growing; EU and national supervisors enforce EU law together, which also poses challenges to the system of judicial control.[39] What law and court (EU vs. national) is competent for what part of administrative processes? Such cases as *Tillack* and *Borelli*[40] show that the legal accountability in the EU is not as unambiguous as it may seem.

2. Judicial Control of ESMA's Inspection Power

As mentioned above, EU law establishes judicial control over ESMA's inspection power. When the independent investigation officer wishes to exercise the power to request records of telephone or data traffic referred to in point (e) of Articles 23c(1) CRAR or 62(1) EMIR[41] or any inspection powers on the basis of Articles 23d CRAR or 63 EMIR,[42] he first has to determine whether the exercise of such powers (or the assistance provided by a national competent authority in case a person opposes an inspection) requires authorisation from a judicial authority according to national rules. Where that is the case, such authorisation shall be applied for. The authorisation may also be applied for as a precautionary measure (Articles 23c(5) CRAR and 62(5) EMIR). For both regulations (the EMIR and CRAR), "the national judicial authority shall verify that ESMA's decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask ESMA for detailed explanations. Such a request for detailed explanations may in particular relate to the grounds ESMA has for suspecting that an infringement of this Regulation has taken place, as well as to the seriousness of the suspected infringement and the nature of the involvement of the person who is subjected to the coercive measures" (Article 63(9) + 62(6) EMIR and Article 23d(9) + 23c(6) CRAR). The CJEU has the power to check the necessity of the inspection. In light of the first application of ESMA before the English judge, we focus further on this application, relevant national rules and procedures.[43]

In the beginning of 2015, ESMA applied for authorisation to carry out an inspection at the premises in England of DTCC Derivatives Repository Limited (DTCC), which is a TR,[44] for the first time. As of this writing, the investigation is ongoing, so no public information is available as to the reasons for suspicion on the side of ESMA. DTCC was notified of the inspection and indicated that it would cooperate fully with the visit by the ESMA officials.[45] Although the visit would therefore be conducted with the consent of DTCC, ESMA was still required to come with an authorisation from the High Court (Financial Ser-

37 Ibid.

38 Ibid.

39 Scholten (2015), supra fn 3.

40 In *Tillack*, the European Courts held that the forwarding of information by OLAF was not a reviewable act under EU law. They considered it to be for the national courts to provide judicial review of measures potentially infringing individual's rights. However, the Belgian courts rejected the application of Mr. Tillack on the basis of the understanding that they were not authorized to review the correctness of information provided by European institutions and bodies. Mr. Tillack was thus unsuccessful in seeking judicial protection in both the Belgian courts and EU Courts. In *Borelli*, the CJEU claimed to have no jurisdiction to decide about the legality of a national authority's decision, even when the latter was part of an EU decision-making procedure and was decisive for the outcome of a final Commission decision. The CJEU found that it was irrelevant to the question of admissibility of an action for annulment that under Italian law Borelli had no remedy against the negative opinion expressed by the national authority.

41 Articles 23c(5) CRAR and 62(5) EMIR.

42 Articles 23d(8) CRAR and 63(8) EMIR.

43 Note that according to Article 267 TFEU, any national court or tribunal may refer a question concerning the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union to the Court of Justice of the European Union. This theoretically includes the decisions from EU agencies, but it is questionable whether this would materialize in practice. National court would be likely to ask ESMA directly (Article 63(9) EMIR). Such a request may in particular relate to the grounds ESMA has for suspecting that an infringement has taken place, as well as to the seriousness of the suspected infringement and the nature of the involvement of the person who is subjected to the coercive measures. Besides, the preliminary reference procedure is not relevant at all in cases where an EU authority does not have to request authorization from a national judicial authority. This procedure would not offer any additional protection to a party under investigation.

44 According to article 2(7) of EMIR 'trade repository' means a legal person that centrally collects and maintains the records of derivatives.

45 Case No: HC-2015-001218, para 1.

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vices and Markets Act 2000 (Over the Counter Derivatives, Central Counterparties and Trade Repositories) Regulations 2013 (S.I. 2013/504) ('the Domestic Regulations')[46](para 1)). Regulation 17(3) provides that the High Court may grant authorisation for the purposes of paragraph (1) or (2) if satisfied, on an application made to the High Court in accordance with rules of court by ESMA or the FCA, that a) ESMA has initiated an Article 63 inspection; and b) the Article 63 inspection would be neither arbitrary nor excessive having regard to the subject matter of the inspection. The High Court must conduct this assessment in accordance with Article 63(9) of the EMIR regulation, and may exercise the powers conferred by that paragraph for the purposes of making its assessment (Regulation 17(4)). The UK has a similar rule requiring authorisation regarding CRAs (Rule 33).[47]

On the 18th of March 2015, a public hearing between ESMA and DTCC took place at the Chancery Division of the High Court of Justice. Interestingly, DTCC did not appear and was not represented. At the hearing, Mrs Justice Rose has seen a number of documents (para 11-12):

- the decision adopted by ESMA on 17 February 2015 requiring DTCC to submit to an inspection. The decision did not provide for the use of any coercive measures such as the power to seal business premises and it did not grant the power to request record of telephone data and traffic. It did set out the two matters that would be investigated during the inspection and gave the location, date and subject thereof. It also did set out the powers that the persons authorised could exercise, it informed DTCC of the potential periodic penalty payments under Article 66 of the EMIR if they would not submit to the inspection or if they would provide incorrect or misleading answers to questions, it informed DTCC of its right to appeal to the Board of Appeal and from there to the Court of Justice of the European Union, and it annexed the text of Article 66 of EMIR.
- the authorisation by ESMA of five named people who were vested with the powers set out in the decision. The authorisation described the purpose of the investigation and referred to the power to impose a periodic penalty if DTCC would not submit to the inspection.
- the email exchange between ESMA and the Director of Legal & Compliance at DTCC showing that DTCC had been informed of the date of the inspection and that they intended to cooperate with it.
- the letter from ESMA to the Chief Executive of the FCA informing him of the forthcoming inspection; its date, subject and location and explaining in general terms the two matters that will in particular be investigated.

Having seen all this documentation, Mrs Justice Rose was satisfied that it was appropriate to grant authorisation for this inspection (para 13). The only amendment she made to the draft order that was provided was to state that the inspection is subject to Article 60 of the EMIR relating to the non-disclosure of legally privileged information and documents (para 13). She considered that a reference should be made to this important safeguard on the face of the documents, which are presented to the company. In this way, she exercised her power to ensure that the inspection would be neither arbitrary nor excessive having regard to its subject matter.

As an additional remark, in the discussed case, ESMA has decided to make an inspection and applied for the authorisation because the national law obliged it to do so. In this light, the issue seems to be quite straightforward as to which court is relevant and for what purposes. However, we would like to draw the readers' attention to the fact that more complex questions of jurisdiction and judicial protection in general may arise in the case of shared enforcement procedures, as was the case with the landmark cases *Tillack* and *Borelli* as well as the European Medicines Agencies (EMA) before the English judge in 2014.[48] Concerning the latter, the Medicines and Healthcare Products Regulatory Agency (MHRA), EMA's national counterpart in the UK, conducted an inspection to a pharmaceutical company in light of relevant EU law and part of the information from that inspection was given to EMA for the ongoing infringement procedure. The English judge faced, among other things, the question of on what national court could rule. Interestingly, in EMA's opinion, the national court had

46 www.legislation.gov.uk/uksi/2013/504/regulation/17/made (last check January 2016)

47 www.legislation.gov.uk/uksi/2011/1435/pdfs/uksi_20111435_en.pdf (last check January 2016)

48 The case can be found at http://1exagu1grkmq3k572418odooym.wpengine.netdna-cdn.com/wp-content/uploads/2014/07/Roche-Limited-v-MHRA.pdf, Case No: CO/393/2014, (last check February 2016)

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no jurisdiction at all, while MHRA and the national judge were more careful in drawing the boundaries. The question of the defendant illustrated the challenge quite well: "are the courts of this country entitled to evaluate whether the conduct of public authorities in this country is lawful in circumstances where those public authorities are acting in support of an investigation by institutions of the EU?" (para 80). The national court nicely drew a borderline:

> the challenge is to the acts of a domestic body exercising national powers. The basis for that challenge is an alleged misunderstanding by the domestic body of EU law, but there is no reason in principle why the national court cannot interpret and apply EU law. And even if the Court was being invited to rule that an act of an EU institution was invalid, it would still have jurisdiction – either to rule that the act was valid or to make a reference. Nor does the fact that a question of construction may yet come before the Commission necessarily deprive the national court of jurisdiction (though it may limit the national court's powers). (para 92) <...> The question is not so much one of substantive jurisdictional entitlement, but rather a question as to how that jurisdictional entitlement should be exercised. (para. 96).[49]

It is important to note, however, that EMA has no inspection powers on its own,[50] it relies on its national counterparts to conduct the inspections. In other cases, such as the one with ESMA, EU supervisors and national authorities may share these powers, which could complicate the issue of judicial control – which court has the control over inspection and according to which rules?, Will the party under inspection have access to that court?, Will the court be able to access all the necessary files from supervisors of two legal orders?, to name but a few.[51]

IV. Is ESMA's Inspection Power under Judicial Control?

We opine that ESMA's inspection power can be under judicial control, but the existing legal framework allows ESMA escaping it, which should be redressed for the purposes of the 'rule of law'. The challenge to the judicial control is twofold: the differences between national laws and procedures and the unconditioned discretion characterising ESMA's inspection power. The challenge comes from having 'double discretion' or 'discretion²', which is formed from national discretion to establish controls over EU supervisors (or not/and which type) and EU supervisors' discretion on where to inspect and by whom (EU or national supervisor).

When ESMA registers, monitors and sanctions, it acts on its own and follows EU law. Its actions are controlled by EU law, the ESA Board of Appeal, and the Court of Justice of the European Union. The question of control becomes intriguing when ESMA inspects, which requires interaction with national law and/or authority. EU law subjects ESMA's inspection power to judicial control at the national (arbitrariness check) and EU (necessity check) levels. In the discussed case, both controls can take place. The requirement to apply for a national authorization could be classified as a 'meantime' accountability check upon ESMA. The national court receives the (requested) information from an EU supervisor, discusses it with him, and the EU supervisor faces consequences: receiving an authorization or not.[52] The national judge holds the agency to account with regard to the arbitrariness of its inspection. Interestingly for the accountability literature is that this accountability check takes place *ex ante*, i.e., before the inspection.[53] Also, it is exercised at the national level (by the national judge) but with regard to the EU supervisor for the exercise of EU powers and law. Furthermore, the requirement upon ESMA to apply for an authorization offers judicial protection to a party under investigation against the possible abuse of power by an investigating authority. The protection is offered at the seemingly most appropriate level (national) in terms of proximity and acquaintance to the party concerned, at least from a perspective of the existing shared legal order. Since the investigation is ongoing, the English judge only has so far checked ESMA's inspection power. The existence of such national checks however is subject to national discretion, which is the first challenge to the system of judicial control over ESMA and to legal protection.

49 Ibid.

50 Ibid. para 94.

51 Eliantonio 2014, supra fn 6.

52 Bovens (2007), supra fn 29.

53 Ibid; R. Mulgan (2003), *Holding Power to Account: Accountability in Modern Democracies*, Palgrave Macmillan; R. Behn (2001), *Rethinking Democratic Accountability*, Brookings Institution Press.

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"This dependency on national law leaves room for differences between the Member States and in practice such differences do exist."[54] This concern is a bit more traditional in the sense of the question on the impact of differences among the Member States in enforcing EU law for the effectiveness of EU law.[55] The EU regulatory framework (Regulation (EU) No 513/2011 and Regulation (EU) No 648/2012) subjects ESMA to national procedural requirements but neither does it regulate these procedures nor does it set up a minimum level of protection. In the UK, the relevant national law imposed an obligation upon ESMA to apply for an authorization before a specific court, because it would be "wrong to seek an order which imposes sanctions in the event of non-compliance without notice and without a hearing."[56] It is against the values of a 'rule of law' state. However, what if this is not the case?

If this was not the case, ESMA would escape the discussed accountability check by the national court by chance (if another jurisdiction happens to have no such authorization requirements) or on purpose (if ESMA would choose to inspect in a jurisdiction where no such authorization requirement exists). The latter creates a risk of abuse of discretion. In any case, the question is if the arbitrariness check would take place at all. The EU law prescribes it specifically for the national court. Will the Court of Justice make such a check for those cases where the national check has not happened? All in all, ESMA can (choose to) be either less or more accountable for the same tasks depending on the jurisdiction in which an inspection takes place.[57]

An investigation into the relevant national requirements as regards specific sectors where different EU supervisors have been established could determine to what extent differences cause accountability problems, but this falls outside the scope of this article. As an example, "in the Netherlands the possibility (not an obligation) to apply for a prior judicial authorisation has been introduced in the area of competition law, but in practice most inspections by the competition authority are still conducted without such authorisation."[58] Outside the area of competition law, for instance in the area of banking and financial market supervision, the possibility of applying for a prior judicial authorisation does not exist at all.[59] This means that every inspection in this area is conducted without a prior judicial authorisation.[60] Furthermore, similar to the case of ESMA, EU law prescribes a prior national judicial assessment of an inspection by the European Central Bank with regard to the excessiveness, *if* the national law of a Member State requires such authorisation.[61] The latter is not the case in the Netherlands where the judicial check on the arbitrariness of inspection takes place after the imposition of a fine[62], which would be imposed and hence challenged at the EU level.

Concerning ESMA and its supervisory responsibilities in relation to CRAs and TRs, differences among national rules could be less of a problem if it is considered that "ESMA's powers over rating agencies are extensive, but they are confined to a small sector of the capital markets".[63] The head offices of ESMA's major potential suspects[64] are situated in London. However, CRAs and trade repositories have subsidiary offices in different (EU) countries and nowadays information has been increasingly shared and kept online. The rules can thus differ for these subsidiaries situated in other national jurisdictions (of the EU). The respective EU regulations do not regulate mutual recognition of (negative) judgments. This means that in those cases when the physical lo-

54 L. Wissink, T. Duijkersloot & R. Widdershoven (2014), Shifts in Competences between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection, *Utrecht Law Review*, 10(5), p. 110.

55 R. Van den Bergh (1998), Subsidiarity as an economic demarcation principle and the emergence of European Private Law, *Maastricht Journal of European and Comparative Law*, 5, pp. 129-152.

56 Case No: HC-2015-001218, para 15.

57 For a similar problem with regard to the EPPO, see Luchtman & Vervaele (2014), supra fn 10.

58 Wissink et al. (2014), supra fn 54, p. 110.

59 Ibid. See also: www.afm.nl/nl-nl/professionals/doelgroepen/adviseurs-bemiddelaars/toezicht-onderzoek/onderzoek (last check January 2016).

60 Wissink et al. (2014), supra fn 54, p. 110.

61 Ibid. See also Article 13 of the SSM Regulation.

62 Jans et al. (2015), supra fn 6.

63 N. Moloney (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(2), p. 207.

64 Currently four out of the six registered TRs are London-based, see para 138 of 'ESMA supervision of Credit Rating Agencies and Trade Repositories. Annual Report 2014 and Work Plan' available at: www.esma.europa.eu/sites/default/files/library/2015/11/esma-2015-280_cra_and_tr_annual_report_2014_and_supervisory_work_programme_2015.pdf (last check January 2016).The "Big Three" CRAs, namely Moody's, Standard and Poor's, and Fitch still dominate, even though far more agencies now operate in Europe to offer competition; they all are situated in London (ESMA supervision of Credit Rating Agencies and Trade Repositories Annual Report 2014 and Work Plan: www.esma.europa.eu/supervision/credit-rating-agencies/risk (last check January 2016).

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cation of a financial market participant is irrelevant, instead of deciding to inspect in London or after a negative decision from the English judge, ESMA could try to make an inspection to a subsidiary in another Member State, which may have less or no national checks upon ESMA.[65] The forum shopping also has a reverse side: it may be used by companies who could choose those jurisdictions for their premises where the EU supervisor could face the most obstacles when it plans an on-site inspection.[66]

The possibility of forum shopping by ESMA raises a more general question of control over ESMA's discretion, which is the second challenge to judicial control. ESMA's inspection power is not subjected to specific conditions regarding 1. the jurisdiction in which it will inspect the offices of a suspected company and 2. as to whether to conduct an inspection on its own or to request its national counterpart to do that on its behalf.[67] These choices have implications for the questions of judicial control, i.e., what court (EU or national) will be able to hold whom to account, for what exactly and what are the procedural safeguards that parties under investigation will enjoy. If a national supervisor was to conduct the inspection, would the national court also be restricted in its review on the question of arbitrariness of the inspection or would the national court also review the necessity of the inspection? Discretion, which is not subjected to clear conditions as to when it should be used and how, complicates the *ex post* check. The judge has no *ex ante* reference level - i.e., conditions on how ESMA has to select the appropriate national jurisdiction to inspect companies with multiple offices and conditions on when ESMA has to ask a national supervisor to inspect on its behalf - to check against.[68] Judicial control can be circumvented and limited, especially when the courts adopt a policy of 'judicial restraint' and do not consequently interfere with the substance of the exercise of official discretion.[69]

V. Conclusion

This article has explored the recently established and so far under-studied domain of EU supervision by EU agencies and the implications that shared enforcement has for judicial control over agencies' enforcement powers, more specifically the power to inspect.

ESMA has been given a complete set of direct enforcement powers: it registers relevant private bodies, monitors their compliance with EU law in its policy domain, potentially investigates suspicious cases, inspects premises of the suspected companies and imposes sanctions for non-compliance. Generally, EU law has set up a system of judicial control over ESMA's inspection power: the arbitrariness of ESMA's inspection is to be checked at the national level and the necessity check is to be done by the CJEU. Looking more specifically however, the system of control is not waterproof. The allowed national procedural differences can result in accidental differences and possibly in gaps of judicial control or, what is perhaps more worrying, in circumventing controls on purpose by using unconditional discretion in the selection of jurisdictions for inspection or to delegate inspection to ESMA's national counterparts.

ESMA's objectives include a sound, effective and consistent level of financial regulation and supervision, preventing regulatory arbitrage and promoting equal conditions of competition, and fostering supervisory convergence. Can ESMA achieve these objectives in the discussed organization of shared enforcement? The fact that the control over ESMA's supervisory tasks depends on national rules, which are allowed to differ, shows that the system does not equalize all conditions for competition (i.e., safeguards in the course of an investigation) and runs a risk of inconsistencies in financial supervision and convergence. As a result, the irony is that the supervision system does not necessarily respect the values, which it wishes to promote. While the supervisor has been given the responsibility to establish strict operational requirements for the participants of the financial

65 Luchtman & Vervaele (2014), supra fn 10, p. 142, 149.

66 Ibid.

67 In this light, another relevant question becomes whether the delegation of the inspection power is lawful in the first place in the sense that if it conforms the ESMA-short selling case (C-270/12). There, the Court allowed delegating discretionary (decision-making) powers to ESMA as long as the discretion is limited (Scholten and van Rijsbergen (2014a), supra fn 1, p. 394). Concerning the inspection power, no 'delineating conditions' have been imposed on ESMA to make the specified choices.

68 M. Scholten (2014), The Political Accountability of EU and US Independent Regulatory Agencies, Brill.

69 Rowe (2009), supra fn 4, p. 187. "The question here is whether administrative supervision should extend to the examination of the evaluative judgment operating in such cases and of the substance of discretionary decisions, as well as of the purely legal limits of discretionary action."

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markets, the 'supervision over the supervisor' may differ from jurisdiction to jurisdiction.

Respect for national sovereignty and the principle of national procedural autonomy are behind the existing legal framework, which allows for national procedural differences in relation to ESMA but also other EU supervisors. The framework needs however further elaboration for it to ensure an *equal* (at least minimum) level of legal protection for the parties under investigation and a *common* way of holding EU risk regulators to account. We do not say that the UK-type authorizations should be obligatory for all, though the UK procedure demonstrates nicely how to ensure protection of the parties under investigation and safeguards a national accountability check over the EU supervisor. If the differences continue to exist, what is important is to limit the negative implications from having the differences for holding an EU supervisor to account. Thus, for instance, the EU legislator[70] or an intergovernmental attempt could establish rules for mutual recognition of (negative) judgments among the Member States (based on the principle of loyal cooperation (Article 4 (3) Treaty of the European Union)) and make it clear as to when an EU or national inspection should take place on the basis of what laws and safeguards (EU-national). In this light, the EMIR and CRA-Regulation could, for instance, include a prohibition to inspect in any jurisdiction without prior judicial authorization if ESMA has received a negative judgement at the national level. They could oblige national courts to consider at least each other's judgments, if not also to reason their opinions, when they differ from the already existing decisions of other national judges, which could lead to judicial cooperation and enhancing legal certainty. Also, these regulations could include a set of criteria on when ESMA should (or not) ask a national authority to inspect, or at least an obligation to give reasons in its decision to inspect as to why ESMA intends to inspect itself or delegates this action in the specific case. As Shapiro explains,

> "Giving reasons requirements are a form of internal improvement for administrators. A decisionmaker required to give reasons will be more likely to weigh pros and cons carefully before reaching a decision than will a decisionmaker able to proceed by simple fiat. <...> Such requirements are a mild self-enforcing mechanism for controlling discretion."[71]

"Giving reasons requirements are an obvious vehicle for transparency,"[72] which is a prerequisite to accountability.[73] Because the decision to inspect can be appealed first before the Board of Appeal and then before the CJEU, ESMA's reasoning (and hence discretion) could then also form part of the judicial review. ESMA has no obligation to justify its choice at this moment. This does not hence form part of judicial review. Anyhow, since EU and national powers have become increasingly shared, the system of control over EU–national risk regulators cannot remain completely separated, as it is the case today. In this light, the upcoming regulation modifying Europol is a good example of how controls could be joint; the proposal, which is likely to be approved in April 2016 by the European Parliament,[74] established an unpreceded so far joint parliamentary scrutiny group consisting of members of the European and all national parliaments.[75] Regulating risks certainly necessitates giving discretion to the regulators and supervisors. At the same time, discretion involves risks, too, which necessitates proper mechanisms of control. How the EU supervisor is to be controlled should not be up to the EU supervisor to choose.

70 This could also take part in the future EU administrative act discussed within the Research Network on EU administrative law (ReNEUAL).

71 M. Shapiro (1992), 'The Giving Reasons Requirement', University of Chicago Legal Forum 1992, 179-221, p. 180-181.

72 Ibid, p. 220.

73 "There can be no accountability without transparency; rather accountability presumes transparency as a precondition" (L. Verhey, M. Claes and H. Broeksteeg (2008), Political Accountability in the European Union: Conceptual Analysis and Future Prospects, in: L. Verhey, H. Broeksteeg and I. van den Driessche (eds.), Political Accountability in Europe: Which Way Forward?: A Traditional Concept of Parliamentary Democracy in an EU Context, Groningen: Europa Law Publishing, p. 316.)

74 www.europarl.europa.eu/news/en/news-room/20151130IPR05456/Europol-deal-on-new-powers-to-step-up-EU-police-cooperation-and-fight-terrorism (last check February 2016).

75 www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0096+0+DOC+XML+V0//EN (last check February 2016).

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