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In the Aftermath of the Crisis – The EU Administrative System Between Impediments and Momentum

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Abstract
The European responses to the financial and public debt crisis have triggered a process of administrative reorganisation and growth in the governance of the internal market in financial services and economic and monetary union. Such a process is characterised by four main tensions, referring respectively to: the powers conferred on the satellite administrative bodies established in order to tackle the crisis; the jurisdictions of the new administrations; the degree of centralisation which is sought within the new mechanisms for the implementation of EU laws and policies; and to the accountability mechanisms. The effects of such tensions are deeply ambivalent. On the one hand, they might operate as 'fault lines' within the EU administrative machinery. On the other hand, by pointing to a host of unsolved issues in EU administrative law, they provide an opportunity for opening a genuine institutional and scientific discussion on the ways in which the EU administrative system should be adjusted or reformed.

Keywords: Euro crisis, administrative law, administrative reorganisation

I. A PROCESS OF REORGANISATION AND GROWTH

The European responses to the financial and public debt crisis have not only set in motion a number of processes which are reshaping certain fundamental features of the Member States and European Union (EU) polities,[1] they have also determined a

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[1] On the many facets of the impact of the European responses to the Eurozone crisis on the constitutional structures of the EU Member States see the working papers prepared for the workshop on 'Constitutional Change Through Euro Crisis Law', mentioned above, first footnote, and available at http://eurocrisislaw.eui.eu/working-papers/constitutional-change/ [last accessed 6 October 2015]. The implications of the European responses both to the financial and public debt crisis on the EU constitutional structures are explored by E Chiti and PG Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis' (2013) 50 (3) *Common Market Law Review* 683; M Ruffert, 'The European Debt Crisis and European Union law' (2011) 48 (6) *Common*

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remarkable transformation of the EU administrative system, here meant as the whole of EU, national and mixed structures and processes functionally oriented to implement EU laws and policies.[2] Indeed, the EU and its political actors have rapidly identified in the EU administrative machinery an instrument of integration, or at least, an instrument to avoid disintegration. In the last six years, within the internal market of financial services and the economic and monetary union (EMU), they have created new administrative bodies, delegated new and more incisive powers to EU administrations, expanded the scope of action of EU administrations. In brief, the attempts to tackle the crisis have triggered processes of administrative reorganisation and growth within two crucial sectors of the EU.

This is a largely unnoticed development, which European legal studies have been so far reluctant to recognise and investigate. Yet, it raises some important questions on the evolution of the overall EU administrative system. What is the inner dynamic of the ongoing process of administrative transformation? In what direction is such sectoral process driving the EU administrative machinery and its law? And how can we assess the current developments?

This essay argues that the process of reorganisation and growth of the EU administrative machinery within the single financial market and EMU is characterised by a number of inherent tensions. When assessed in the light of their capability to improve the EU administrative capacities by the objective sought by EU actors, the effects of such tensions appear to be deeply ambivalent. On the one hand, they might operate as 'fault lines' for the whole EU administrative machinery, destabilising its functioning in two important fields of EU action. On the other hand, by pointing to a host of unsolved issues in EU administrative law, they provide an opportunity for opening a genuine institutional and scientific discussion on the ways in which the EU administrative system should be adjusted or reformed. The reality of administrative change, thus, is more nuanced than it is assumed to be by the EU actors.

The following sections will discuss four main tensions inherent to the process of transformation of the EU administrative machinery within the internal market of financial services and EMU. Such tensions refer, respectively, to the powers conferred on the satellite administrative bodies established in order to tackle the crisis (Part II), to the jurisdictions of the new administrations (Part III), to the degree of centralisation which is sought within the new mechanisms for the implementation of EU laws and policies (Part IV), and to the accountability mechanisms (Part V). It goes without saying that further tensions might be identified and provide a more precise account of the overall dynamic of the ongoing process of administrative

(F'note continued)
Market Law Review 1777; M Dawson and F de Witte, 'Constitutional Balance in the EU After the Euro-Crisis' (2013) 76 (5) *Modern Law Review* 817; P Craig, 'Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications' in M Adams et al (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing, 2014).

[2] For an explanation of this understanding of the EU administrative system, see E Chiti, 'La Costruzione del Sistema Amministrativo Europeo' in MP Chiti (ed), *Diritto Amministrativo Europeo* (Giuffrè, 2013).

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reorganisation and growth within the single financial market and the EMU. Yet, the four tensions that will be pointed to in the next sections are capable of shedding light on the challenges that the EU administrative system is currently facing. The final section will present some general conclusions.

II. POWERS

When considering the administrative arrangements laid down in the aftermath of the crisis, there is no escaping the overall impression that the EU is gradually reinforcing the regulatory and adjudicatory powers of its satellite administrations. New administrative bodies have been established beyond the European Commission, different from the models that have so far prevailed in the EU administrative system, and more powerful than the previous ones. Most importantly, the various measures adopted by the EU assume that the new bodies are not only responsible for the rational implementation of well-designed EU law and policies, but are also engaged in the political process of adjusting an increasingly greater range of conflicting claims; they make political choices. At the same time, however, the discretionary nature of the action carried out by the new EU administrations is not openly recognised, but somehow hidden or camouflaged, as a consequence of a restrictive interpretation of the constitutional framework governing the adoption of EU administrative measures. Moreover, the complex chains of administrative powers envisaged by the EU do not put the new administrations in the conditions to exercise effectively their new functions.

The result is a tension between two opposite forces, one driving towards the reinforcement of the powers of EU satellite administrations and the clarification of their discretionary nature, the other obstructing the effective exercise of these powers and presenting them as purely technical. Such tension gives rise to a number of legal and operational issues, which make the functioning of the new institutional arrangements relatively unstable. At a more general level, it encapsulates and promotes the idea that administrative change can be sought without taking clear-cut choices among various possible political and legal options. Comparative investigation of administrative law suggests that this approach is not likely to support the evolution and maturation of the EU administrative system.

Historically, the articulation of the political and legal preferences involved, their open discussion and the choice among different options, have been crucial factors of development for most western administrative systems.[3] There is no reason to consider that this should not apply to the EU administrative system, which is still in the process of defining its basic features, including the functional position of the European Commission and its relationships with the other EU administrations.

[3] On the relevance of ideology in the development of administrative systems see in particular JL Mashaw, 'Explaining Administrative Law: Reflections on Federal Administrative Law in Nineteenth Century America' in S Rose-Ackerman and PL Lindseth (eds), *Comparative Administrative Law* (Elgar, 2010), p 40. An application of this overall perspective can be found in JL Mashaw, *Creating the Administrative Constitution. The Lost One Hundred Years of American Administrative Law* (Yale University Press, 2012).

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The tension inherent to the new administrative arrangements, however, might also prove a fruitful one, as it offers an opportunity to reflect on the possible ways forward and calls to make clear choices on the powers to be granted to EU satellite administrations.

An example of the current situation is provided by the new arrangement for financial regulation. For the first time in the history of the internal market of financial services, the EU has expressly identified in administrative rule-making a fundamental instrument to establish a level playing field and an adequate protection of depositors, investors and consumers across the Union. While EU political institutions are responsible for the adoption of the so called 'level 1' measures, the Commission, acting on the basis of drafts developed by the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA), is called to adopt regulatory technical standards and implementing technical standards.[4] Administrative rule-making, therefore, is placed at the heart of the overall regulatory effort which is required to advance in the establishment of a single market of financial services. At the same time, though, administrative rule-making is called to operate within an imperfect regulatory chain. The distribution of tasks between the various rule-makers is based on an excessively rigid distinction between policy-making and technical decision-making, which is difficult to respect in the regulatory practice, as well as on an unclear articulation of administrative rule-making in regulatory and implementing technical standards. In the exercise of their regulatory action, the administrative rule-makers in the field of financial services, including the new European supervisory authorities (ESAs), meet a number of uneasy issues: is it really possible to distinguish in practice between policy-making and technical measures? How can the boundaries of technical decisions be identified? Is there a substantial difference between the available types of binding technical measures?

The establishment of an imperfect regulatory chain should not be taken as a minor imperfection of the ESAs establishing regulations. It rather reflects a more profound problem of institutional design. The arrangement set up by the establishing regulations, indeed, does not lay down a clear and stable architecture of the institutional relations between the various rule-makers. Rather, it suffers from a fundamental tension between two different visions of the relations among the rule-makers in the field: one recognising the potentialities of the ESAs as specialised regulators, the other minimising their regulatory role. On the one hand, the ESAs represent, within

[4] More precisely, the three European supervisory authorities have the task of developing draft regulatory technical standards, implying neither strategic decisions nor policy choices, in the areas within the scope of the powers delegated to the Commission under EU financial services law and in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU). Moreover, they may develop draft implementing technical standards in the areas where financial services law provides the Commission with powers for issuing uniform conditions for the implementation of EU law in accordance with Article 291 TFEU. See Articles 10–15 of the three establishing regulations: Regulation (EU) No 1093/2010 [2010] OJ L331/12; Regulation (EU) No 1094/2010 [2010] OJ L331/48; Regulation (EU) No 1095/2010 [2010] OJ L331/84).

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the overall rationale of the regulations, the best-equipped bodies to elaborate the specialised measures that are necessary to regulate the financial services area at the level of secondary measures.[5] In this sense, the new administrative regulatory powers represent a qualitative change not only in the administrative governance of the field of financial services, but also within the context of the wider EU administrative system, as European agencies and other satellite bodies have never before been put at the heart of the regulatory process of any sector of EU action.[6] On the other hand, as a consequence of a restrictive interpretation of the existing constitutional framework governing the adoption of sub-legislative regulatory measures, the procedural framework laid down by the regulations provides the ESAs with a regulatory role which is too narrow to allow them to exploit their potentialities as specialised regulators. Their action is limited to the adoption of draft regulatory measures and confined within the strict boundaries of purely technical decision-making, excluding the exercise of any discretion.

This fundamental tension is capable of conditioning the effective functioning of the single market of financial services. It excludes the possibility of finding, within the context of the ESAs establishing regulations, a set of operational solutions to the above mentioned questions concerning the interplay between level 1 and level 2 measures. It undermines the capacity of the various rule-makers to co-operate effectively in the establishment of an European single rule book applicable to all financial institutions. It makes ESAs action potentially subject to contestation.

It also provides, however, an opportunity to clarify the legal boundaries of the powers that the ESAs might be granted. This requires an open and fresh institutional discussion between the ESAs themselves, the European Commission, the Council and the European Parliament. Such discussion should not be necessarily oriented towards the amendment of the establishing regulations, although such possibility should not be excluded as a taboo.

As for the contents of the clarification sought, one could promote an interpretation of the establishing regulations which minimises the regulatory role of the ESAs. In this perspective, the ESA's regulatory tasks should be interpreted in such a way as to be perfectly coherent with a radically restrictive reading of the constitutional framework for the adoption of sub-legislative regulatory measures. According to such reading, Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU) require a direct and substantial action by the European Commission. Moreover, the *Meroni* and *Romano* rulings exclude, respectively, that European

[5] See, eg Recitals 21–23 of Regulation (EU) No 1093/2010 [2010] OJ L331/12, Regulation (EU) No 1094/2010 [2010] OJ L331/48, Regulation (EU) No 1095/2010 [2010] OJ L331/84.

[6] Of course, one might refer to several EU sectors in which European agencies exercise *de jure* or *de facto* rule-making powers, both through participation in the adoption of binding implementing rules and regulation by soft law. The ESAs, though, may be said to represent a qualitative change with respect to that practice in so far as administrative rule-making is one of the fundamental instruments through which the EU aims at guaranteeing the smooth functioning of the single financial market and the ESAs are openly recognised by the establishing regulations as the specialised regulators in the field. For a bird's-eye view of European agencies' rule-making, see E Chiti, 'European Agencies' Rule-Making. Powers, Procedures and Assessment' (2013) 19 (1) *European Law Journal* 93.

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agencies may adopt measures implying any kind of discretionary choice[7] and may be granted with rule-making powers.[8] ESAs' regulatory powers should be kept within those boundaries. This orientation, though, is not acceptable, as neither of the two interpretations of the constitutional framework on which it is based is correct. The first is unnecessarily restrictive. As happens with other equivalent Treaty provisions, such as Article 317 TFEU, the explicit reference to the European Commission's responsibility in delegating and implementing measures made by Articles 290 and 291 does not at all mean centralised action. More simply, it establishes a constitutional protection of supranationalism in the administrative implementation process. While the Commission's responsibility cannot be neutralised and has to be fully guaranteed, it can nevertheless be translated by the EU legislator in a variety of institutional arrangements, including arrangements exploiting the regulatory capacity of European agencies or other specialised administrations. As for the second reading, it is legally not sustainable to interpret *Meroni* in such a way as to exclude EU administrative bodies other than the European Commission from adopting measures implying a certain degree of discretion. This understanding of *Meroni* is contrary to the reality of the EU administrative system, which already relies on a great number of administrative bodies exercising different degrees of discretion, even when carrying out tasks that are apparently instrumental to the action of other national and EU public powers. It would also lead, if accepted, to the paradoxical conclusion that the EU cannot ensure the effectiveness of EU laws and policies by developing an administrative component of its executive power beyond the

[7] *Meroni v High Authority*, C-9/56, EU:C:1958:7; see also *Meroni v High Authority*, C-10/56, EU:C:1958:8. In the *Meroni* judgments, as it is well known, the Court of Justice traced a clear-cut distinction between two different hypotheses: on the one side, the delegation of purely executive powers, compatible with the Treaty; on the other side, the delegation of a discretionary power, which is not legitimate under Community law. Such restriction is based on the principle of institutional balance, which *Meroni* has recognised for the first time in the Community legal order. After a 50 year long silence, the Court has confirmed the *Meroni* doctrine in several judgments: see *The Queen, on the application of Alliance for Natural Health and Nutri-Link Ltd v Secretary of State for Health* and *The Queen, on the application of National Association of Health Stores and Health Food Manufacturers Ltd v Secretary of State for Health and National Assembly for Wales*, C-154/04 and C-155/04, EU:C:2005:449, para 90; *Carmine Salvatore Tralli v European Central Bank*, C-301/02 P, EU:C:2005:306; and *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, C-270/12, ECLI:EU:C:2014:18. See also *DIR International Film Srl, Nostradamus Enterprises Ltd, Union PN Srl, United International Pictures BV, United International Pictures AB, United International Pictures APS, United International Pictures A/S, United International Pictures EPE, United International Pictures OY and United International Pictures y Cía SRC v Commission of the European Communities*, T-369/94 and T-85/95, EU:T:1998:39, paras 52–53.

[8] *Giuseppe Romano v Institut national d'assurance maladie-invalidité,* C-98/80, EU:C:1981:104. According to this judgment, the Treaty provisions on the implementation of EC law and on the system of judicial protection excludes that an administrative body may be 'empowered by the Council to adopt acts having the force of law'. Among the recent contributions on this case-law, see in particular M Chamon, 'EU Agencies Between *Meroni* and *Romano* or the Devil and the Deep Blue Sea' (2011) 48 (4) *Common Market Law Review* 1055; and S Griller and A Orator, 'Everything Under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine' (2010) 35 (1) *European Law Review* 3.

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European Commission and European Central Bank (ECB). In a perspective of legal realism, the *Meroni* doctrine should therefore be interpreted as requiring that European agencies and other EU specialised agencies and bodies may be granted powers implying a certain degree of discretion, and more precisely a discretion framed by a previous EU legislative act in such a way to preclude an arbitrary exercise of power by the relevant EU body. One should also recall the recent *ESMA* case, in which the Court of Justice (ECJ) has held that powers 'precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority' comply with the requirements laid down in *Meroni.*[9] In the same judgment, the ECJ has clarified that it cannot be inferred from *Romano* that the delegation of powers to a body such as ESMA is governed by conditions other than those set out in *Meroni.*[10]

A different option is to exploit the ESAs' potentialities as specialised regulators in the field. This would be not only functionally justified, but also legally possible. Three main reasons suggest, from a legal point of view, a full exploitation of the ESAs' potentialities as regulators. Two of them have just been mentioned: the European Commission's responsibility in delegating and implementing measures envisaged by Articles 290 and 291 TFEU should not be meant as necessarily requiring centralised action; and *Meroni* cannot be interpreted in such a way to exclude EU agencies and bodies other than the European Commission from adopting measures implying a certain degree of discretion. The third reason is that the provision of a genuine regulatory role to the ESAs is inherent to the fundamental dynamics of the making of the single market of financial services. If the current phase of the making of the single financial market relies on a really effective single rulebook as a factor for further integration, and if the single rulebook requires key technical rules to be adopted through EU regulations, directly applicable in all 28 Member States and leaving no room for national choices, then the only way forward is to exploit the capacities of the ESAs as specialised regulators.

How to interpret and adjust the current institutional arrangements in such a way to exploit the regulatory capacities of the ESA is a question escaping the ambitions of this paper. Yet, at least the following paths could be explored. To begin with, it would be appropriate to institutionalise some form of involvement of the ESAs in the discussions on level 1 regulation, at least in order to define the scope and contents of ESAs mandates. In addition to this, a preference should be expressed for level 1 measures limiting the elements of discretion for the national competent authorities to those cases in which this discretion is really needed, and relying on the regulatory capacity of the ESAs to draft technical standards in the form of directly applicable

[9] *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, ECLI:EU:C:2014:18, paras 41–54, concerning the ESMA's power to adopt emergency measures on the Member States' financial markets in order to regulate or prohibit short selling.

[10] Ibid, para 66. For a point of view different from that expressed in the text, substantially critical of the judgment and deploring the rejection of *Romano*'s relevance beyond that of *Meroni*, see M Chamon, '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' (2014) 39 (3) *European Law Review* 380.

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Regulation. Moreover, a restrictive interpretation of the powers of the European Commission within the endorsement procedure should be promoted, which also implies self-restraint in the informal exchanges with the ESAs in the procedure leading to the elaboration of binding technical standards. Finally, one should also favour a balanced self-restraint by the European Parliament and the Council in the exercise of their power to object to regulatory technical standards.

III. JURISDICTIONS

In their attempts to tackle the crisis, the EU has established a vast array of EU administrative arrangements that are relevant for all Member States. This is the case, for example, for the ESAs established by EU legislative acts and called to co-ordinate the national supervisors within a 'European System of Financial Supervision'. A further example is provided by the new administrative framework envisaged by the reform of the Stability and Growth Pact (SGP) by the so-called 'Six Pack', based on the administrative supervision carried out by the European Commission on the fiscal and budgetary policies of all Member States. In several other instances, though, the EU actors have opted for administrative arrangements that have a limited jurisdiction, as they apply only to some Member States. For example, 18 of the 28 EU Member States participate to the European Financial Stability Facility (EFSF) and to the Treaty establishing the European Stability Mechanism (ESM), while 23 Member States are subject to the administrative framework of the Euro Plus Pact, and 25 countries operate within the context of the Treaty on Stability, Coordination and Governance in the EMU (TSCG). As these examples show, the administrative arrangements limited to certain Member States are sometimes established by legal sources that are not purely internal to the EU framework, but that combine EU law instruments with public international law instruments.

The EU responses to the crisis thus encapsulate a tension between two diverging moves, one towards the refinement of the administrative capacities of the EU as a whole, the other towards the establishment of administrative arrangements that apply only to a limited number of Member States, mainly the Eurozone countries. The result is a variable geometry administrative architecture. Not all EU Member States participate simultaneously to the various components of the administrative regulatory framework. A variety of administrative disciplines applicable to different groups of EU Member States are called to co-exist one next to the others. At the organisational level, moreover, the economic governance of the EU now relies on an arabesque of multiple administrative bodies, acting in different compositions and relevant to different groups of States. The main dividing line is that between administrative arrangements working for the EU as a whole and administrative arrangements working for the Eurozone countries only.

This situation has partly negative and partly positive effects. On the one hand, the working capacity of the EU administrative system cannot be taken for granted. Indeed, several positive law issues stem from the difficulties to manage the co-existence of administrative disciplines applicable to different groups of EU countries. At a more

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profound level, the emerging variable geometry might determine a loss of coherence in the overall EU administrative action and jeopardise the unity of the EU administrative system. On the other hand, the current situation opens the way to a discussion on the European administrative system as a project of institutional design, and in particular on the ways in which unity and differentiation may be combined within it.

One way to explore this tension is to refer to the Single Supervisory Mechanism (SSM). The SSM is a genuine novelty both at the constitutional and administrative level.[11] Its establishment is the most remarkable transfer of national competences to an EU institution after the explosion of the crisis. Moreover, it brings about an unprecedented centralisation of banking supervision tasks, which are now entrusted to the ECB.[12] As for its jurisdiction, which is the point that is here relevant, the SSM has a peculiar and interesting architecture. It is designed as an administrative arrangement as much as possible compatible with the EU administrative arrangements operating for the EU as a whole and potentially open to all Member States. But it operates primarily as an administrative mechanism internal to the Eurozone.

The open character of the SSM is testified by several aspects of the founding Regulation.[13] Article 127(6) TFEU, which was used as a legal basis, requires that the decision to adopt a Council Regulation is taken by all Member States, including Denmark and the UK, and may be interpreted not only as a monetary policy provision, but also as a single market clause, as banking supervision refers to competences relating to the provision of financial services. Most importantly, the founding Regulation attempts in a variety of ways to guarantee that the SSM, as an administrative arrangement of the Eurozone, is capable of harmoniously fitting within the administrative framework of the EU as whole.[14] As for the relations between the SSM and the EBA, for example, the SSM Regulation, on the basis of the recognition that the EBA substantially represents the single market regulator, requires the ECB to comply with the EBA's guidelines and recommendations. In addition to this, the ECB jurisdiction may be extended through the instrument of 'close cooperation'. The Member States from outside the Euro area may request to join the SSM. If a close cooperation is established between the ECB and the national supervisor of a Member State whose currency is not the Euro, the banks in that Member State are made subject to the supervision of the ECB.[15]

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[11] See the thorough analysis by PG Teixeira, 'Europeanising Prudential Banking Supervision. Legal Foundations and Implications for European Integration' in JE Fossum and AJ Menéndez (eds), *The European Union in Crises or the European Union as Crises?* (Arena Report Series, 2014).

[12] See eg M Clarich, 'I poteri di vigilanza della Banca centrale europea' (2013) 19 (3) *Diritto Pubblico* 975.

[13] Council Regulation (EU) No 1024/2013 [2013] OJ L287/63. See also Regulation (EU) No 468/2014 of the European Central Bank [2014] OJ L141/1.

[14] S Cassese, 'La nuova architettura finanziaria europea' (2014) 19 (1) *Giornale di diritto amministrativo* 79.

[15] For a short account of this mechanism, see M Clarich, 'Governance of the Single Supervisory Mechanism and Non-Euro Member States' in E Barucci and M Messori (eds), *Towards the European Banking Union* (Passigli, 2014).

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None of these elements, though, is capable of modifying the basic nature of the SSM as a Eurozone administrative instrument. Article 127(6) TFEU may be subject to wide interpretations, but it falls within the monetary policy chapter of the Treaty and is certainly internal to the regulatory framework of the single currency. The main supervisory tasks within the SSM have been conferred upon an EU institution, the ECB, whose jurisdiction is currently limited to the Member States within the Euro area. Close cooperation undoubtedly allows the extension of the SSM's jurisdiction beyond the Eurozone, but it does so through a legal arrangement which does not grant the Member States in close cooperation the same legal position as that of the Eurozone countries. For example, the 'close cooperation' is not a permanent arrangement and it may be terminated by either the SSM or the Member State.

The circumstance that the SSM is primarily destined to operate within the Euro area has at least one relevant implication. It accentuates the distinction between the Euro countries and the other EU members. The Eurozone countries and the other EU members are becoming two increasingly distinct groups of states because they are subject to partly different sets of administrative rules and may rely, in certain sectors (the monetary union and the internal market for financial services) on different administrative capacities.

This may be described as a process of internal differentiation of the European administrative system. As such, it is far from being a new development in EU administrative law. Internal differentiation has for long time been a distinguishing feature of the European administrative system. Yet, one should not miss the specific nature of the current evolutions. The process of internal differentiation of the European administrative system has traditionally concerned the techniques of administrative action available in the various fields of action (internal market, competition, social regulation, etc.). The establishment of the SSM and other administrative instruments internal to the Eurozone produces a different effect. What is currently taking place is not a process of differentiation of the administrative capacities available within different sectors, but a process of differentiation of the administrative capacities available to different groups of Member States within the same sectors. Indeed, the SSM operates across the single market of financial services and the monetary union, but it essentially applies to the Eurozone States. This is not, though, an entirely new phenomenon within the EU legal order. The European administrative system has already experienced forms of differentiation in relation to groups of States.[16] The monetary union itself has been designed since the beginning as a project inclusive and mandatory for all EU Member States, except for the UK

[16] The continuity between the past practices of differentiated integration and the current developments within the Eurozone is highlighted by several authors: see, eg J-C Piris, *It is Time for the Euro Area to Develop Further Closer Cooperation Among its Members* (Jean Monnet Working Paper 05/11, NYU School of Law) 24; B Laffan, 'European Union and the Eurozone: How to Coexist?' in F Allen et al (eds), *Governance for the Eurozone. Integration or Disintegration?* (Fic Press, 2012); J Emmanouilidis, *Which Lessons to Draw from the Past and Current Differentiated Integration?*, paper presented at the workshop *Challenges for Multi-Tier Governance in the EU*, European Parliament, 4 October 2012, available at http://www.europarl.europa.eu/document/activities/cont/201210/20121003ATT52863/20121003ATT52863EN.pdf [last accessed 20 July 2015].

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and Denmark, but also as a multi-speed project, allowing a differentiation between Euro countries and countries that have not yet adopted the Euro as their currency.[17]

What is important to notice, in any case, is that the emergence of forms of variable geometry within the European administrative system is a highly ambivalent process. The co-existence within the same sectors of EU administrative disciplines and organisations applicable to different groups of states is likely to raise uneasy legal issues in the near future. The interactions between the SSM and the EBA will offer an interesting case-study to test the actual capacity of the existing framework to prevent overlaps and conflicts between two instruments operating for different groups of countries. Most importantly, the co-existence within the same sectors of administrative arrangements involving different groups of States may affect the overall structure of the European administrative system. Two dangers are prominent. First, the deepening of the administrative integration between the Eurozone countries might jeopardise the unity of the EU sectoral regimes, such as the regulatory framework of the single market. Through the administrative capacities offered to them by the EU, different groups of countries are likely to develop, within the single market or another EU sectoral regime, different administrative practices, techniques of action, regulatory strategies and accountability instruments. For example, until the European Single Rulebook in the single financial market is fully realised, the SSM is likely to lead to a substantial unification of banking law within its jurisdiction.[18] While the search for administrative uniformity is not justified *per se*, administrative differentiation becomes problematic when it is not justified on functional or normative grounds. Second, at a more general level, the European administrative system might lose the minimum degree of its internal coherence that is granted by the simultaneous participation of all Member States to the various EU administrations. This would not be a minor shortcoming, given the traditional difficulties of the EU 'composite' executive power, made up of the European Commission, the Council and the Member States, in leading and orientating the functioning the EU administrative system.[19]

The emergence of forms of variable geometry within the European administrative system, however, might also have a positive effect. Indeed, the co-existence within the same sectors of administrative arrangements involving different groups of states offers the EU political institutions and legal scholars an interesting chance to reflect

[17] See, for a short account of differentiation within the EMU, T Beukers and M van der Sluis, *The Variable Geometry of the Euro-Crisis. A Look at the Non-Euro Area Member States* (EUI Working Paper 2015/33).

[18] PG Teixeira, see note 11 above, p 568. The risk of regulatory conflicts is highlighted by GL Tosato, 'The Governance of the Banking Sector in the EU: A Dual System' in E Barucci and M Messori (eds), see note 15 above.

[19] The features of the European executive power are discussed in a vast literature. See in particular, S Cassese, 'La Costituzione Europea' (1991) 10 (3) *Quaderni costituzionali* 487; K Lenaerts, 'Some Reflections on the Separation of Powers in the European Communities', (1991) 28 (1) *Common Market Law Review* 11; P Dann, 'The Political Institutions' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart, 2006). The composite character of the EU executive power is specially stressed by D Curtin, *Executive Power of the European Union. Law, Practices, and the Living Constitution* (Oxford University Press, 2009).

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on the overall architecture of the European administrative system, and in particular on the appropriate balance between unity and differentiation within it. Is a minimum degree of unity necessary for the European administrative system to work effectively? How much differentiation may be admitted? In case a certain degree of unity is considered to be necessary, what lessons can be drawn from a comparative assessment of the existing administrative arrangements? Are the Eurozone administrative arrangements more effective and qualitatively more advanced than those available to EU at large? Should they be extended to all Member States?

These are, of course, issues of institutional design. They differ, in this regard, from the issues pointed out in the previous section. While those were positive law issues, concerning the legal possibility to provide EU satellite bodies with genuine regulatory powers, the issues at stake here relate to the structure and rationale of the European administrative system. In order to address them, it is necessary to reflect on the relationship between the European administrative system and the EU executive power, to consider paths so far overlooked in the construction of the European administrative system, such as the establishment of a transnational civil service, and to take into account the specific features of the EU as a still in the making polity, ambiguously combining federal, intergovernmental and governance elements. This paper cannot engage in such reflection. It aims, however, at bringing legal scholarship's attention to a set of open issues of institutional design concerning the European administrative system, as well as at calling for a genuine discussion of the point.

IV. CENTRALISATION

In organising a stable response to the crisis, the EU has envisaged mechanisms for the implementation of EU law which heavily rely on the cooperation between national and EU administrations. This is fully in line with the developments of the last twenty-five years, in which the administrative implementation of EU law has become essentially a matter of joint action by national, supranational and mixed authorities, beyond the traditional dichotomy between centralised and decentralised administrative action.[20] More precisely, the implementing mechanisms set up by the EU in order to tackle the crisis are designed as top-down organisational arrangements, made up by national and composite administrations but functionally dominated by an EU body. This confirms the consolidated tendency to establish instruments of joint administrative implementation based on a great number of nuanced combinations of transnationalism and supranationalism,[21] the most

[20] See eg E Chiti and C Franchini, *L'integrazione Amministrativa Europea* (Il Mulino, 2003); HCH Hofmann and AH Türk (eds), *EU Administrative Governance* (Edward Elgar, 2006); HCH Hofmann and AH Türk (eds), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration* (Edward Elgar, 2009); JÁ Fuentetaja Pastor, *La Administración Europea. La Ejecución Europea del Derecho y las Políticas de la Unión* (Civitas, 2007); P Craig, *EU Administrative Law*, 2[d] ed (Oxford University Press, 2012), p 79.

[21] For a tentative taxonomy of those instruments, see E Chiti, 'The Administrative Implementation of European Union Law: A Taxonomy and Its Implications' in HCH Hoffmann and AH Türk (eds), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration*, see note 20 above.

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complex of which is probably that of implementation through administrative networks coordinated by European agencies.[22]

While falling within this consolidated tradition, the implementing mechanisms established in the aftermath of the crisis also present a peculiarity. What is new is the strengthened position of the EU bodies in charge of the co-ordination of the administrative networks. In their relations with the national components of the networks, the EU bodies may rely on powers more elaborated and incisive than those traditionally accorded to EU bodies within administrative composite systems. At the same time, however, the move towards more hierarchical and centralised arrangements is countered by the excessive complexity of the overall constructions or by the ambiguity of the solutions laid down by the EU legislator.

Two forces are therefore at work, one driving towards further centralisation, the other limiting the action of the functionally prominent EU body. Such tension produces several operational issues, which jeopardise the capacity of the new implementing mechanisms to ensure the full effectiveness of EU laws. The smooth functioning of the new top-down arrangements cannot be taken for granted. Yet, the existing tension also offers a chance to reflect on the legal possibility to reinforce centralisation and hierarchy within the administrative networks.

An example of the current situation is provided by the EBA role in the interpretation of the EU rules in the field of the internal market of financial services. In the overall construction laid down by the EU legislator, regulation in that field is conceived as a process which cannot be confined to the creation of a European Single Rulebook made up of EU principles, rules and binding technical standards. A consistent interpretation and application by national authorities of the existing EU principles, rules and standards is crucial in order to establish a high-quality regulatory environment.[23] The EU legislator, in other terms, recognises the functional need to govern the processes of adjustment, reaction and neutralisation of EU law by national authorities when interpreting and applying the European Single Rulebook.

The response given to such need is the conferral to the EBA of the task of managing and orienting the interpretation and application of the relevant EU law provisions by national authorities. This choice is justified by the nature of the EBA as an EU administration both highly specialised and internally designed in such a way as to give voice to the national competent authorities. Thus, the EBA does not only contribute to the creation of the European Single Rulebook by drafting the relevant binding technical standards. It is also called to guide the interpretation and application of EU law by national authorities. This contributes to grant the EBA a position of functional prominence within the composite administration for financial services.

Such functional prominence, however, is countered by the reluctance to provide the EBA with binding powers. The tools available for the EBA are non-binding

[22] The literature on European agencies is too abundant to be usefully recalled here. In the perspective developed in this article, see E Chiti, 'An Important Part of the EU's Institutional Machinery. Features, Problems and Perspectives of European Agencies' (2009) 46 (5) *Common Market Law Review* 1395.

[23] See eg Recital 26, Article 8 and Article 16(1) of Regulation (EU) No 1093/2010 [2010] OJ L331/12.

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regulatory measures, aimed at building compliance in a non-coercive way and relying on adaptation and gradual regulatory convergence. This is a consequence not only of a strict interpretation of the *Meroni* ruling, but also of the political will to safeguard the prerogatives of national authorities. As a result, the EBA is granted a 'meta-regulatory' role, as it is called to orientate the interpretation and application of EU law by national authorities by means of soft law measures.[24]

The tension between one force supporting centralisation within the network and the other constraining the action of the EBA results in an ambiguous legislative framework, raising a number of operational issues. In order to exercise appropriately its soft law regulatory powers, the EBA has to cope with some uneasy questions. This is the case, for example, in questions concerning the scope of the EBA's power to issue guidelines and recommendations envisaged by Article 16 of the establishing Regulation, the conditions for the exercise of such power and the legal value of the adopted measures.

Admittedly, some of the issues met by the EBA when acting under Article 16 can be solved in the light of the overall functional framework laid down by the EBA establishing Regulation. In particular, one may argue that Article 16 envisages two functionally different hypotheses of exercise of soft law powers by the EBA: guidelines and recommendations may be used both within the context of supervision 'with a view to establishing consistent, efficient and effective supervisory practices within the ESFS', Article 16(1); and within the context of regulation 'to ensuring the common, uniform and consistent application of Union law', Article 16(1). Only in this second case, though, are they functionally regulatory tools, as they are meant to complete and develop the regulatory process in the field.[25] The EBA is therefore to clarify, when making recourse to that provision, whether it is relying on guidelines and recommendations either as supervisory instruments or as regulatory instruments. In the second case, it may rely on Article 16 as a general enabling provision for the adoption of recommendations and guidelines. This stems from the recognition by the EU legislator of the crucial relevance of interpretation and application for the construction of an effective regulatory environment. Yet, the EBA is called to explain why their use is functional 'to ensuring the common, uniform and consistent application of EU law'. This does not necessarily imply that the relevant soft law measure should aim at supporting the interpretation and application of a specific EU binding regulatory measure. The EBA may issue recommendations and guidelines in segments of the single financial market not yet subject to a fully developed EU legislation.[26]

[24] The role granted to the EBA corresponds to that of the other ESAs. For an analysis of the case of ESMA, see M van Rijsbergen, 'On the Enforceability of EU Agencies' Soft Law at the National Level: The Case of the European Securities and Markets Authority' (2014) 10 (5) *Utrecht Law Review* 116.

[25] For the sake of clarity, it is perhaps appropriate to incidentally observe that the functional distinction between supervisory and regulatory soft law measures is relevant also beyond Article 16: for example, the European Supervisory Handbook envisaged by Article 29(2) as amended by Regulation (EU) No 1022/2013 [2013] OJ L287/5, should be considered as a soft law measure functionally oriented to supervision, rather than to regulation, and even of little usefulness, provided that it should grow up as a simple collection of best practices.

[26] This interpretation is supported by the text of Article 9(2) of Regulation (EU) No 1093/2010 [2010] OJ L331/12.

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What the EBA has to indicate, though, is the existence of a real or potential problem of interpretation and application of EU law which justifies recourse to recommendations and guidelines under Article 16(1). Once that such justification is provided, the EBA should be considered free to determine the contents of recommendations and guidelines, without accepting any indication either from the Commission or from national authorities. The EBA is free also in the choice of the formal vestment of the measure, whether recommendation or guideline. However, the difference between the two measures seems to be irrelevant, as it basically concerns only the way in which the EBA orientation is formulated: as a formalised point of view of the EBA in the case of guidelines; as a more direct invitation to take a certain behaviour in the case of recommendations.

Pointing to the regulatory role of the EBA laid down by the establishing Regulation, however, does not allow us to address all the issues at stake. The most complex group of issues is related to the legal value of guidelines and recommendations with respect to national authorities. As non-binding regulatory measures, guidelines and recommendations do not compel national authorities to follow them. In case of non-compliance, the EBA cannot apply the mechanism envisaged by Article 17 of the establishing Regulation. Nor can the European Commission launch an infringement procedure. National authorities, moreover, should be considered free to change their orientation after acceptance.[27] However, the circumstance that guidelines and recommendations are legally non-binding does not mean that they do not produce any effect at all on national authorities. Under Article 16(3), the competent authorities are obliged to 'make every effort to comply with those guidelines and recommendations'. The way in which this provision is to be interpreted, though, is far from clear. Indeed, two different and potentially conflicting dimensions co-exist in the procedure laid down by Article 16(3): one is oriented towards compliance, the other is dialogical and argumentative. The compliance dimension is legally ambiguous. Article 16 lays down an obligation to 'make every effort to comply with those guidelines and recommendations'. Yet, this obligation does not open the way to the use of coercive means. Rather, it may be interpreted as a duty of loyal cooperation, which is translated in the specific duties to make an explicit choice and to give reasons, hypothetically sanctionable through the procedure envisaged by Article 17, which does not limit the ultimate freedom of national authorities to choose whether or not to comply with EBA's recommendations and guidelines. As for the dialogical dimension, it is under-developed. It relies on the exchange of arguments between the competent national authorities and the EBA. Such exchange, though, is not well designed. For example, the EBA may publish the fact that the

[27] See on this point the Decision of the Board of Appeal of the European Supervisory Authorities given under Article 60 Regulation (EU) No. 1093/2010 and the Board of Appeal's Rules of Procedure (BOA 2012 002), *Appeal by SV Capital OÜ v European Banking Authority* BoA 2014-C1-02. Para 56 of the Decision states that 'even on the basis that the EBA Guidelines are not legally binding, they address the matter from a practical perspective, and assist in the interpretation of the scope of the provisions of Directive 2006/48/EC'. Such a statement, though, is too under-elaborated to suggest a different interpretation of the legal consequences of compliance by a national authority.

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national authority does not comply, but is not obliged to publish the reasons. Moreover, the EBA has no duty to state its own reasons.

The tension between the recognition of an EBA's functional prominence and the limitation of its powers, therefore, raises several operational issues, which prevent the smooth functioning of the network and make the relations between the EBA and national authorities substantially unstable. At the same time, however, the current situation also offers an opportunity to clarify the limits of the functional prominence that the EBA might be granted within the network.

As for the powers that may be conferred to the EBA, we have already observed that European agencies and other EU specialised administrations can be lawfully granted discretionary powers under the existing constitutional framework, provided that the role of the European Commission is effectively guaranteed when it is so required by the Treaty and provided that the administrative discretionary powers are framed by a previous EU legislative act in such a way as to preclude an arbitrary exercise of power by the relevant EU body. There are no legal reasons, in my opinion, to exclude that the EBA is granted fully binding powers in order to manage the interpretation and application of the relevant EU law provisions by national authorities.

Leaving aside the issue of the EBA powers, though, one might doubt that the EBAs' functional prominence within the financial services administrative network is compatible with the existing EU constitutional framework for the implementation of EU laws and policies. In particular, it might be argued that the introduction by the Lisbon Treaty of a new EU competence of support and coordination in the field of administrative co-operation implies the re-affirmation of the principle of indirect execution, through national administrations only, as the general pattern of administrative implementation of EU laws and policies. The establishment of any instrument of administrative co-operation between national administrations would be possible only within the strict boundaries of the new competence envisaged by Article 197 TFEU,[28] which in any case does not allow the setting up of a transnational network functionally dominated by an EU body.

In a perspective a legal realism, however, one should recognise that granting the EBA with a position of genuine functional prominence would be not only functionally justified, but also legally possible. While the Lisbon Treaty may be based on a preference for indirect administrative execution, the new competence in the field of administrative co-operation does not have the effect of overthrowing the regulatory technique which has been used so far by the EU legislator to establish mechanisms of joint implementation of EU law and has been upheld by the ECJ.[29] We are referring

[28] The substance and boundaries of the EU intervention are sketched in Article 197 TFEU. Under Article 197 TFEU, possible interventions include facilitating the exchange of information and civil servants as well as supporting training schemes. Moreover, EU measures in this area must be regulations adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure. In addition to this, the limits of the EU intervention are specified: harmonisation of national laws is excluded and no Member State is obliged to avail itself of the EU support.

[29] See *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, C-217/04, EU:C:2006:279, in particular paras 44–45; and *United Kingdom of*

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to the adoption of measures of harmonisation in certain sectors envisaging, together with the harmonisation of substantial rules, also instruments of co-operation among national administrations and among the latter and the EU authorities. In this context, the most reasonable interpretative option is to consider Article 197 TFEU as a legal basis adding to the legal bases already existing and usefully exploited by the EU political institutions to establish and deepen administrative co-operation between national and EU administrations. The legal bases already existing are provisions laying down material competences and relate to specific fields of action. The legal basis provided by Article 197, instead, has an institutional content and it is not linked to a specific sector. It thus provides further options to the EU political institutions.

A reform of the administrative architecture of the financial services single market, therefore, could lawfully reinforce EBA's functional prominence *vis-à-vis* its national partners. On a more general level, such development would even be in line with the deep rationale of the new provisions, based on the recognition of the importance of co-ordination of national administrations for the maturation of the EU. The decisive elements are, on the one side, the formalisation of the effectiveness of the implementation of EU law by the Member States as a 'matter of common interest', on the other, the acknowledgement that compliance by the addressees of EU law cannot be simply controlled through the traditional coercive means of infringement proceedings and judicial control, but it needs to be gradually built through instruments of administrative co-operation managed at the European level.

V. ACCOUNTABILITY

Accountability has been part of EU administrative law since long before the financial and public debt crisis. The gradual emergence of an EU administrative system has

(F'note continued)
Great Britain and Northern Ireland v European Parliament and Council of the European Union, ECLI:EU:C:2014:18, paras 41–54. In the first case, concerning the ENISA, the UK argued that the legal basis of the establishing Regulation had been erroneously identified in Article 95 instead of Article 308 of the Treaty establishing the European Community. The Court of Justice, though, held that the EU legislator may deem it 'necessary to provide for the establishment of a Community body responsible for contributing to the implementation of a process of harmonisation in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate'; the tasks conferred on such a body, however, 'must be closely linked to the subject-matter of the acts approximating the laws, regulations and administrative provisions of the Member States'. In the second case, concerning ESMA, the UK argued that Article 114 TFEU does not empower the EU legislator to take individual decisions that are not of general application or to delegate to the Commission or a Union agency the power to adopt such decisions. The Court of Justice, though, rejected this plea by holding that Article 28 of Regulation (EU) No 236/2012 of the European Parliament and of the Council [2012] OJ L86/1 satisfies all the requirements laid down in Article 114 TFEU, which therefore constitutes an appropriate legal basis for the adoption of Article 28. Indeed, the TFEU confers the EU legislature discretion as regards the most appropriate method of harmonisation for achieving the desired result, including the establishment of an EU body responsible for contributing to the implementation of a process of harmonisation. That is the case in particular where the measures to be adopted are dependent on specific professional and technical expertise and the ability of such a body to respond swiftly and appropriately (paras 100–117).

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been accompanied by the provision of a number of ever more incisive mechanisms of control, such as, for example, judicial review, the administrative rule of law,[30] institutional control carried out by EU institutions, and horizontal control taking place within the transnational networks coordinated by EU bodies. Some of these control mechanisms may be reconstructed as accountability tools, that is as legal and institutional arrangements functional to force EU administrations to explain and justify their conducts, both in their decision-making processes and outcomes, and to face the consequences of the assessment of their behaviour.[31]

While certainly confirming the EU orientation towards accountability, the developments connected to the European responses to the crisis bring about a qualitative change. In order to tackle the crisis, the EU has not simply established control instruments that may be conceptualised, through an *ex post* reconstructive exercise, as accountability arrangements. It has openly recognised the relevance and centrality of accountability instruments to the proper functioning of the EU administrative system. This shows a new political and legal sensitivity, combining the administrative with the constitutional in the reform of the EU administrative capacities.

At the same time, the new arrangements do not seem capable of making the EU administrations really accountable. In laying down accountability mechanisms, the various EU actors have been driven by pragmatism and pluralism. The result is an approach searching to adapt the accountability regimes to the specificities of the various types of new administrations. Yet, the existing instruments are not designed as complementary elements of wider 'accountability regimes', that is as components of sets of principles, rules and practices coherently organised in such a way to ensure

[30] Which is here broadly meant as the set of procedural rights and duties in administrative proceedings before EU administrations. On the principle of the rule of law in the EU legal order see K Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 (6) *Common Market Law Review* 1625; L Azoulai and L Clément-Wilz, 'Le principe de légalité' in J-B Auby and J Dutheil de la Rochère (eds), *Droit Administratif Européen*, 2[d] ed (Bruylant, 2014); A von Bogdandy, 'Constitutional Principles', in A von Bogdandy and J Bast (eds), see note 19 above; L Pech, *The Rule of Law as a Constitutional Principle of the European Union* (Jean Monnet Working Paper 04/09, NYU School of Law); and A von Bogdandy and M Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done' (2014) 51 (1) *Common Market Law Review* 59, p 62.

[31] The notion of accountability which is here used partly differs from that adopted in other studies on the EU administrations; see, for example, C Harlow, *Accountability in the European Union* (Oxford University Press, 2002), pp 53 and 182; C Harlow and R Rawlings, 'Promoting Accountability in Multi-Level Governance: A Network Approach' (2007) 13 (4) *European Law Journal* 542; D Curtin, see note 19 above, p 246; M Bovens et al (eds), *The Real World of EU Accountability. What Deficit?* (Oxford University Press, 2010); EM. Busuioc, *European Agencies. Law and Practices of Accountability* (Oxford University Press, 2013); EM Busuioc and M Groenleer, 'The Theory and Practice of EU Agency Autonomy and Accountability: Early Day Expectations, Today's Realities and Future Perspectives', in M Everson, C Monda and E Vos (eds), *European Agencies In Between Institutions and Member States* (Wolters Kluwer, 2014). As in those studies, accountability is here meant as a relationship between an actor and a forum, in which the actor has the obligation to explain and justify his conduct, the forum can pose questions and pass judgment, and their actor might face consequences. Accountability, however, is not conceived as a purely retrospective exercise, but extended to cover both the making and the outcome of administrative action.

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the accountability of EU administrations.[32] Moreover, the accountability instruments do not exploit the multiple possibilities offered by the structural and functional features of the relevant administrations.

This is a further tension underlying the process of reorganisation and growth of the EU administrative machinery within the single financial market and the EMU: on the one hand, for the first time in its administrative history, the EU explicitly points to the need to ensure the accountability of its administrative machinery; on the other hand, it envisages a number of arrangements which are not always capable of reaching that objective.

Such tension has somehow ambivalent effects. The attempt to enhance administrative accountability through imperfect instruments does not give rise to legal and operational issues. Nor does it determine a loss of coherence and unity in the EU administrative system. Rather, it limits the capacity of the accountability instruments to operate as a source of legitimation of the EU administrative system. In liberal-democratic orders, based upon the values of democracy and the rule of law, the instruments of administrative accountability are not simply oriented to ensure that administrative action is kept under control. At a more profound level, they contribute to the legitimation of the administrative system by promoting and strengthening the rule of law and the principle of democracy within the administrative machinery (for example, when accountability relies upon instruments of the administrative rule of law or implies oversight by democratic political institutions). The imperfections of the current accountability arrangements, of course, do not make the EU administrative system less legitimate. Yet, they hinder the capacity of the accountability instruments to operate as one of the sources of legitimation for the EU administrative system. Such shortcoming is partly compensated by the circumstance that the current situation provides an opportunity for opening an institutional and scientific discussion on the relevance and articulation of administrative accountability within the EU.

The SSM offers an example of the tension between the new sensitivity towards accountability and the difficulties met by the EU actors when attempting to lay down accountability arrangements. One should first of all recognise that the SSM's regulation encapsulates a genuine effort of the EU legislator to establish effective accountability arrangements. What is remarkable, in particular, is the choice to treat accountability as an issue deserving autonomous consideration within the regulation.[33] Moreover, accountability is developed through a number of inter-related instruments, working one in combination with the others. First, the regulation provides for a number of accountability requirements towards the European Parliament and the Council 'as democratically legitimised institutions' representing the citizens of the Union and the Member States.[34] Democratic accountability over the ECB mainly consists in reporting and responding obligations and it is justified insofar as

[32] On the notion of accountability regime see in particular JL Mashaw, 'Structuring a "Dense Complexity": Accountability and the Project of Administrative Law' (2005) 5 (1) *Issues in Legal Scholarship* (2005), doi:10.2202/1539-8323.1061 [first published online 6 February 2005].

[33] See Article 20 of Council Regulation (EU) No 1024/2013 [2013] OJ L287/63.

[34] Ibid, Rec 55.

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the ECB acts as a banking supervisor. Second, the accountability framework of the SSM takes pragmatically into account the limited jurisdiction of the SSM. For the conduct of its supervisory tasks, the ECB is made accountable not only to the European Parliament and the Council. It also reports to the Eurogroup, implicitly acknowledged as a leading political body within the Eurozone jurisdiction.[35] Third, the ECB is called to account to the parliaments of the participating Member States. This is motivated by the fact that 'the supervisory tasks of the SSM may have a bearing on fiscal responsibilities of Member States, notably in the case of a bank failure or financial crisis'.[36] Fourth, the accountability framework of the SSM exploits the accountability arrangements provided for under national law, which continue to apply to the national competent authorities taking action under the regulation.

The effort of the EU legislator to structure and organise the SSM accountability suggests that a new political and legal culture is in the process of emerging. This should not hide, though, the fact that the choices made by the EU legislator are not really capable of reaching the effect which is sought. One aspect is that accountability is essentially constructed as a compensation for the loss of national powers, rather than as a necessary feature of the functioning of the administrative machinery of a liberal-democratic polity. The preamble of the regulation, for example, states that '[a]ny shift of supervisory powers from the Member State to the Union level should be balanced by appropriate transparency and accountability requirements'.[37] This perspective is of course understandable within the context of the political discourse concerning the expansion of EU competences and the parallel reduction of the Member States' scope of action. But it reduces the rationale of accountability to one single functional reason, that of the balance between national and supranational powers, ignoring other possible functional reasons, as well as the possibility to provide accountability with normative foundations. In addition to this, although designed as complementary elements, the various SSM accountability instruments do not combine in a fully coherent 'accountability regime'. The SSM regulation promotes accountability, but it does not address in a single framework all the main issues involved in the accountability practice (who, to whom, about what, through what processes, by what standards and with what effects). What it does, instead, is to identify some technical solutions that are potentially capable of making the ECB more responsive when exercising its banking supervisory powers. In identifying those technical solutions, moreover, the SSM regulation makes a number of quite conventional choices. While such choices certainly go in the direction of accountability, they could have been complemented and enriched by more creative arrangements, exploiting the multiple possibilities offered by the structural and functional features of the SSM, starting with the use of techniques of intra-institutional and horizontal accountability. Finally, the relevance of the instruments of institutional accountability is seriously undermined by the circumstance that the

[35] Ibid, Article 20/3, which clarifies that the Eurogroup shall meet in the presence of representatives from any Member State whose currency is not the euro and which is in close cooperation with the SSM.

[36] PG Teixeira, see note 11 above, p 576.

[37] Council Regulation (EU) No 1024/2013 [2013] OJ L287/63, Rec 55.

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consequences of a negative assessment by the competent EU institutions are mainly limited to political censure.

The imperfections of the SSM accountability framework have at least one major shortcoming. They limit the capacity of such a framework to fulfil the potential of accountability. Accountability is here designed as a technique of control over administrative action. It cannot serve, though, as a source of legitimation of the new EU administrative capacities. The various accountability instruments, indeed, are not directly linked to the principle of democracy and the rule of law, on which the EU is founded. They do not encapsulate any clearly identifiable normative values, but only reflect the functional need to compensate the shift of competences from the Member States to the EU. They are not coordinated one with the other in a single accountability regime, explicitly oriented to supplement the legitimation provided to the SSM by the establishing legislation.

The tension between the ambition to enhance administrative accountability and the difficulties to lay down proper accountability arrangements, in any case, does not necessarily lead to an impasse. It might also open the way to an institutional and scientific reflection on the function, scope and content of administrative accountability within the EU. Such a reflection should not address positive law issues. It should rather address issues of institutional design. Are accountability regimes a necessary element of a mature EU administrative system? If so, how could they be articulated? What rationale should underlie their development? Which normative values and functional exigencies should they promote and address?

This paper cannot enter into such discussion. It claims, though, that these are inescapable questions. The attempt to move towards administrative accountability without clarifying its rationale and orientation, both normative and functional, may facilitate, to a certain extent, the consolidation of accountability practices. But it is a too narrow project, minimising the possible relevance of accountability within the EU administrative system. The challenge is to be more ambitious and to put at the heart of EU administrative law a project of institutional design, oriented to the establishment of accountability regimes, deploying in a creative way multiple modalities of accountability, such as, for example, the traditional instruments of procedural and judicial accountability, the mechanisms of political accountability and the emerging tools of horizontal or inter-institutional accountability, which may be precious in an administrative system based on administrative networks by sector. As Jerry Mashaw has recently observed, 'every exercise in devising appropriate accountability systems is … an exercise in comparative incompetence'.[38] But this is a project that the administrative law of a polity oriented towards democratic constitutionalism cannot fail to carry out.

VI. CONCLUSIONS

The European responses to the financial and public debt crisis have triggered a process of administrative reorganisation and growth within two fundamental sectors

[38] JL Mashaw, see note 32 above, p 30.

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of the EU, the internal market of financial services and the EMU. This paper has not discussed such a process through an analysis of the single administrative changes introduced by the EU actors. Rather, it has tried to reflect on its overall features, by asking which dynamic the process of administrative change is based on, in what direction is it leading the EU administrative system and its law, and how can it be assessed.

Admittedly, this inquiry represents only a preliminary step in a complex field of research. Indeed, it has been based on a bird's-eye view of the process of administrative reorganisation and growth. Moreover, it might be deepened and broadened by taking into consideration further aspects of the overall picture, such as, for example, the transformation of the purposes of EU administrative action. Despite these shortcomings, the inquiry seems useful in so far as it highlights a number of elements that should be taken into consideration in a general reconstruction of the ongoing process of administrative change in the EU.

The main conclusions may be summarised as follows. First, the underlying dynamic of the process is one of policy learning, rather than of administrative reform. The explosion of the financial and public debt crisis has not prompted the elaboration of a coherent and unitary administrative strategy, based upon consistent principles and oriented to the achievement of clearly identified objectives. Instead, the lessons learned from the experience of the crisis have triggered a non-linearly progressing sequence, responding to the logic of a slow and gradual improvement of the administrative capacities of the internal market of financial services and the EMU.

Second, while confined to two specific EU sectors, the process of administrative reorganisation and growth is potentially relevant beyond the internal market of financial sectors and the EMU. Indeed, it raises issues that also characterise other fields of EU administrative action. Moreover, it might influence the administrative developments in other sectors, operating as a term for comparison and as a source of inspiration.

Third, at its current state of development, the process of administrative change does not drive the EU administrative system into a precise direction. The EU actors have made a number of choices that do not reflect a clear orientation, but tensions between opposite forces. They have both reinforced the powers of EU satellite administrations and obstructed their effective exercise. They have at the same time refined the administrative capacities of the EU as a whole and established administrative arrangements for the Eurozone only, thus giving place to a variable geometry administrative architecture. They have both strengthened and limited centralisation within the implementing mechanisms. While explicitly affirming the need to ensure administrative accountability, they have envisaged a number of arrangements which seem incapable of reaching that objective. These tensions may be connected to several factors, such as the constraints of the current EU constitutional framework and the institutional culture of the EU. Yet, they are mainly due to the divergencies between the political preferences of the Member States in organising the EU responses to the crisis.

Finally, and most importantly, the process of administrative change is highly ambivalent. The developments of the last five years have been assessed in the light of

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their capability to improve the EU administrative capacities of the internal market of financial services and the EMU, which was the objective sought by the EU actors. Considered in this perspective, the tensions inherent in the choices made by the EU actors operate as partly negative and partly positive forces. On the one side, the four tensions might destabilise the functioning of the EU administrations operating in the two fields subject to administrative change. As the analysis has shown, they give rise to positive law issues which undermine the working capacity of the EU administrations. They challenge the internal coherence of the EU administrative system. They might undermine the capacity of the implementing mechanisms to ensure the full effectiveness of EU laws and policies. They prevent the new administrative capacities from working as a source of legitimation of the EU administrative system. On the other side, the tensions highlighted in this paper provide an opening for institutional and scientific discussion on the powers that can be provided to the EU satellite administrations, on the appropriate balance between unity and differentiation in the EU administrative system, on the legal possibility of reinforcing centralisation and hierarchy within the administrative networks, and on the function and relevance of administrative accountability. It would be therefore misleading to represent the process of administrative growth and reorganisation as a process oriented towards the improvement of the administrative capacities of the EU in two key sectors of its action, as it is assumed by the EU actors. Indeed, the tensions inherent in the process may at the same time work as 'fault lines' in the EU administrative machinery and offer a chance for taking clear choices on a number of important issues.

Some of the possible solutions to the issues at stake have been suggested in the previous pages. Others, and in particular those related to issues of institutional design, have been left to further reflection. While declining to directly contribute to such reflection, I point to the fact that any discussion on possible administrative changes within the EU should start by recognising the relevance and ambivalence of the administrative developments of the last five years. This is a crucial moment for the EU administrative system, which might either face a process of gradual decline or clarify its structural and functional features, as well as its overall position within the EU legal order.

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