Niamh Moloney, *The Age of ESMA. Governing EU Financial Markets*, Hart Publishing.

Great historical novels both lay bare the souls of great characters, be they historical figures or ordinary people, and allow readers to understand the epoch they lived in. In a somewhat similar vein, the succession of books by Niamh Moloney about EU financial markets law consistently succeed in both delving into the intricacies of individual components of the relevant regulations (all of them in the case of her comprehensive treatise, *EU Securities and Financial Markets Regulation* (3rd ed., OUP: 2014), or individual aspects thereof such as investor protection in her book *How to Protect Investors: Lessons from the EC and the UK* (CUP: 2010)) and giving a sense of the general state of EU financial markets law at the time of her writing. Her latest book is no exception: it revolves around just one 'character', the European Securities and Markets Authority (ESMA) and, in describing its *Einbildung* from a coordinating forum of national regulators to one of the key players in European financial markets regulation, it allows the reader to understand exactly where we stand in terms of centralisation of financial markets law in Europe. Succinctly put, the book shows that we are living in the age of ESMA (p 1).

ESMA is portrayed across six chapters. In the first one, ESMA is introduced as a unique player both from the perspective of EU law and as a financial markets regulator, highlighting its nature as an EU agency, its position as an actor within the networks of European Supervisory Authorities (ESAs) and of international financial regulators, and its role as a financial market regulator among, and to a certain degree above, national competent authorities (NCAs). To add to ESMA's uniqueness as a financial markets regulator, its EU remit is as an instrument for both market integration, and hence liberalisation, and financial stability (or in the book's words, 'risk management': p 5), two goals that can clearly be at odds with each other.

After a thorough description of ESMA's governance (ch. 2), the book embarks on the ambitious exercise of assessing ESMA's endeavours and achievements under two main headings: effectiveness and legitimacy (ch. 3-7). Effectiveness, in the author's words, means being capable of delivering on one's mandates (p 37). More specifically, and with additional tweaks in individual chapters used to tailor the criteria to the specific functions under examination, it means productively engaging with 'state of the art' practices, being open to experimentation with new tools, 'learning by doing', 'mutual ESMA/NCA regulatory learning, [and] extensive consultation', and displaying 'a concern to build and interrogate reliable data infrastructures, risk assessment frameworks, and risk-based supervision models' (p 37-38). Legitimacy, in turn, means acting within one's mandates and powers and, therefore, in the case of ESMA, refraining from 'mak[ing] public interest choices, engag[ing] in redistribution, or act[ing] in the political sphere'.

More precisely, ESMA's effectiveness and legitimacy are assessed with reference to its performance as a rulemaker at the EU level (ch. 3), as a meta-supervisor, that is, in ESMA's own words, as a 'facilitator, coordinator, coach and policeman' of NCAs (p 191), as a supervisor itself (ch. 5), and as a network actor (ch. 6).

Moloney's assessment throughout the chapters is in her own words 'optimistic' and 'overall positive'. Page after page, she reports facts and unearths documentary evidence supporting the view that ESMA has established itself as an effective regulator, coordinator, supervisor, and network agent, and that, all in all, its actions have not overstepped its institutional boundaries.

However, she is less 'optimistic' about the future, if the European Commission's proposal for a reshape of ESAs' governance in the direction of more centralisation and bureaucratisation, (de facto) lower accountability, and a higher degree of hierarchy vis-à-vis NCAs is ever adopted (eg p 42-43, 74-77, 309-13). As the author points out throughout the book, if implemented, such changes could easily strain the delicate balance that has hitherto allowed ESMA to incrementally become the key player in EU financial markets regulation.

As the author herself reminds the reader (p 37), the positive state of the art that she describes and, effectiveness and legitimacy assessments aside, the uncontestable centrality of ESMA as a policymaker, meta-supervisor, supervisor and active network agent, were far from certain outcomes when ESMA was established. The agency was designed to have limited powers both for constitutional reasons (as epitomised in the *Meroni* doctrine) and owing to Member States' resistance to greater centralisation of supervisory powers. Its rulemaking role was only a supporting one, with the European Commission retaining the ultimate power to enact binding rules. Not only were supervisory powers, with few exceptions, left to NCAs but ESMA's governing body itself was almost entirely composed of NCAs' representatives (their chairs). In addition, ESMA's human resources have always been limited,[1] meaning that it has had to rely on the support of NCAs' personnel to perform its tasks (eg p 62).

The Age of ESMA is yet another of Moloney's books that manages to provide the reader with a uniformly deep and factually accurate account of its subject. It is therefore somewhat arbitrary for a reviewer to highlight aspects that the author could have delved into more. Still, the book could have done more to explain how, given the inauspicious conditions at the outset, ESMA was so successful in establishing itself as a key player. We read about how ESMA was entrepreneurial and keen on expanding its own remit and influence (e.g. p 106-7). What the book does not clarify though is how ESMA's 'ambitious and expansionist approach' (id) was so effective in overcoming resistance from

[1] See WP de Groen and K Zielińska, 'European Supervisory Authorities Still Playing Second Fiddle to National Financial Regulators (2018) CEPS Commentary, at 2 (showing that ESMA's headcount in 2016 was 204, which was, for what the comparison is worth, one third of Italy's NCA).

both the European Commission, which is described throughout the book as quite jealous of its own turf (ch 3), and NCAs, which would appear to lose clout as ESMA's role strengthens. As the book acknowledges (in ch. 5), NCAs have indeed been effective in curbing ESMA's incursions into direct supervision both as policeman of NCAs and as a supervisor of financial institutions. It is no coincidence that ESMA only supervises entities and activities that had been, for all practical purposes, unregulated and unsupervised at the Member State level before EU legislation intervened.

This reviewer can offer no more than educated guesses, albeit based on the book's insights, to supplement Moloney's account of ESMA's *Einbildung* from an entity almost *designed* to be weak to the key continental player in financial regulation it has become. The hypothesis is that ESMA itself has proved to be an effective tool for NCAs to expand their own role and powers: a more powerful ESMA, so long as it does not interfere with NCAs' supervisory powers and actions, means more powerful NCAs. For sure, incidentally but importantly, this means empowerment for those departments within NCAs (the EU or international affairs departments) that interact with ESMA: they directly support NCAs' chairs sitting on ESMA's supervisory board and influence their voting decisions. Ultimately, the greater the ESMA's role, the greater those departments' own roles will be. At the same time, ESMA's burgeoning activity as an official rulemaker or as a rule drafter on behalf of the European Commission means more work (or at least no less work) for NCAs' departments in charge of regulation: as ESMA does not have the necessary human resources to work on these issues by itself, it has to rely on NCAs' input. To generalize, a stronger ESMA is agreeable for NCAs so long as their headcount is unaffected, which is arguably the case if ESMA does not replace them in their supervisory tasks. It may in fact affect their headcount positively, if the outcome of the re-regulation exercise in which ESMA has been a key player throughout the current decade means that more resources are needed to perform supervisory tasks at the Member State level.

The book explicitly refrains from answering the question of whether the outcome of ESMA's (and other European rulemakers') post-crisis regulatory activism has remained within the boundaries of proportionality. Rightly, the author notes that such an answer 'would require a different book, as well as a material degree of speculation on [the regulatory framework's] market impact' (p 114). And even an answer to that question would not tell us whether the same outcome would not have been achieved had NCAs been in charge of issuing implementing rules of EU (or national) legislation. Yet, again with the advantage of a reviewer's licence to offer nothing more than educated guesses, there are reasons to believe that centralisation of regulatory responses is more likely than not to result in over-regulation, if only because it removes the risk of both regulatory arbitrage and competitive disadvantage vis-à-vis other Members States.

No book review is complete without one final criticism. One of the book's main research questions is whether ESMA is effective in executing its mandates. While individual chapters tailor the contours of effectiveness to adapt to the specific functions they focus on, we can take chapter 3, on ESMA's rulemaking functions, as an example of the kind of analysis that the book conducts. Here, effectiveness is defined as deploying powers 'in a manner that is technically [or data] informed, responsive, agile, and sensitive to NCA experience, and which engages openly with the processes through which it is overseen by the Commission, Parliament, and Council'. One may doubt whether this definition is the best for the purposes of assessing ESMA's ability to deliver on its mandates. The book does show that ESMA increasingly uses the data it possesses to inform its policy recommendations (p 134-35). It also shows that it can respond to criticisms raised during consultation periods (p 135-36). What is troubling is that as evidence of the latter the book reports that ESMA changed one of its proposals to reflect the industry's criticism over the poor quality of the data used to justify the initial proposal (p 136).

More generally, one wonders whether the book's operational definition of effectiveness is sufficiently demanding as to justify a positive assessment of ESMA's work so far. Given ESMA's internal and external governance, it would be striking if ESMA was found to be insensitive to NCAs' experience, given their dominance in the decision-making body. And how could ESMA not engage openly with the processes through which it is overseen by the Commission, Parliament and Council, given the institutional setting? Data-informed policymaking is, especially after the financial crisis, policymaking *tout court* and it would be shocking if ESMA was found not to gather and use data for rulemaking purposes. Public consultations before rules are enacted are the rule almost everywhere, and certainly at the EU level, so how could ESMA be expected to ignore it as a tool or to be indifferent to well-grounded criticism from consultation respondents? Finally, 'agility' is hard to gauge: what specific threshold must be passed to qualify as an 'agile' agency? Any responsive agency will do its best to find quick, practical solutions to apparent urgent problems or to remedy mistakes, and this is in fact what the book finds ESMA to be doing (p 136-37). However, again, would it not be quite extraordinary if that was *not* the case?

Whatever this criticism is worth, *The Age of ESMA* is, to conclude, an excellent piece of research: it is replete with facts, ambitious in identifying the key questions and cautious in both its answers and in drawing lessons for the future therefrom. Anyone with an interest in understanding how centralised EU financial markets regulation is (both on and off the books) should read it.