

# Shedding Light on EU Financial Regulators: A Sociological and Psychological Perspective

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## I. Introduction

In the aftermath of the 2007-2009 Global Financial Crisis, financial regulation in the European Union, following an international trend, underwent a process of intensive legal reforms that led to the revision of the legal premises underpinning the EU architectural framework for financial regulation and supervision. The EU has attempted to design a better equipped supranational apparatus for the governance of financial markets and crises. This effort accompanies a more general questioning of the role of law in the financial sector. The interaction between financial entities and legal rules has been re examined and novel theories have focused on the idea that legal norms are constitutive elements of finance,<sup>1</sup> rather than exogenous phenomena that intervene upon markets’ spontaneous order as a *deus ex machina*. In addition, the behavioral dynamics influencing the

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1. Katharina Pistor, *A Legal Theory of Finance*, 41 J. OF COMP. ECON. 315 (2013).

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choices financial consumers, professional investors and other actors of the financial markets has been scrutinized. The interaction between financial markets and regulators has been also considered through an enriched, socio-legal vision.<sup>2</sup> These novel approaches helps to understand that the interaction among regulators, financial entities and consumers occurs through legal and social constructions. Furthermore, the postulate of rationality developed in financial economics and influencing the regulators' understanding of finance has been questioned.<sup>3</sup> It is now largely understood that individual cognitive processing has limited capacity and that the brain economizes upon such processing by relying on heuristics and other shortcuts, which will save time but also generate biases and predictable errors.<sup>4</sup> Behavioral finance moved from the fringes of financial economics to the mainstream stage.<sup>5</sup> Regulatory actions are refined in order to take into account these insights that depart from the traditional rationality paradigm.<sup>6</sup>

Despite this attention towards the social and psychological dimensions of finance, the behavioral dynamics defining regulators' modus operandi remains an uncharted area. Echoing the distinction between "rules of the game" and "players" as key components of markets elaborated in the literature of institutional economics,<sup>7</sup> regulators are at best depicted as players and thus considered as units, in the form of social actors or organizations. Albeit offering a useful simplification, such an understanding neglects that organizations are composed of individuals with objectives that may conflict, even if operating in a cooperative fashion under an overarching structure.<sup>8</sup> Veering from this unitary conception, there is a flourishing literature in anthropological and sociological studies that considers

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2. Julia Black, *Reconceiving Financial Markets – From the Economic to the Social*, 13 J. OF CORP. L. STUD. 401 (2013).

3. In the UK, see Financial Services Authority (FSA), *The Turner Review: A Regulatory Response To The Global Banking Crisis*, Ref. No. 003289 (March 2009), available at [http://www.fsa.gov.uk/pubs/other/turner\\_review.pdf](http://www.fsa.gov.uk/pubs/other/turner_review.pdf).

4. Kristine Erta et al., *Applying Behavioral Economics at the Financial Conduct Authority*, Financial Conduct Authority, Occasional Paper No. 1 (April 2013), available at <https://www.fca.org.uk/publication/occasional-papers/occasional-paper-1.pdf>.

5. This is witnessed by the fact that Robert Shiller, considered one of the fathers of behavioural finance, shared in 2013 the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel with Eugene Fama, commonly referred as the father of the efficient-markets hypothesis, based on the rationality postulate.

6. Emilio Avgouleas, *The Global Financial Crisis, Behavioural Finance Regulation: In Search of a New Orthodoxy*, 9 J. OF CORP. L. STUD. 23 (2009).

7. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE, 3 - 5 (Cambridge University Press 1990).

8. *See generally*, Geoffrey M. Hodgson, *What are Institutions?*, 40 J. OF ECON. ISSUES 1 (2006).

administrative agencies, such as regulators, as collective entities.<sup>9</sup> Through these lenses, supranational regulatory and supervisory outcomes stem from decision-making processes organized by legal provisions that define: membership criteria, organizational structures with collegial governing bodies, powers, responsibilities, as well as goals and objectives for each institutions.

For our purpose, and drawing from these studies, financial regulators are considered as organizations composed of individuals. The conduct of those individuals are impacted by the legal design as well as by the conduct of other individuals and organizations, such as investors, depositors, and various financial firms populating the heterogeneous financial ecosystem. The external relationship of regulators towards regulated sectors, the public at large, or the political powers, have received extensive consideration in the regulatory literature.<sup>10</sup> Our paper examines how the legal dimension influences the relational dynamics within regulators. Drawing on insights from social psychology, regulators appear to reach decisions through processes that can be identified and analyzed as collective decision making,<sup>11</sup> shaped by social roles, cultural norms as well as legal design. Social psychology provides a language that enables to capture and analyze these aspects,<sup>12</sup> as it focuses on the result of individual interactions within or among groups.<sup>13</sup> Social psychology provides an analytical grid that, for the first time, our paper uses to examine financial regulatory agencies.

Against this backdrop, we focus on the EU institutions directly involved in the governance of financial markets with the primary objective of identifying whether basic sociopsychological models could be associated with the legal framework. For this purpose, we examine the legal rules and the EU constitutional framework under which regulatory bodies operate. EU institutions perform their activities and roles within the perimeters of EU law, as defined by the constitutional provisions enshrined in the Treaty of the

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9. See, e.g., MARY DOUGLAS, *HOW INSTITUTIONS THINK* (Syracuse University Press 1986)

10. See generally, ROBERT BALDWIN, MARTIN CAVE & MARTIN LODGE, *UNDERSTANDING REGULATION: THEORY, STRATEGY AND PRACTICE* (Oxford University Press 2012).

11. See Floyd H. Allport, *A Structural Conception of Behavior: Individual and Collective - Structural Theory and the Master Problem of Social Psychology*, 64 *J. OF ABNORMAL PSYCHOL. & SOC. PSYCHOL.* 3 (1962).

12. A classical definition of social psychology was given by Gordon Allport: "Social psychology is the attempt to understand and explain how the thoughts, feeling, and behaviours of individuals are influenced by the actual, imagined, or implied presence of other human being"; GW Allport, *The Historical Background of Modern Social Psychology*, in *HANDBOOK OF SOCIAL PSYCHOLOGY*, vol. 1, at 5 (G. Lindzey ed., Addison-Wesley 1954).

13. Although there is some overlap between sociology and social psychology, there are also differences. Sociologists tend to relate social behaviours to norms, roles, social class and other structural variables. Differently, social psychologists focus on the goals, motives and cognitions of individuals operating in a social context.

European Union (TEU)<sup>14</sup> and the Treaty of the Functioning of the European Union (TFEU).<sup>15</sup> The dynamics amongst the members composing the main decision-making bodies of these institutions are examined with reference to public documents, such as judicial decisions, official communications, and independent reviews of EU institutions. This enables us to focus on the relational dynamics defining regulators' actions — with reference to their primary decision-making bodies — and to relate them to the 'fundamental forms of sociality', as isolated by Alan Fiske in his seminal work.<sup>16</sup> Fiske, bridging different studies and building upon own ethnographic research, isolates four relational modes in a unified theory of social relations. The relational modes are archetypes describing the elementary forms of sociality featuring in every culture and characterizing all social interactions. These four models, illustrated in detail in the third part of this paper, are: i) Market Pricing, ii) Equality Matching, iii) Communal Sharing, and iv) Authority Ranking.<sup>17</sup> They operate in all domains of social action and cognition, such as transfer of property, standards of social justice, groups decisions, social influence, organization of labor, moral judgments, response to suffering, and interpretation of human behaviors. Combinations between the four models result into various forms of social interactions pursuant to general cultural rules.<sup>18</sup> At a more fundamental level, "the relational models theory explains social life as a process of seeking, making, sustaining, repairing, adjusting, judging, construing, and sanctioning relationships."<sup>19</sup>

The analysis of EU financial regulators through the prism of the four fundamental forms of sociality has the potential of opening up new perspectives. It can offer a better understanding of how these institutions works and a robust conceptual framework to consider how conflicts within and among institutions are likely to arise. However, what cannot be directly inferred from the behavioral dynamics of specific decision-making bodies, is the overall psychological attitude (or culture) of the regulatory

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14. Treaty of Lisbon, Dec. 13, 2007 [2009], later known as Treaty of the European Union, consolidated in 2016 C 202/16, O.J [hereinafter TEU].

15. Treaty of Lisbon, Dec. 13, 2007 [2009], Treaty on the Functioning of the European Union, consolidated in 2016 C 202/16, O.J [hereinafter TFEU].

16. Alan Page Fiske, *The Four Elementary Forms of Sociality: Framework for a Unified Theory of Social Relations*, 99 PSYCHOL. REV. 689, 689 (1992) [hereinafter Fiske, Four Forms of Sociality].

17. Identified by Fiske through field study in West Africa and also uncovered at the same period in other branches of social sciences. See ALAN PAGE FISKE, *STRUCTURES OF SOCIAL LIFE: THE FOUR ELEMENTARY FORMS OF HUMAN RELATIONS* (Free Press, 1991). [hereinafter Fiske, *Structures of Social Life*].

18. Fiske, *Four Forms of Sociality*, *supra* note 16, at 690.

19. *Id.* at 689.

agencies under scrutiny. In fact, by steering away from the idea that regulators are unitary entities, various forms of sociality naturally characterize only specific bodies within agencies and institutions. Yet, given that these bodies are ultimately responsible for determining critical regulatory outcomes, mapping their inherent behavioral dynamics appears to offer a novel set of analytical tools through which regulatory activities could be examined. To this end, we elicit the underlying core *relational blueprint*, or dominant relational model characterizing the decision-making process of EU institutions in discharging their regulatory functions towards the financial sector. Particular attention will be given to the European Commission, the European Central Bank, and the European Supervisory Authorities. From a theoretical standpoint, a given relational structure calls for specific decision making processes, group dynamic, and governing values. However, tensions and prolonged dissents among individuals operating in a collective structure may extend the natural divergence of opinions and affect relational dynamics sustaining the cooperative efforts. The article then applies the analytical framework offered by social psychology to the current issues that financial, economic, and political crises have exacerbated.

The overhaul of the EU architectural framework for financial regulation and supervision, leading to the establishment of a Banking Union and triggering the agenda for a broader Financial Union, generated constitutional conundrums in the EU primary law. It created overlaps and tensions amongst EU institutions that are designed to protect the stability of the single currency and EU institutions that are in charge of the integrity of the single market as a whole. As a result, an increasingly sharper divide emerges between Member States taking part to the euro-area (Eurozone) and Member States whose currency is not the euro (non-Eurozone) and that are not participating in the Banking Union. This divide furthers with the threats to the unity of the European project posed by the UK decision to leave the EU following the results of the referendum (held on June 23, 2016) and generally termed as Brexit. This fragmentation calls into question the reliance on common values underpinning and guiding the collective decision-making process of EU financial regulators, when the representatives of Eurozone and non-Eurozone countries have to cooperate. Hence, the sociopsychological perspective appears also useful to advance prospective analyses over a variety of critical aspects affecting the unfolding European architectural framework for financial regulation and supervision.

As a prerequisite to the sociopsychological examination of EU financial regulators, the article offers a typology to navigate through the complex, multilayered EU architectural framework for financial markets supervisions and regulation. The typology is constructed by reference to two dimensions: the function of institutions vis-à-vis the common interest

of the Union, on the one hand; the constitutional status of such institutions, on the other hand. First, the EU is a *sui generis* regional structure, constructed as an international legal community. Its institutions are inspired by a “common interest,” and are also designed to pursue such interest, which, in turn, is an autonomous and fluid concept that does not necessarily overlap with the interests of its individual members. Specific institutional capacities are required to define the legal and policy contents of the common interest and to carry on its effective development. Hence, it emerges that EU regulators perform three key functions vis-à-vis the general interest of the Union, i.e., advancing and protecting its existence, defining its content, and ensuring its operation throughout the Union. Second, regulators may be classified into two main categories, by reference to their constitutional statuses. Only some financial regulatory institutions are established through EU primary law: the European Commission (the Commission) and the European Central Bank (ECB). Other financial institutions in the EU, such as the European Supervisory Authorities (ESAs) and the European Systemic Risk Board (ESRB) have been created through secondary laws, whilst supervisory coordination amongst national authorities over cross-border financial entities and operations occurs through Colleges of Supervisors and, within the Banking Union, Joint Supervisory Teams. These are network-based mechanisms, governed primarily through memoranda of understandings and secondary law provisions.

This typology is not merely descriptive. Beyond the classification of the institutions, it offers a useful tool to identify how EU institutions operate. Typically, the two dimensions, i.e., the function of the institutions vis-à-vis the common interest, first, and the constitutional status of the institutions, second, bear a direct relationship with specific relational models. This means that where a given decision-making organ within an institution performs more than one function, more than one model of sociality is expected to operate. Also, we find that institutions whose legitimacy and remit is enshrined in the Treaty framework appear to follow the Communal Sharing and the Equality Matching forms of sociality, where considerations over common interest and balance within the group establish the ground for a structured cooperation. By contrast, notwithstanding the specific reference to the pursuit of the common interest in the remits of the ESAs, they appear to organize their social relationship around Market Pricing models, where the maximization of individual interests, i.e., the interests of Member States advanced by the individuals composing the decision-making bodies of the ESA, dominates the group dynamics.

The argument of this article develops in five parts. Part II introduces the EU multilevel architectural framework for financial regulation and supervision, stressing the waves of reforms that led to the current governance apparatus. Subsequently, the concept of common interest is

introduced and the typology for financial regulators is constructed by focusing on the Commission, the ECB and the ESAs, with reference to other form of institutional cooperation among financial regulators. Part III illustrates the theory of relational models. It then applies it to isolate the dominant relational modes for each of the above-mentioned institutions within the EU legal order. Part IV offers an application of the socio-psychological framework in the context of the current tension between Eurozone and non-Eurozone countries. Conclusive remarks will follow in Part V.

## II. The Architectural Framework for Financial Regulation in the European Union

The EU multilevel governance developed to provide new mechanisms to address an increasingly complex and diverse range of policy issues requiring enhanced supranational coordination.<sup>20</sup> In its current form, it strongly departs from the initial design, whereby the supranational decision-making process was confined to specific domains that were dealt within the fora offered by Treaty-based institutions, largely following the unanimity principle amongst founding members.<sup>21</sup> The EU governance framework has evolved into a broader apparatus with its own system of rules and procedures, where the recourse to delegated legislations follow the logics of the “regulatory state.”<sup>22</sup> These developments lie at the core of the transition from the Common Market to the Internal Market overarching aim, as introduced with the Single European Act and reinforced, in particular, by the Treaty of Maastricht and the Lisbon Treaty.<sup>23</sup> However, the translation of the general EU principles into administrative and regulatory actions advancing the integration of national financial markets proved to be one of the most difficult ambits for the European project.<sup>24</sup>

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20. On the emergence of multi-level governance in different sectors, *see e.g.*, David Coen & Mark Thatcher, *Network Governance and Multi-Level Delegation: European Networks of Regulatory Agencies*, 28 J. OF PUB. POL’Y 49 (2008).

21. *See, e.g.*, Jacques Pelkmans, *The New Approach to Technical Harmonization and Standardization*, 25 J. OF COMMON MKT. STUD. 249 (1987).

22. *See, e.g.*, Giandomenico Majone, *The Rise of the Regulatory State in Europe*, 17 w. eur. pol. 77 (1994); *see also*, Thomas Christiansen, *Governance in the European Union*, in MICHELLE CINI & NIEVES PEREZ-SOLORZANO BORRAGAN, *EUROPEAN UNION POLITICS* (5th ed. 2016) (for an evolution of the EU governance approaches).

23. The Single European Act, 1987 (L169) O.J. 29, paved the way to economic and monetary union set forth in the Treaty of Maastricht.

24. *See generally*, Lucia Quaglia, “Old” and “New” Politics of Financial Services Regulation in the European Union, 17 NEW POL. ECONOMY 515 (2012); *see also*, Emiliano

The resulting architectural framework for financial regulation and supervision in the EU designs a complex institutional arrangement that involves supranational institutions and national authorities linked through mechanisms of cooperation and coordination. General policy objectives, such as the integration of financial services or the maintenance of financial stability, justify regulatory and supervisory convergences that are increasingly more centralized at the supranational level. The authorities involved in these tasks respond to different logics that are set forth in the constitutional premises of EU primary laws and influenced by the interests of Member States, which may not necessarily collimate with those of the Union at large. After presenting the developments leading to the current multilevel governance framework for financial regulatory governance, the various institutions involved are considered in light of the function they perform towards the advancement, the identification, and the realization of the EU general interest. It will emerge that the different levels of institutional engagement with the broad — and often vague — overarching goal of pursuing a common interest characterize the relational dynamics within institutions, which may ultimately affect their decision-making process.

#### **A. The EU Multi-level Governance of Financial Regulation**

The modern architectural framework for financial regulation and supervision in the EU is rooted in the Treaty framework and builds upon a series of profound reforms spanning decades. For exposition clarity, three consecutive phases of reform could be isolated, starting from the turn of the century. Each phase sets the legal and institutional premises upon which new legal and regulatory changes have been implemented. The first phase, covering the first years of the new millennium, was marked by the Commission's Financial Services Action Plan (FSAP), comprising 42 measures — to be adopted over six years (1999-2004) — intended to harmonize the legal rules affecting various aspects of banking, insurance and securities sectors as well as other forms financial services.<sup>25</sup> The enterprise followed the primary policy objective of establishing an integrated financial market, given that its development was lagging behind

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Grossman, *Network European Financial Integration: Finally the Great Leap Forward?*, 49 J. OF COMMON MKT. STUD. 413 (2011); For an earlier comment, see *EU Securities Market Regulation: Adapting to the Needs of a Single Capital Market*, Centre for European Policy Studies Task Force, Report No. 34 (Mar. 1, 2001).

25. See *Implementing the Framework for Financial Markets: Action Plan*, COM (1999) 232, European Commission (May 11, 1999).



the general process of economic integration. A high level of legal harmonization, mutual recognition and the passport rule were the core principles to ensure a single market for financial services. The backbone of this ambitious plan was offered in the Lamfalussy Report,<sup>26</sup> which also established the ground for a novel rule-making process, commonly referred to as the Lamfalussy Process.<sup>27</sup> The Lamfalussy Process, gave a new legislative impetus and affirmed the prominence of the EU institutional apparatus in the rule-making process, with a consequential curtailment of the regulatory powers of Member States. With the completion of the FSAP a process of review started, characterized by a relative tranquility and, more generally, by the archival of the Constitutional Treaty and the adoption of the Lisbon Treaty.

The second and the third phase have been initiated during the Seventh European Parliament (2009-2014) and continue to present days, with the Eighth European Parliament (2014-2019). In particular, the second phase is marked by the reforms adopted as a response to the Global Financial Crisis that affected European countries as a diffused credit crisis, a sovereign debt crisis, and the consequential eurocrisis. While markets and regulators were enjoying a period of regulatory pause after the adoption of the FSAP, the unfolding crises required profound revisions with a shift in the primary objectives. The establishment of a single market mutated into the necessity of preserving its integrity by designing new rules and a new institutional framework to prevent and cope with financial crises at the supranational level. The de Larosière Report on the Global Financial Crisis offered the blueprint for such reforms.<sup>28</sup> One of the first measures consisted in the establishment of a European System of Financial Supervision (ESFS),<sup>29</sup> which transformed the Lamfalussy committees into three ESAs and established the ESRB, entrusted with the responsibility of overseeing the integrity of the European financial system.<sup>30</sup> The ESAs are composed of representatives of Member States' regulatory authorities and are: the European Banking Authority

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26. A. Lamfalussy, D. Wright & P Delsaux, *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets*, 85, 89, 93, & 95 (Feb. 15, 2001).

27. For a comprehensive review of the rule-making process enacted through the Lamfalussy Process see Niamh Maloney, *The Lamfalussy Legislative Model: A New Era for the EC Securities and Investment Services Regime*, 52 INT'L AND COMP. L. Q. 509 (2003) (for a comprehensive review of the rule-making process enacted through the Lamfalussy Process).

28. *The High-Level Group on Financial Supervision in the EU: Report*, The de Larosiere Group (Feb. 25, 2009).

29. Council Directive 2010/78, 2010 O.J. (L 331) 120, 120 (EU).

30. Council Regulation 1092/2010, 2010 O.J. (L 331) 1, 2 (EU); Council Regulation 1096/2010, 2010 O.J. (L 331) 162 (EU).

(EBA),<sup>31</sup> the European Insurance and Occupational Pensions Authority (EIOPA),<sup>32</sup> and the European Securities and Markets Authority (ESMA).<sup>33</sup> The roles among various EU institutions and Member States resulted segmented following a three-layered allocation of responsibilities. These are:

- i.) A supranational level, where the Commission acts as primary financial regulator, with rule-drafting and policy-setting prerogatives established by EU primary laws to define a harmonized set of rules.
- ii.) A national level, where supervisory tasks have been primarily allocated. Member States' administrative authorities have been called to ensure the application of the EU law under the principle of mutual recognition and the passport rule and supervisory responsibilities have been distributed between 'home' and 'host' jurisdictions for cross-border financial entities and operations. A further mechanism of coordination has been offered by an increased reliance on Colleges of Supervisors, which are network-based structures of national authorities established to supervise multinational entities.
- iii.) The intermediate level was introduced with the establishment of the ESAs. The ESAs offer both technical assistance to the Commission in the drafting of regulatory standards and coordination in conducting supervisory tasks. Hence they are intended to enhance both 'horizontal' cooperation, i.e., among national authorities, and 'vertical' cooperation, i.e. between national authorities and the Commission.<sup>34</sup>

The third phase of institutional reforms is landmarked by an enhancement of supranational centralization, with the establishment of a Banking Union, which, since 2014, has acquired more definitive legal

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31. Council Regulation 1093/2010, 2010 O.J. (L 331) 12 (EU) [hereinafter EBA Regulation].

32. Council Regulation 1094/2010, 2010 O.J. (L 331) 48, 49 (EU).

33. Council Regulation 1095/2010, 2010 O.J. (L 331) 84, 85 (EU) [hereinafter ESMA Regulation].

34. Giuliano G. Castellano et al., *Reforming European Union Financial Regulation: Thinking through Governance Models*, 23 EUR. BUS. L. REV. 409 (2012).

contours.<sup>35</sup> The Banking Union is composed of a Single Rulebook, a Single Supervisory Mechanism (SSM),<sup>36</sup> a Single Resolution Mechanism (SRM),<sup>37</sup> and a Common Deposit Guarantee Scheme.<sup>38</sup> From an institutional perspective, the SSM and the SRM substantially modifies the geometry of the architectural framework in the EU. In fact, in the SSM, the ECB has been tasked with the power to directly and indirectly supervise credit institutions operating in Member States that adopts the euro as a common currency as well as those of EU countries that decide to join. Whereas rule-making prerogatives largely belong to the Commission in conjunction with the ESAs — in particular, to the EBA — the supervision of approximately 6,000 banking institutions has been allocated to the ECB within the SSM. Albeit the enforcement relies on national authorities, the ECB enjoys direct sanctioning powers. New coordination mechanisms have been established and the daily supervisory activity is carried out through Joint Supervisory Teams, composed of staff from both the ECB and the competent authorities of Member States where regulated credit institutions operate.

The SRM took effect on January 1, 2016, and represents the legal and institutional framework for the orderly resolution and recovery of banks within the Banking Union. The SRM is aligned with the needs of ensuring the integrity of the single market and complements the SSM by establishing Single Resolution Board (SRB),<sup>39</sup> which represents the resolution authority for the financial entities directly supervised by the ECB (plus all cross-border groups) and oversees national competent authorities. The SRB administers the Single Resolution Fund.<sup>40</sup> The Fund is made up of the contributions of market participants — primarily, but not exclusively, banks — of the nineteen Member States participating to the Banking Union. It supports bank resolutions and is the first line of defense in case of a major financial crisis that requires public funds to rescue troubled financial institutions while ensuring the viability of their businesses. The SSM and the SRM are essential elements of the Banking Union and represent a new configuration of powers and responsibilities between the central

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35. See Niamh Moloney, *European Banking Union: Assessing Its Risks and Resilience*, 51 COMMON L. MKT. REV. 1609 (2014) (for a comprehensive assessment of the EU Banking Union); *But see*, David Howarth & Lucia Quaglia, *Banking Union as Holy Grail: Rebuilding the Single Market in Financial Services, Stabilizing Europe's Banks and 'Completing' Economic and Monetary Union*, 51 NEW POL. ECON. 103 (2013) (on the different positions of EU Member States).

36. Council Regulation 1024/2013, 2013 O.J. (L 287) 63, 63 — 64 (EU).

37. Council Regulation 2015/81, 2015 O.J. (L 15/1) 1 (EU).

38. Council Common Position 2014 No. 49/2014, O.J. (L 173) 149 (EC).

39. Council Regulation 806/2014, 2014 O.J. (L 225) 1 (EU).

40. Council Agreement 8457/14, *Intergovernmental Agreement on the Single Resolution Fund*, May 14, 2014.

(supranational) level and national supervisory structures.

The new institutional arrangement does not replace the aforementioned tripartite distribution of competencies and responsibilities that applies across the entire Union. However, as far as the Banking Union is concerned, the segmentation between supranational rule-making and national supervision is substantially reduced. As further illustrated below, the resulting institutional arrangement stretches the boundaries of EU primary law and, in consideration of the different constitutional status of the ECB, the Commission, and the EBA, institutional conflicts may result. The trend towards a progressive centralization based on the collaboration with national authorities is likely to characterize the proximate future of EU financial regulation. While in the aftermath of the Global Financial Crisis the attention has been primary towards the banking sector and financial stability constituted the primary policy objective for financial regulation,<sup>41</sup> the idea of deepening the integration across all financial sectors emerges distinctively from the Capital Markets Union project, as President Juncker declared in his opening statement to the European Parliament.<sup>42</sup>

## **B. The Common Interest in EU Financial Regulatory Framework**

From the above, it is possible to identify in the key institutional players specific functions vis-à-vis the constitutional framework established by the Treaties. Such a functional account differs from the more traditional distinction between institutions tasked with rule-making or supervisory powers.<sup>43</sup> In particular, it is possible to isolate three main functions that EU institutions involved in the governance of financial markets should perform under the EU primary laws. These are: (i) the safeguard and the advancement of a pan-European common interest; (ii) the definition of its contents, with regards to financial regulation; and (iii) the operative application of the measures enacted to protect or advance such a common interest.

Recognizing and protecting a common interest lies at the roots of the

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41. Niamh Moloney, *The Legacy Effects of the Financial Crisis on Regulatory Design in the EU*, in Eilís Ferran et al., (eds.), *THE REGULATORY AFTERMATH OF THE GLOBAL FINANCIAL CRISIS* 152 (Cambridge University Press 2012).

42. Jean-Claude Juncker, Opening Statement in the European Parliament Plenary Session in Strasbourg, at 18, July 15, 2014, transcript available at <http://www.eesc.europa.eu/resources/docs/jean-claude-juncker---political-guidelines.pdf>.

43. See, e.g., NIMAH MOLONEY, *EU SECURITIES AND FINANCIAL MARKETS REGULATION* (Oxford EU Law Library, 3d. ed., Oxford University Press 2014).

European project. Yet its precise definition escapes specific legal parameters and appears to be a concept that generally reflects the ethos of the European project; a plurality of national interests is collapsed into the interest of one community where resources are shared through the establishment of a single market. The Treaty of Paris of 1951 and Treaty of Rome of 1957 intended precisely to design an international legal framework to share resources among European countries in order to ensure the political and economic stability of the region. As Robert Schuman stated in the Declaration of May 9, 1950, “[t]he solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible.”<sup>44</sup> The creation of a common market was, in fact, based on the pooled production of coal and steel. This established the roots for a common interest and, in turn, required a supranational governance structure to safeguard and advance such an interest, namely the High Authority from which the modern Commission derives. Upon this idealized construction, the common interest may be originally conceived as the interest in, first, creating and, then, protecting a single market.<sup>45</sup>

The evolution of the European project, leading to a Union, builds upon this embryonic supranational apparatus, which progressively enlarged, reflecting the expansion of the perimeters of the common interest.<sup>46</sup> Further developments and elaborations provided by European institutions and, in particular, by the European Court of Justice, reveal that the common interest is not a static concept. Rather it constitutes the essential bond for constructing the European project and for identifying Europe as a community. Hence, the common interest seems to coincide with the preservation of the community in itself and, as such, it is superior to and autonomous from the interests of individual Member States.

Since the landmark decision in *Van Gend en Loos*,<sup>47</sup> EU law transcends national laws and diverges from traditional international legal

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44. Robert Schuman, A United States of Europe, speech recorded in SELECTION OF TEXTS CONCERNING INSTITUTIONAL MATTERS OF THE COMMUNITY FROM 1950 TO 1982, 47, European Parliament Committee on Institutional Affairs (1982).

45. Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R., 2-15 (this point emerges from the decision in this case, and is further illustrated below) [hereinafter *Van Gend en Loos*].

46. See, DAMIAN CHALMERS ET AL., EUROPEAN UNION LAW, Ch. 1 (Cambridge University Press, 3d ed., 2014) (Chapter One provides a complete account of the evolution of the European Communities and the subsequent establishment of the European Union).

47. *Van Gend en Loos*, *supra* note 45, at 4. In 2013, the Court of Justice marked the 50th anniversary of the judgment highlighting the constitutional importance of the judgment, see Conference Proceedings, May 15, 2013, available at [http://curia.europa.eu/jcms/jcms/P\\_95693/en/](http://curia.europa.eu/jcms/jcms/P_95693/en/).

arrangements by creating a legal community whose members are: states, national administrations, as well as citizens, industries and corporations. The judgment defined Europe as a legal community based on a new legal order that is independent from national legal systems. Its members have direct relationships with the legal community through a series of rights and obligations that are justified by the pursuit of common interest. The common interest is defined by the Court as the establishment of a common market,<sup>48</sup> which translated into the commitment to establish a functioning internal market, pursuant to Article 26 of the TFEU.

A modern reading of *Van Gend en Loos* indicates that the Court established the premises for a strong leadership of EU institutions towards Member States. EU institutions have the monopoly over both the pursuit of community's interest and the teleological reasoning that determines whether a specific action is legitimized under the pursuit of such a common interest.<sup>49</sup> The authority thereby established appears to define a hierarchical organization well summarized in the doctrine of supremacy of European law over national law.<sup>50</sup> These considerations have merit in offering a deeper understanding of the dynamics shaping the European constitutional architecture. Nonetheless, they have to be juxtaposed to the idea that Member States accept their subordination to a supranational community not under a federalist legal doctrine. Rather they accepted a voluntarily act of subordination, in specific areas, towards a community in which they are active and integral components. This organization serves to both expand and advance the common interest of the community through its translation into objectives that could be pragmatically pursued by the EU governance apparatus. For instance, the measures to increase the integration of financial services in the last decades have been identified by the Lamfalussy and the de Larosiere reports, which were then put forward by the Commission.<sup>51</sup>

In the context of financial markets governance, financial stability is not a direct interest of the EU legal community. Instead, it is a derived objective that emanates from the overarching interest of, first, integrating financial services through the free circulation of capital and services as currently enshrined in TFEU Article 26(2), and, then, by preserving the

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48. *Id.*

49. Damian Chalmers & Luis Barroso, *What Van Gend en Loos Stands For?*, 12 INT'L J. OF CONST. L. 102, 113–114 (2014).

50. Case 6/64, *Flaminio Costa v. National Electricity Board (ENEL)*, 1964 E.C.R. 587–601.

51. More generally, the steps necessary for the establishment of an internal market have been advanced by Lord Cockfield in the *White Paper on Completion of Internal Market*. See *Completing the Internal Market*, 85 COM 310 (1985).

integrity of integrated financial markets. Following the 2007-2009 financial crisis, the necessity for international and supranational efforts to ensure financial stability and curb systemic risk became evident, given that the decisions purely driven by national interests could compromise the stability of the single market.<sup>52</sup> In pursuing this enlarged dimension of the common interest, the EU legal order has expanded to include financial stability as a central element; particularly for Member States adopting the common currency, which automatically join the Banking Union. From the above it emerges that the common interest is a fluid concept that changes depending on the needs of community.

***i. Institutions Warranting the Existence of The Common Interest.***

Within this constitutional framework the Commission — first, as the Commission of the European Communities, then, as the European Commission — represents, in its own words, the ‘embodiment’ of the common interest.<sup>53</sup> The Commission is thus conceived and designed as an institution that is divorced from the interests of individual Member States. It has been noted that the notion of *fonction publique européenne* (European civil service) cites the administrative functions of the Commission above national politics and defines the authority under which its officers perform their duties and tasks.<sup>54</sup> This role and identity derives directly from EU primary law and it has been reaffirmed with the Lisbon Treaty. The Commission is expected to be a guardian, by overseeing the correct and harmonious application of European law across the EU<sup>55</sup> and by acting as both the police and the prosecutor of the Union.<sup>56</sup> It also acts as a gatekeeper by channeling the interests of different groups into legislative proposals that are (or should be) in line with the common interest of the

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52. For instance, in the context of the resolution of large, cross-border financial institutions Rosa M. Lastra, *Systemic Risk, SIFIs and Financial Stability* 6 CAP. MARKETS L. J. 197 (2011); Dirk Schoenmaker, *Banking Supervision and Resolution: The European Dimension* 6 L. & FIN. MARKETS REV. 52 (2012).

53. European Commission, *The European Commission: 1995-2000*, 7 (DGX, Office for Official Publications of the European Communities 1995).

54. CRIS SHORE, *BUILDING EUROPE: THE CULTURAL POLITICS OF EUROPEAN INTEGRATION*, 178 (Routledge 2013).

55. Treaty of Lisbon art. 17, Dec. 18, 2007 [2009].

56. See R. Schütze, *European Constitutional Law* 194 (2d ed., Cambridge University Press 2016). The Commission’s role of main protector of the Union notably emerges from its ability of commencing infringement procedures against Member States (TFEU, *supra* note 15, at art. 258,) and other EU Institutions (TFEU, *supra* note 15, at art. 263).

Union.<sup>57</sup> Moreover, the Commission enjoys quasi-legislative and policy-setting powers that define the contents of the common interest; albeit, it has direct legislative powers only on specific fields related to the protection of the common interest,<sup>58</sup> as further illustrated below.

The multifaceted and evolving nature of the common interest is also reflected in the evolution of European primary law. In particular, by virtue of the Maastricht Treaty,<sup>59</sup> the Community's interest expanded with the inclusion of "economic and monetary union" — immediately after the reference to the "common market" — amongst the objectives of the Community enumerated in EC Treaty, Article 2.<sup>60</sup> Such an addition resulted in two major consequences. First, it expanded the role of the Commission in new areas and, second, offered the constitutional ground, also in the core objectives of the Community for establishing the European System of Central Banks, chaired by a supranational central bank. The need for a European central bank became apparent precisely with the decision to move towards a monetary union. The ECB hence came into existence in 1998 and assumed its formal functions starting January 1, 1999, when the euro was introduced as common currency. The process appears a natural development when the emergence of national central banks is considered. In the 17th Century, starting with the Swedish Riksbank and the Bank of England,<sup>61</sup> national central banks emerged in Europe to regulate money supply. Their role and structure evolved from purely private institutions to entities performing a public function. Once embedded in the legal, or even constitutional framework, central banks traditionally discharged their tasks through higher degrees of institutional autonomy and independence from political powers.<sup>62</sup>

Within the European context, the establishment of the ECB as an autonomous body protecting the interest of the monetary union was ambiguous. First, the Maastricht Treaty included the provisions on

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57. DAMIAN CHALMERS ET AL., *EUROPEAN UNION LAW*, 72 (Cambridge University Press, 3d ed., 2014).

58. Specifically, the Commission may take directives or decisions to Member States to ensure that public undertakings are compliant with the provisions of the TFEU, *supra* note 15, at art. 106(3), and it may regulate the conditions under which EU nationals may remain in the territory of a Member State, after having been employed there, pursuant to the TFEU, *supra* note 15, at art. 45(3)(d).

59. The Treaty of Maastricht, Feb. 7, 1992, established the European Union and substantially amended the Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, as amended by Single European Act.

60. Treaty of Rome as reported in Consolidated Version of the Treaty Establishing the European Community, Oct. 11, 1997, C 340 P. 0173 O.J. [Hereafter EC Treaty].

61. Founded, respectively, in 1664 and in 1694.

62. Rosa M. Lastra, *The Evolution of the European Central Bank*, 35 *FORDHAM INT'L L.J.* 1260 (2012).



monetary and economic union within the EC Treaty, rather than in separate protocols or pillars, like the Common Foreign and Security Policy and the Cooperation in Justice and Home Affairs.<sup>63</sup> This signaled an expansion of the scope of the common interest to cover deeper levels of integration. Second, a new constitutional balance resulted, whereby the Commission and other institutions, such as the European Court of Justice, extended their roles to cover new domains, e.g., by ensuring judicial reviews over ECB's decisions.<sup>64</sup> Third, notwithstanding the fact that monetary and economic union are key constitutional objectives, the ECB had an unclear constitutional status, given that it was not included in the pantheon of the Community's institutions. Its existence was provided by EC Treaty, Article 8, which was separated from the provisions concerning other institutions.

Such an ambiguity became evident in, and to some extent resolved by, the *OLAF* case.<sup>65</sup> The ECB, in rejecting to be subjected to the Commission's review, claimed to enjoy a legal personality and autonomy that should have been considered distinct from those attributed to the other Community institutions. The Court, largely following the Advocate General's opinion, rejected this view, stating that the ECB, in discharging its task of maintaining price stability, supports the general economic policy of the European Community, thus should be subjected to its rule of law even while enjoying a great degree of autonomy.<sup>66</sup> As a result, even if the ECB performs its monetary policy to preserve the interest of the monetary union, and the euro, the principal guardian of the general Community's interest, that includes the proper functioning of *all* its institutions, remains the Commission.

The Lisbon Treaty reshaped the EU constitutional framework and deepened the notion of "union" to mark an intensified European integration. The pervasiveness of European supranational structure and the idea of "community" was strengthened by building on established legal principles of European Law to further partition the interests of individual members from those of the community at large. After the years spent in vain on the Constitutional Treaty, the Lisbon Treaty has marked a new ambitious step more reassuringly rooted in the *acquis communautaire*.

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63. For an historical account, see DESMOND DINAN, *EUROPE RECAST: A HISTORY OF EUROPEAN UNION*, 240 (Palgrave Macmillan Basingstoke 2004).

64. EC Treaty, *supra* note 60, at art. 230.

65. C-11/00 Commission v. European Central Bank, 1999/726, 1991 E.C.R. (EC).

66. A position sustained by various commentators, see, e.g., J-V Louis, *The Economic and Monetary Union: Law and Institutions*, 41 COMMON MKT. L. REV. 575 (2004); Rojer J. Goebel, *Court of Justice Oversight over the European Central Bank: Delimiting the Ecb's Constitutional Autonomy and Independence in the Olaf Judgment*, 29 FORDHAM INT'L L.J. 610 (2005).

Instead of announcing a global revision, the Lisbon Treaty relied on amendments to the *acquis* created by the Rome Treaty establishing the European Community and to the Maastricht Treaty establishing the European Union. The duality between the European Union and the European Community collapsed into a renewed European Union. Within this novel constitutional framework, whose implications affect the entire European political, economic, and legal spectrum,<sup>67</sup> two elements are of particular relevance for our analysis. First, the central role of the Commission in protecting the interest of the Union has been reaffirmed, by ensuring its monopoly of legislative initiative and by explicitly conferring executive powers to the Commission. Prior to the Lisbon Treaty the Council exclusively held executive powers. Second, the Lisbon Treaty clarified the role of the ECB, which gained new constitutional status.

TEU Article 13(1) expressly identifies the ECB as one of the core institutions of the European Union. ECB's primary objective — laid down in TFEU Article 127(1) — is the pursuit of monetary stability. This objective must be pursued without prejudice to the support of general EU economic policies and contribute to the achievement of the general EU interests and objective enshrined in Article 3 TEU. In addition, the same article attributed to the ECB the general objective of contributing to the overall stability of the financial system and allowed the Council to delegate the supervision of the banking sector to the ECB.<sup>68</sup> It is precisely upon these constitutional premises that the Banking Union was established. This new architectural framework illustrates how the ECB participates in the coming into existence of a new governance function of the Union: the stability of the financial systems in the Eurozone,<sup>69</sup> and the supervision of banking institutions via the Banking Union.

The Commission and the ECB also enjoy a significant level of independence and autonomy. TEU Article 17(3) and TFEU Article 245 establish the independence of the Commission and the Commissioners who should not favor any specific country or body and should pursue the general interest of the Union. Likewise, Article 130 TFEU ensures the independence of the ECB and of its governing organs while performing monetary policy functions. Through TFEU Article 282(3), which refers to independence as an attribute of the powers granted to the ECB, independence is also

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67. For a comprehensive review and analysis of the changes implemented with Treaty of Lisbon, see PAUL CRAIG, *THE LISBON TREATY: LAW, POLITICS, AND TREATY REFORM* (Oxford University Press 2010).

68. TFEU, *supra* note 15, at art. 127(6).

69. ROBERT SCHÜTZE, *EUROPEAN CONSTITUTIONAL LAW*, 154 (Cambridge University Press 2012).

extended to the newly acquired supervisory functions granted to the ECB within the SSM.<sup>70</sup>

## *ii. Institutions Defining the Content of the Common Interest*

The definition of the contents of the common interest is reflected in the powers of EU institutions to adapt it, through policy-setting, rule-making, interpretative efforts, to the mutating needs of various policy domains. In other words, the common interest is not a static concept. Rather it is articulated in a series of specific legislative and regulatory activity that ensure the survival and, possibly, the thriving of the community. The European Court of Justice is probably the most representative EU institution carrying out a constant interpretative activity to define the contents of the common interest. In the context of financial regulation, the Commission appears as a key player in expanding the contours of the common interest and in defining its contents.

Pursuant to TEU Article 17, “the Commission shall *promote the general interest of the Union* and take appropriate initiatives to that end” (emphasis added). In discharging its legislative, quasi-legislative and executive roles, the Commission, other than being a guardian of the Union and its law, acts as an “engine” of both the European Union and integration process, through its prerogative of formally proposing legislative bills.<sup>71</sup> The responsibility of initiating the policy-making process extends to setting the annual legislative program of the Union as well as stimulating the debate over reforms, usually via Green or White Papers. The leading role of the Commission in defining the content of the Union’s common interest has gained intensity through the use of quasi-legislative powers supported by the “comitology” system. The comitology system consists of specialized committees, composed of national administrators that assist the exercise of delegated legislative powers granted to the Commission.<sup>72</sup> The wide use of

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70. It was debated whether the independence of the ECB would extend also to the newly acquired supervisory powers; however, the issue has been resolved in favour of an extensive interpretation of TFEU, *supra* note 15, at art. 282(3) – given that the norm does not pose any specific restriction; see Benedikt Wolfers, Thomas Volland, *Level the playing field: The New Supervision of Credit Institutions by the European Central Bank* 51 COMMON MARKET L. REV., 1463, 1487, (2014).

71. Treaty of Lisbon, *supra*, note 55, at art. 17(2). However, the majority of the Commission’s bills advance regulations; whereas directives are most commonly originated from the Parliament or the Council. NEIL NUGENT & MARK RHINARD, *THE EUROPEAN COMMISSION*, 284 (Palgrave Macmillan, 2d, 2015).

72. See J. Blom-Hansen, *The Origins of the EU Comitology System: A Case of Informal Agenda-Setting by the Commission*, 15 J. OF EUR. PUB. POL’Y 208 (2008); Fabio Franchino,

comitology and delegated legislative powers has raised concerns over the democratic accountability of a quasi-legislative process pivoting around an unelected institution.<sup>73</sup>

In the context of financial regulation, the Lamfalussy Process relied massively upon the comitology system with the objective, felt particularly strong before the Global Financial Crisis, of rapidly integrating national financial industries and markets. Hence, if, on the one hand, the Lamfalussy Process redesigned the procedures of rule-making with a greater involvement of specialized committees, the Commission's FSAP, on the other hand, provided the legal contents deemed necessary to establish an integrated market for financial services. To this end, a high level of detail has characterized the measures contained in the FSAP. The traditional distinction between regulations and directives blurred with the progressive abandonment of the *minimum harmonization* approach — according to which EU law only establishes minimum standards leaving to Member States the possibility to add new rules in the transposition process — in favor of a more pronounced reliance on *maximum harmonization*, according to which Member States are expressly prevented from adopting additional rules.<sup>74</sup> Within this framework, the centrality of the Commission emerges distinctively in defining the contents of financial regulation, and thereby articulating the elements of the common interest.

After the completion of the FSAP and with the entrance into force of the Lisbon Treaty in 2009 — which coincidentally also marked the post-financial crisis phase of EU financial regulation — a new definition of the common interest emerged. As earlier noted, the necessity of enacting measures to support the creation of a single market mutated into the necessity of ensuring its integrity by preserving financial stability. This led to the establishment of the Banking Union, of which the Commission was the primary promoter.

The establishment of a Banking Union, within the European Union — aimed at defining a more centralized apparatus in response to current and, possibly, future financial crises — became a part of the Commission's agenda towards deeper economic and monetary integration. Central to the Banking Union is the Single Rulebook, which is a set of substantive rules that builds upon and expands the

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*Delegating Powers in the European Community*, 34 BRITISH J. OF POL. SCI. 269 (2004).

73. See *id.*; see *inter alia*, Michelle Cini, *The European Commission: An Unelected Legislator?*, 8 THE J. OF LEGIS. STUD. 14 (2002).

74. For a comment on the benefits and the drawbacks of these approaches in the context of securities regulation, see Carsten Gerner-Beuerle, *United in Diversity: Maximum Versus Minimum Harmonization in EU Securities Regulation* 7 CAP. MKT. L.J. 317 (2012).

measures implemented through the FSAP. New capital requirements,<sup>75</sup> harmonized provisions for deposit guarantee schemes,<sup>76</sup> and common rules for recovery and resolution of troubled banking institutions<sup>77</sup> represent the major novelties in the bulk of EU substantive laws that are applicable to all credit institutions operating in all Member States.<sup>78</sup> It has been noted that, rather than a cohesive set of legislative provisions, the Single Rulebook encompasses a number of measures including legislative, nonlegislative and implementing acts.<sup>79</sup> This is potentially in conflict with the higher level of centralization sought through the new institutional structure and prompted distinguished commentators to question the appropriateness of the term “single rulebook”<sup>80</sup> and to highlight the need for enhanced enforcement mechanisms and approaches.<sup>81</sup>

### *iii. Institutions Ensuring The Operation of The Common Interest*

The safeguard and the definition of the contents common interest percolate from EU primary laws to secondary legislative acts and ultimately to the administrative mechanisms that allows the enactment and the enforcement of EU law across the legal systems of its Members States. It is precisely the institutional framework enacting regulatory and administrative provisions that locates a general, programmatic objective and puts it into operation. In the general context of EU financial regulation, this function appears to be primarily performed by non-Treaty institutions, namely the ESAs, with a resulting dilution of the pursuit of a common interest with the interests of individual Member States. Such a structure is anchored to the constitutional fabric of EU law that in turn is stretched to create a peculiar

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75. Council Directive 2013/36, 2013 O.J. (L 176) (EU), referred to as Capital Requirement Directives IV (CRD IV); Council Regulation No. 575/2013, 2013 O.J. (L176) (EU), referred to as Capital Requirement Regulation (CRR).

76. Council Directive 2014/49, 2014 O.J. (L 173) (EU).

77. Council Directive 2014/59, 2014 O.J. (L 173) (EU).

78. To the list of major novelties in financial regulation, the following should be added: the Markets in Financial Instruments Directive II (Council Directive 2014/65, 2014, O.J. (L 173) 349(EU)); the Markets in Financial Instruments Regulation (Council Regulation 600/2014 2014, O.J. (L 173) 84 (EU)), the 2014 Market Abuse Regulation (Council Regulation 596/2014, 2014 O.J. (L 173) 1(EU)) and Council Directive 2014/57 O.J. 2014 (L 173) 179 (EU)).

79. Moloney, *European Banking Union*, *supra* note 35 at 1611.

80. Eilís Ferran, *European Banking Union: Imperfect, but It Can Work*, in, EUROPEAN BANKING UNION, (Danny Busch & Guido Ferrarini eds., Oxford University Press 2015).

81. Dalvinder Singh, *The Centralisation of European Financial Regulation and Supervision: Is There a Need for a Single Enforcement Handbook?*, 16 EUR. BUS. ORG. L. REV. 439 (2015).

architectural framework for financial regulation and supervision.

The ESAs (and the ESRB) acquire their legal personality from TFEU Article 114. Article 114 stipulates that the European Parliament and Council may take required measures for the approximation of the provisions contained in law, regulation, or administrative action of Member States “which have as their object the establishment and functioning of the internal market.” Through the interpretation of Article 114 TFEU offered by the European Court of Justice and defining the *Meroni* doctrine on the establishment of new European authorities,<sup>82</sup> the three ESAs and the ESRB are soft-law bodies;<sup>83</sup> or, to use the EU law terminology, they are measures for the approximation of national laws. The ESAs define Regulatory Technical Standards and Implementing Technical Standards. They also oversee the correct implementation and application of EU laws and may intervene in case of emergency. Their legitimacy in conducting rule-making activity is ascribed to the provisions of the Treaty governing the exercise of the quasi-legislative powers attributed to the Commission, specifically TFEU Articles 290 and 291. Hence, when secondary legislative acts entrust the Commission with the power to enact a delegated act pursuant to TFEU Article 290, the ESAs draft these acts in the form of Regulatory Technical Standards. These standards are then endorsed by the Commission and subjected to the possibility of veto by the Council and the Parliament, as established by the same article. Also, in the case of implementing acts, pursuant to TFEU Article 291, the ESAs draft these acts in the form of Implementing Technical Standards, subject to the procedures and control contained in that norm. In both instances, the Commission has limited room to amend those acts or reject them, thus restricting its role to an activity of oversight on the legality of technical standards and their conformity with the general interest of the Union. Furthermore, albeit the Treaty does not contain an explicit possibility for delegating directly to the ESAs, it is not uncommon for the provisions of the Single Rulebook, composed of regulations enacted by the Council or by Parliament, to confer on the ESAs delegated powers.<sup>84</sup> In this respect, the EBA represents the guardian of regulatory convergence and the keeper of the Single Rulebook of which defines its contents and, in principle, gives it a sense of cohesiveness.<sup>85</sup>

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82. Case 9/56, *Meroni & Co., Industrie Metallurgiche s.p.a v. High Authority*, 1957-1958, E.C.R. 133; Case 10/56 *Meroni & Co., Industrie Metallurgiche s.p.a v. High Authority*, 1957-1958, E.C.R. 157.

83. Eilis Ferran & Kern Alexander, *Can Soft Law Bodies Be Effective? The Special Case of the European Systemic Risk Board* 6 EUR. L. REV. 751 (2010).

84. For instance, capital requirements often delegate the EBA to establish specific provisions.

85. Access to the Single Rulebook is granted via the EBA website.

The amplitude and the pervasiveness of the powers allocated to the ESAs emerge from a recent case, where the UK sought before the Court of Justice the annulment of the provision,<sup>86</sup> contained in Article 28 of Regulation 236/2012 regulating short-selling operations.<sup>87</sup> That regulation granted the ESMA the power of adopting legally binding measures in the event of a threat to the stability or the orderly functioning of the EU financial system. According to the applicant, TFEU Article 114 was not the appropriate legal basis for this delegation of powers and was at odds with the constitutional imbalances of the EU. Moreover, the UK sustained that the Parliament and the Council do not have any authority under the EU primary law to delegate powers to a EU body, whose amplitude was deemed to violate the limits set by the *Meroni* doctrine. The Court rejected the request of annulment and noted that the powers conferred to the ESMA are sufficiently restricted and are thus in conformity with the principles established in *Meroni*. The Court further noted that the powers follow a regulatory logic that requires temporary restrictions, confined to emergency circumstances threatening the integrity of the single market. Furthermore, consultation with other relevant EU institutions is required and ESMA's acts may be challenged through judicial review, given that the Lisbon Treaty explicitly permits judicial review of acts of EU agencies and other bodies. This judicial review implies the possibility a conferral of powers outside the perimeters of delegated legislation established by Articles 290 and 291.<sup>88</sup> The Court also stated that those binding measures are devices to ensure further coordination and approximation of national laws, given that the addressees are markets' participants, only in circumscribed circumstances, when ESMA represents a regulator of "last resort."<sup>89</sup>

The expanded role of nontreaty based institutions exemplifies the rise of the administrative Union,<sup>90</sup> whereby governmental tasks are transferred to bodies not expressly mentioned in the constitutional design. In the post-Lisbon settlement, the comitology system has been substituted by a system of "agencies," where national representatives are asked to enact the

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86. Case C-270/12, United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union, 2014 Grand Chamber (EU) [hereinafter UK v. European Parliament and Council].

87. Council Regulation No. 236/2012, 2012, O.J. (L86/1) (EU).

88. Under Article 263 of the TFEU, acts of "bodies, offices" and "agencies" of the Union may be subject to judicial review by the Court. The rules governing actions for failure are also applicable pursuant to Article 265. Furthermore, courts and tribunals of the Member States may refer questions over the validity and the interpretation of those acts in accordance to Article 267. Finally, such acts are subject to Article 277 governing the pleas of illegality.

89. UK v. European Parliament and Council, *supra* note 86, at para 108.

90. Cf. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

common interest of the Union. The decision-making process, thus, follows a logic — and, as further elaborated below, a relational dynamic — that is different from the one adopted by supranational, Treaty-based institutions governed by EU civil servants to advance, or even embody, the common interest. Albeit it has been argued that the ESAs are structurally intergovernmental<sup>91</sup> and that the national interests are naturally embedded in the decision-making process of the ESAs. In fact, their governing organs follow the (simple or qualified) majority voting rule, as does, for instance, the Council, the EU political institution *par excellence*.<sup>92</sup>

The establishment of a Banking Union also had an impact on the role performed by treaty-based and non treaty-based institutions (and national authorities) to operate the common interest. As noted earlier, banking supervision occurs through a single supervisory mechanism, i.e., the SSM, which is composed of the ECB and national authorities. TFEU Article 127(6) *de facto* and *de jure* mandates the advancement of the common interest to a Treaty-based institution, i.e., the ECB. However, the ECB is subjected to the rules drafted by the EBA and to a large extent enforcement is conducted by national authorities and coordination ensured through Joint Supervisory Teams. In fact, the SSM operates on the basis of a mix of EU and national legislations;<sup>93</sup> thus if a sufficient level of harmonization is not reached the application of EU laws may be impaired.<sup>94</sup> Harmonization is, in principle, ensured by the Single Rulebook and by the implementing and delegated standards of the EBA. Nonetheless, national authorities, in exercising their supervisory tasks, may adopt different approaches and enforcement strategies, potentially undermining the uniformity sought through the implementation of common rules.<sup>95</sup> All in all, within the Banking Union the multilevel governance may be summarized as follows:

- i.) Two Treaty-based authorities are involved in the regulatory governance of the EU banking sector. The Commission in

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91. Niamh Moloney, *The European Securities and Markets Authority and Institutional Design for the EU Financial Market A- Tale of Two Competences: Part (1) Rule-Making*, 12 EUR. BUS. ORG. L. REV. 41, 77 (2011).

92. PAUL CRAIG, *COMITOLOGY, RULEMAKING AND THE LISBON SETTLEMENT: TENSIONS AND STRAINS, RULEMAKING BY THE COMMISSION: THE NEW SYSTEM*, (Carl Bergstrom & Dominique Rittleng, Oxford University Press (2015).

93. *See, e.g.*, European Central Bank Regulation, Art. 4(3), 9(1), 18(5), and 21(4).

94. A problem noted by many. *See, e.g.*, Andrea Enria, European Central Authority Chairman, *The New Role of the European Banking Authority in the Banking Union*, ESE Conference in Frankfurt, (2013).

95. *See* Valia Babis, *Single Rulebook for Prudential Regulation of Banks: Mission Accomplished?* 26 EUR. BUS. L. REV. 779 (2015); Singh, *supra* note 81.



exercising policy-setting and quasi-legislative powers (within the limits just illustrated) ensures both the advancement of the common interests and the definition of its contents. The ECB oversees monetary stability and discharges its newly acquired supervisory functions towards banking institutions operating in the Banking Union. In so doing, the ECB also safeguards the common interest while defining its contents.

- ii.) Soft-law bodies, i.e. the ESAs and the ESRB, put into operation the common interest, by defining technical standards, and ensuring regulatory and supervisory convergence both within and outside the Banking Union. In particular, the EBA and the ESMA, albeit composed of national representatives, should exercise their powers in line with the interest of the EU.
- iii.) Network-based systems, i.e. Joint Supervisory Teams, ensure the daily supervision and coordination among national authorities that, by definition, pursue national interests, but, in applying common rules, should also operate for the realization of the common interest.

The resulting framework appears to be complex with different decision-making centers. Their structures, procedures, and organizations might generate new policy conflicts or deeper fragmentation. In particular, the role of the ESAs and their constitutional configuration pose three critical issues. First, in this schema, the ECB discharges its newly acquired — yet enshrined in the Treaty — supervisory duties in line with its general function of protecting the interest of the monetary union. In operating this interest, the ECB will apply technical standards (regulatory or implementing) that have been drafted by an institution not established by the Treaty, i.e., the EBA, and whose new institutional capacity may potentially adumbrate the role of treaty-based institutions. Second, the risk of the EBA to be politicized, as noted also by the International Monetary Fund, may ultimately undermine the effective operability of the Banking Union.<sup>96</sup> Third and related, the membership of the EBA extends to all EU countries, bringing together Member States participating in the Banking

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96. European Union: Publication of Financial Sector Assessment Program Documentation— Technical Note on European Banking Authority, 7 — 87, International Monetary Fund Country Report, No. 13/74 (2013).

Union and Member States outside that arrangement.

The overlaps of different national and supranational interests, canvassed in an institutional framework that does not sufficiently counteract the risk of politicization and with dubious constitutional contours, may affect the relationship among Member States, in particular between those that are subjected to the Banking Union and those that do not participate in it and have not adopted the single currency. The first group of countries may see the EBA as a forum where undue pressures may be exercised towards the ECB, undermining its constitutional prerogatives. The second group, instead, may see in the new supervisory role of the ECB as a curtailment of their powers to influence the regulatory governance of the EU through their participation in the EBA. For instance, the EU Sub-Committee on Economic and Financial Affairs of the House of Lords, chaired by Lord Harrison, remarked in a report on the Banking Union that the SSM, by allocating new powers to the ECB may undermine the authority of the EBA.<sup>97</sup> The EBA Chairman Enria has also highlighted that a chasm in the single market might emerge, given that Member States within and outside the SSM jurisdiction are driven by different priorities.<sup>98</sup> In this respect, it appears that the primary role of the EBA in the years to come will be to ensure a link between countries that are participating in the Banking Union and those that are not, by offering an interpretation of the Single Rulebook and ensuring coordinated supervision.<sup>99</sup> Further convergence in the regulatory framework and in supervisory practices affecting all EU members appears to be the primary way forward to minimize the risk of a two-speed financial market within the EU.

These issues are approached as phenomena related to the relational dynamics among the individuals participating in the decision-making process of the relevant EU institutions involved in the regulation and supervision of financial markets. These relational dynamics are here examined through the lenses of social psychology that allows identifying the primary forms of sociality underpinning the governance process. To this aim, it is necessary to determine how the EU constitutional framework shapes the relational dynamics within the institutions here considered. This analysis will assist in elucidating the depth of the concerns animating the current debate over the institutional design for financial markets governance in the EU.

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97. EUROPEAN BANKING UNION: KEY ISSUES AND CHALLENGES, 2012, H.L. Paper 88, at 28.

98. Andrea Enria, Chairman of EBA, Challenges for the Future of EU Banking, Speech made at Madrid 3d Financial Meeting, Jan. 2015.

99. Eilís Ferran, *The Existential Search of the European Banking Authority*, EUR. BUS. ORG. L. REV. 1 (2016).

### III. Forms of Sociality in EU Financial Regulation

Studies in the field of social psychology and anthropology highlight that relational structures call for specific decision making processes, group dynamic, and governing values. These structures are defined by four fundamental relational models, or forms of sociality, which characterize every group and may coexist within the same group of individuals.<sup>100</sup> In Fiske's words, all "domains and aspects of social relations may be organized by combinations of just four elementary models (schemata, rules, or grammars): communal sharing, authority ranking, equality matching, and market pricing"<sup>101</sup> Identifying the sociopsychological models at play within a given institution enables us to better understand how this institution works. To this purpose, the typology presented in the previous section elicits the core legal components that, by setting the premises for a collective action, contribute to the definition of a specific socio-psychological (or relational) model and, *therefore*, to a predictable operating mode also.

Of particular relevance in any collective structure is the prominence given to a shared objective that could be more or less detached to the interests of its individual members. In the context of financial regulation, and EU institutions in general, this is well represented by the identification of a common (European) interest. EU Institutions that perform different functions, for instance, by advancing and defining the contents of the common interests, are expected to display more than one relational model, which adds to the complexity of the multilayer governance model. Before advancing an analysis of the sociopsychological models characterizing EU financial regulators, it is worth introducing the four elementary forms of sociality.

#### A. Elementary Forms of Sociality

The theory of social relations identifies four relational models that characterize any social interaction in every culture.<sup>102</sup> Combinations between these four models build various social forms in accordance to the contingent cultural framework. Hence, through these lenses the social dimension of interactions among individuals is understood as a process that involves "seeking, making, sustaining, repairing, adjusting, judging, construing, and sanctioning relationships."<sup>103</sup> The four models — i.e. Market

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100. Fiske, Four Forms of Sociality, *supra* note 16.

101. *Id.* at 690.

102. *Id.* at 689.

103. *Id.* at 690.

Pricing (MP), Equality, Matching (EM), Communal Sharing (CS), and Authority Ranking (AR) — operate in all domains of social action and cognition, such as transfer of property, definition of standards of conduct, group decisions, or organization of labor. The core characteristics for each of these relational modes are briefly presented here, drawing primarily from Fiske's unified understanding of the theory of social relations.

Market Pricing represents the most pervasive mode of sociality in Western cultures.<sup>104</sup> Within this form of sociality, relationships among individuals are based on more or less rational calculations of cost-and-benefit ratios and proceed by self-interested exchange. An illustration of the decision mechanism that is at play in MP is provided by Adam Smith's invisible hand of the market. Market prices or exchange rates are means to facilitate trade, whereby individuals aim at maximizing their idiosyncratic values through a transaction. The voluntary nature of an arrangement is considered as a source of legitimacy and the rationality postulate is often assumed. While rationality is not a necessary element, MP may, in fact, characterize a relational arrangement even if choices are not considered rational. Other than price and exchange mechanisms, MP represents a driving force that can guide coordinated action towards a general goal, as long as the goal is pursued through voluntary actions that imply a calculative attitude. For example, in a hiring process, the establishment of specific criteria, such as the level of formal education, relies on the value that — depending on the social and cultural context considered — is attributed to such criteria. Hence, defined parameters and agreed criteria are necessary, as are prices, to relational dynamics responding to the MP logic. Groups operating (primarily) under this mode, require explicit rules, usually formally stated, to guide their decisions and allow a cost-benefit analysis. In this model, justifications for the actions taken often rely on a utilitarian and individualistic logic that is deemed to put forward the advancement of the general interest. This is, for instance, the rationale underlying the General Equilibrium Theory, according to which the interactions amongst multiple, profit-seeking individuals lead to a point of market equilibrium and, thus, to the maximization of the general welfare.<sup>105</sup> Albeit MP is the most common relational mode, it is not the only mode of relating to others in Western cultures.<sup>106</sup> The three other modes are also present, though in more subtle ways, precisely because the rules governing

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104. Fiske, Four Forms of Sociality, *supra* note 16 at 706.

105. Kenneth J. Arrow & Gerard Debreu, *Existence of an Equilibrium for a Competitive Economy*, 22 *ECONOMETRICA* 265, (1954).

106. See generally, KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIMES* (Beacon Press 2001).

social interactions remain (often) implicit.

In the Equality Matching mode of relation,<sup>107</sup> exchange is also central. Exchange is so central that some authors conflate EM and MP under the general label of “exchange relationships.”<sup>108</sup> However, in comparison to MP, EM presents a distinctive focus on ensuring an even balance: Each member of the group is entitled to the same amount pursuant to egalitarian and distributive justice principles. In this schema, any imbalance can be accounted for through the principles of equality and reciprocity. Empirical studies highlighted a distinct tendency of punishing individuals whose actions, not obliging to general principles of reciprocity and equality, were deemed unfair. In particular, when the participants to an experiment were asked to share a fixed sum with anonymous strangers, identified only by the distribution they had proposed in a previous round, the large majority opted to share the amount evenly only with those unknown individuals who had previously shared their sum evenly.<sup>109</sup> Rawls’ theory of justice provides, with its notorious reference to the “veil of ignorance,” an illustration of the ethical dynamics underlying EM.<sup>110</sup> In fact, the veil of ignorance is a thought experiment according to which rulers would not know the role that they will play in a world where they are called to determine the rules. Under relational models governed through equality a balanced distribution of resources is incentivized, making no share worse than the others.<sup>111</sup> EM involves distinct individuals who are considered and respected as equals and whose differences are acknowledged and assessed to reach an optimal point, which is represented by an even balance.

In Communal Sharing relationships,<sup>112</sup> members of a group consider each other as of the same kind, as belonging to a single group, or as sharing a common identity. Communal relationships are characterized by mutual feelings of responsibility for the well-being of other members and of the

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107. Fiske, Four Forms of Sociality, *supra* note 16, at 702.

108. Margaret S. Clark & Judson Mills, *Interpersonal Attraction in Exchange and Communal Relationships*, 37 J. PERSONALITY & SOC. PSYCHOL. 12, (1979) [hereinafter *Interpersonal Attraction*]; Judson Mills & Margaret S. Clark, *Exchange and Communal Relationships*, in 3 REV. OF PERSONALITY & SOC. PSYCHOL. (L. Wheeler ed., Sage 1982) [hereinafter *Exchange and Communal Relationships*].

109. Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Fairness and Assumptions of Economics*, 59 J. BUS. 285 (1986).

110. *See, generally*, JOHN RAWLS, A THEORY OF JUSTICE (Harvard University Press 2009).

111. A similar criterion is encountered in economics with the concept of pareto-efficiency, whereby a given allocation of resources among individuals is considered optimal when it is impossible to make any individual better off, without making someone worse off; *see* Vilfredo Pareto, *The New Theories of Economics*, 5 J. POL. & ECON. 485 (1897).

112. Fiske, Four Forms of Sociality, *supra* note 16, at 693.

group as a whole; benefits and concessions are given in response to the needs of the others without expectation of repayment. By contrast, in “exchange relationships,” intended as both MP and EM, benefits are given in response to specific benefits received in the past or with the expectation to receive benefits in the future.<sup>113</sup> While CS is typical of family, romantic or friendly relationships, the exchange relationships are found more often among strangers or business associates. Ethnographic research revealed that CS is also a basis for constituting sociality in stateless, food-harvesting societies, where ethnical, familial, and religious elements are the main bonds (or group norm) that create and maintain a community.<sup>114</sup> In modern societies, CS manifests as the cooperative attitude towards a common objective deployed by individuals within groups and institutions and relates to the concept of *organizational identity*, according to which members of an organization, including public authorities, share an understanding of what characterizes their organization as distinctive and drives their collective enterprise.<sup>115</sup> Within this framework, members of a group identify themselves under a common denominator — be it an ideology, a shared identity, a cultural element, a mission, or a common interest — and tend to change their behaviors to conform to the behaviors of the others.<sup>116</sup>

In larger communities, CS is also present. Stereotyped repetitive actions, traditions, building of rituals, and general principles sustain group membership and cohesion. There is often an idealization of a general social norm that keeps the individuals of a group together under the ordering principles of consensus, unity, and conformity. Upon this idealized social norm — that glues the group to a common goal — develops the tendency of the group to take actions that preserve and perpetuate its very existence. The existence of conflict is not uncommon in CS and it limits the risk of *groupthink*, which is a psychological phenomenon that occurs when members of a group or a community, in order to avoid conflicts, impede critical thinking.<sup>117</sup> This may result in a dysfunctional decision-making outcome, because the evidence challenging group’s assumptions and

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113. The idea is advanced by Clark and Mills, *see* Interpersonal Attraction, *supra* note 108; Exchange and Communal Relationships, *supra* note 108.

114. *See* Michael E. Meeker, Kathleen Barlow & David M. Lipset, *Culture, Exchange, and Gender: Lessons from the Murik*, 1 CUL. ANTHRO. 6 (1986); Fiske, Structures of Social Life, *supra* note 17.

115. The concept is well established in the organizational literature, *see* Stuart Albert & David A. Whetten, *Organizational Identity*, 7 RES. ORG. BEHAV. 263 (1985).

116. *See* Morton Deutsch & Harold B. Gerard, *A Study of Normative and Informational Social Influences upon Individual Judgement*, 51 J. ABNOR. & SOC. PSYCHOL. 629 (1955).

117. *See* IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* (Houghton Mifflin 1982).

supporting a specific action is uncritically discarded.<sup>118</sup>

Finally, Authority Ranking relationships reflect a hierarchy between people who are ordered in a linear manner.<sup>119</sup> In AR, individuals are either above or below each other, depending on the social status attributed in a specific context. Higher ranked individuals enjoy prestige, prerogatives, and privileges that those in a lower position do not have. Military ranks are epitomic of this relational model, which predominantly govern the interactions between individuals working in the armed forces. There is a stark difference with the relational organization encountered in both CS and EM. In AR, resources are allocated depending on the ranking of individuals instead of being traded, equally distributed, or pooled. When AR features the decision-making process of a given group, information moves upward towards the leader who, after assessing them, passes decisions down through a chain of command. This dynamic has been observed in situations where individuals emulate, obey, or even worship superiors,<sup>120</sup> but also in the political sphere, where the phenomenon has been referred to as “authoritative democracy.”<sup>121</sup> As noted by Weber, a hierarchical organization could be imposed through coercion and unilateral control of resources, but it may be accepted through a process of ideological validation that recognizes and legitimizes a superior authority.<sup>122</sup> Ultimately, as noted by Freud, it may also spontaneously arise within a group, when emulation of and identification with the leader generate herd behaviors.<sup>123</sup> In any cases, individuals in AR groups acquire a sense of self-identity from knowing their place in the hierarchy.<sup>124</sup>

The four models often coexist and a group or an institution that operates according only to one model appears to be a rare occurrence. A combination of the models is more commonly observed in different aspects

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118. A recent example offered by the literature, is the United States administration’s assumptions, then followed by other countries, justifying the Iraqi invasion of 2003; Dina Badie, *Groupthink, Iraq, and the War on Terror: Explaining US Policy Shift toward Iraq*, 6 FOR. POL’Y ANALYSIS 277 (2010).

119. Fiske, *Four Forms of Sociality*, *supra* note 16, at 700.

120. See CHARLES HORTON COOLEY, *HUMAN NATURE AND THE SOCIAL ORDER* (Transaction Publishers 1992).

121. BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (University of California Press 2003).

122. This is reflected in Weber’s distinction of three kinds of legitimate domination, i.e., legal, traditional, and charismatic; see MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 212–215 (Guenther Roth & Claus Wittich eds., University of California Press 1978).

123. SIGMUND FREUD, *GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO* (W.W. Norton & Company 1975).

124. Fiske, *Four Forms of Sociality*, *supra* note 16, at 711.

of the social interaction. For instance, different social models may be unconsciously used as templates to interpret the positions of other individuals in the group, to judge or anticipate others' actions, and ultimately to engage in coordinated enterprises, or sabotage them. In this respect, Fiske observes that the models are used together in a hierarchical fashion through various phases of a social interaction or in distinct activities within an institution.<sup>125</sup> Albeit there is limited empirical evidence on the specific driving elements determining what makes a group of individuals opt for one of the models, or to switch from one model to the next, it is reckoned that there is a consensus among individuals of a group in identifying which form of interaction should be used in any given circumstance.<sup>126</sup> In other words, there are cultural and contextual rules that are shared among members of a group and that drive individuals in adopting one of the four relational models interactions. Drawing from these observations it is possible to identify within the legal context of EU financial regulators the dominant relational rules that underpin the decision-making process of the considered EU bodies.

## **B. Models of Sociality in the Financial Regulation Framework**

A distinct socio-psychological model is implicitly favored by the legal framework for each one of the three categories of EU institutions we isolated in the typology presented in Part II. The specific *modus operandi* and the regulatory outcomes of EU institutions, is rooted in the constitutional fabric of the EU. The allocation of powers, objectives, duties, and tasks defines, together with the procedures regulating the members' appointment and their collective decision-making, a main relational style for each category. More specifically, the following patterns are observable: Communal Sharing is a dominant mode for institutions engaged in recognizing the existence of the common interest; whereas Equality Matching and Market Pricing are dominant for institutions defining the content of the common interest, under the principles of mutual recognition, and for institutions operating the common interest, where regulatory and supervisory convergence occur through a balancing of the interests of the community as a whole, with national and industry's interests. By contrast, due to the very nature of the EU legal framework, Authority Ranking does not appear to be a dominant relational model in

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125. Fiske, Four Forms of Sociality, *supra* note 16, at 701.

126. See ROBERT A. LEVINE, PROPERTIES OF CULTURE: AN ETHNOGRAPHIC VIEW (Richard A. Shweder & Robert A. LeVine eds., Cambridge University Press 1984); Fiske, Structures of Social Life, *supra* note 17.



any of the three categories elicited. This is not to say that there is not a hierarchical organization in the EU legal order (or within its institutions); it rather means that the linear ordering is minimal when the decision-making organs driving regulatory and supervisory activities are observed. However, it may be more pronounced in intra-institutional domains that rest outside the scope of this analysis.

To shift the focus from the general categories to the relational modes of specific regulators, EU institutions are here considered as *groups of individuals* that organize themselves in *collective structures*, where the achievement of one's activity may only occur if other individuals perform another task or activity.<sup>127</sup> With the intent of isolating the relational dynamics within the various collective structures engaged with the governance of financial markets, the distinction between treaty-based institutions and the other bodies appears to be particularly salient. The Commission and the ECB are key treaty-based institutions in the new European financial regulatory framework. Their activities and roles, as regulators and supervisors, are defined within the constitutional provisions contained in EU primary law.<sup>128</sup> Alongside these institutions operate a series of nontreaty—based institutions, i.e., the ESAs, the ESRB and different network-based structures to coordinate the activities of national authorities. It is worth highlighting that all EU institutions ultimately concur in shaping the European financial regulatory space. The Court of Justice, as earlier illustrated, has been called on to define the status of the ECB, before the Lisbon Treaty, and the powers of the ESAs; the Council represents the political forum where the regulatory policy agenda is set; and the European Parliament holds key legislative functions approving or putting a veto, for instance, on delegated legislative acts. New links are also emerging, with the increasing practice of delegating and conferring powers to the ESAs. It is clear that an analysis over the complex nexus of legal and administrative procedures among these institutions would require a detailed treatise that is beyond the scope of this work. This analysis, instead, focuses on the relational arrangements within the EBA, the Commission and the ECB.

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127. This idea draws from Floyd H. Allport, *A Structural Conception of Behavior: Individual and Collective - Structural Theory and the Master Problem of Social Psychology*, 64 J. OF ABNORMAL PSYCHOL. & SOC. PSYCHOL. 3 (1962). The idea that institutions are groups of individuals has been also advanced by MARY DOUGLAS, *HOW INSTITUTIONS THINK* Syracuse University Press (1986).

128. They are two of the seven main EU institutions enlisted in Article 13 of the TEU; the other five being: the European Parliament, the European Council, the Council of the European Union, the Court of Justice of the European Union (including the General Court and the Court of Justice), and the European Court of Auditors.

Upon the basic distinction between treaty-based and nontreaty—based institutions it is already possible to isolate the primary forms of sociality characterizing EU institutions involved in financial regulation. As the dynamics of any group of individuals, from families to companies, may follow different form of sociality, so more than one form of sociality may characterize the political, organizational and administrative activities of EU institutions, and of the Union at large. Hence, EU treaty-based institutions appear to be engaging with the logics of two primary forms of sociality: communal sharing that is oriented towards the realization of the community's interests, and equality matching that aims at ensuring a constant balance among Member States within these institutions. This double (relational) dynamic reflects the duality of the function that EU treaty-based institutions perform vis-à-vis the common interest. With regards to the ESAs their ambivalent — and recently acquired — roles lead to identify as primary form of sociality market pricing. In order to fully appreciate the ramifications of this perspective, the governance of financial markets in the EU is examined by looking at the socio-psychological dimension that transpires from the EU constitutional framework. The relational dynamics influencing the decision-making process of both treaty-based and non-treaty based institutions in the context of EU financial regulation and supervision are then considered.

*i. The Communal Sharing Form of Sociality and the EU Constitutional Framework*

In general, CS is a direct manifestation of the core features of the European project from its modern genesis. Commentators have cogently noted that *Van Gend en Loos* contains a proclamation of authority of a post-national community whose attributes supersede those of nation-states and emanate from an idealized notion of “common interest” —contained in the EU primary law — to justify an increasingly larger scope of intervention.<sup>129</sup> A different reading, one that may well complement the one just illustrated, could be offered if the idea of common interest is examined through the lenses of social psychology.

As earlier noted, the idealization of a social norm constitutes precisely the core bond in CS. Notwithstanding the reasons driving individuals to organize themselves within such a structure, the existence of a basic principle — referred to as “group norm” —represents one of the conditions of existence of a group.<sup>130</sup> Individuals adhere to such a group norm that is

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129. Chalmers & Barroso, *supra* note 49, at 105.

130. Allport, *supra* note 127, at 11.

generally flexible enough to adapt to new circumstances ensuring a constant reciprocal rewarding, which in this context refers to a reciprocal recognition of value among members participating within the same group. Such a psychological mechanism facilitates the functioning of the group even when individuals are not fully aware of the specific activities of other members, but they are necessarily aware that their contributions converge towards the common interest of the group.<sup>131</sup> In focusing on the positions of individual Member States the point may be easily missed. At the national level, in fact, the debate often focuses on national interests that, following the narrative of “limited sovereignty,”<sup>132</sup> are in contrast to those pursued by EU institutions. When a group perspective is acquired to study the decision making process the idea of an underlying common interests emerges more distinctively.

The presence of conflicts and opposing interests is an element that characterizes CS forms of sociality and may signal the lack of groupthink. For instance, it is in pursuit of a common interest that divergent positions converged into the establishment of a Banking Union, which requires pooling more resources and the abdication of more sovereign powers towards supranational authorities. Germany advocated for a more limited authority for the ECB. In particular, given that the German banking market is one of the less concentrated markets in the Eurozone, direct supervisory powers over small banks, such as the *Sparkassen* (savings banks), appeared as excessively intrusive to the German government.<sup>133</sup> Similarly, the UK supported the creation of a Banking Union amongst Eurozone countries to strengthen the single market and ensure financial stability, albeit opposing to subjecting to it. France, Italy, Portugal, and the Netherlands have advocated for greater ECB powers.<sup>134</sup> Once these positions have been conciliated and a compromise (mostly political) has been reached, a

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131. Allport, *supra* note 127 at 13–15.

132. In the UK, for instance, much of the discussion preceding the Brexit referendum was based on the idea that the EU limits the sovereignty of its Member States. This position has been eloquently rebutted in a report of the European Institute of the London School of Economics and Political Science (LSE), which noted: “As a Member of the EU a state may both enhance the sovereignty it retains, and have a say in the development and powers of the club in those areas where sovereignty is shared or pooled.” Ever Closer Union Report of the Hearing Held on 15th April, 2016, at 18, LSE Commission on the Future of Britain in Europe, LSE European Institute, *available at* <http://eprints.lse.ac.uk/66958/1/Hearing-10---Ever-Closer-Union-REPORT.pdf>.

133. David Howarth & Lucia Quaglia, *The Steep Road to European Banking Union: Constructing the Single Resolution Mechanism*, 52 J. COMMON MKT. L. REV. 125, 130–131 (2014).

134. See Aneta Spendzharova, *Is More “Brussels” the Solution? New European Union Member States’ Preferences About the European Financial Architecture*, 50 J. COMMON MKT. L. REV. 315 (2012).

unanimous consensus, is necessary under TFEU Article 127(6) to entrust the ECB with new powers and competencies.

The general constitutional ethos, grounded on the concept of community supported by an idealized interest that is autonomous from the ones of its constituting members, is transposed to treaty-based institutions that are called on to represent such a community as a whole. In particular, the ECB and the Commission, pursue the common interest, however intended, precisely through the realization of specified objectives that shape their regulatory and supervisory action. The decision-making processes to attain these objectives occur under the logics of structured cooperation, which, as illustrated next, appears to be characterized by CS and EM forms of sociality.

### *ii. The Treaty-Based Institutions and Communal Sharing Form of Sociality*

Although the Commission and the ECB are based upon different legal grounds and have very different institutional settings to discharge their respective tasks, their key constitutional features are designed to ensure the pursuit of an interest that transcends the interests of the individual members participating in the EU legal community. It follows that CS is one of the dominant forms of sociality within these institutions because this relational mode directly derives from the idea of Europe advanced by the Treaties. Within the groups of individuals governing these institutions, structural cooperation — whether it is created through legal mechanisms or anchored to an effective shared identity — is a necessary feature to both administer pooled resources and pursue the common interest by realizing the objectives mandated by the community.

As earlier noted, the Commission acts as a guardian of and represents the community's interest, to the point that it defines itself as the institutional embodiment of the community,<sup>135</sup> whereas the ECB preserves the stability of the Eurozone, in the common interest of its members.<sup>136</sup> Their supranational status with extensive autonomy and independence separates them from the individual members and entitles them to manage resources that are pooled in the pursuit of a collective interest. This process occurs through the principles of consensus, unity and conformity that characterize a decision-making structure based on CS,<sup>137</sup> and manifests itself in the status of

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135. THE EUROPEAN COMMISSION: 1995-2000, 7 (European Commission 1995).

136. Lastra, *supra* note 62, at 1260.

137. Fiske, Four Forms of Sociality, *supra* note 16, at 697.

their civil servants. This determines a sense of the group in which individual positions are channeled through a collective commitment which, in the case of the Commission and the ECB, is precisely represented by the preservation of the integrity of the single market. Also, in this case, the existence of different positions within these bodies does not contradict the CS mode; it rather represents an inherent phenomenon for decisions taken within a collective structure.

### ***iii. The Treaty-Based Institutions and Equality Matching Form of Sociality***

A closer look at the organizational structures and decision-making processes of the Commission and the ECB reveals that EM is also a characterizing the relational dynamics within their respective decision-making organs, governed under the principle that distinct, but equal individuals acknowledge their differences to reach an even balance.<sup>138</sup> The coexistence of CS and EM is not surprising as both the Commission and the ECB have a role in pursuing the common interest and in the definition of its contents.

Other than being the guardian of the common interest, the Commission is also the engine of the Union, with its executive, policy-setting, and quasi-legislative powers. Pursuant to the grounding provisions establishing the Commission, it is composed of one Commissioner for each Member State,<sup>139</sup> now twenty-eight Commissioners,<sup>140</sup> with one President proposed by the European Council and elected by the Parliament.<sup>141</sup> Under this framework, Commissioners constitutes the College of Commissioners, which makes all the decisions under the principle of “collegiality.” Even if in practice there is little collegial discussion, any decision taken by the Commission is a collegial decision, to which Commissioners could contribute.<sup>142</sup> However, this praxis has given rise to a host of well-known

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138. Fiske, Four Forms of Sociality, *supra* note 16, at 705.

139. TEU, *supra* note 14, at art. 17(4).

140. As illustrated below, before the UK will formally leave the EU, i.e., two years after the notification to the European Council of the decision to withdraw from the Union, the EU is still composed of twenty-eight Member States.

141. TEU, *supra* note 14, at art. 17(5); TFEU, *supra* note 15, at art. 244(a), stipulating that “Member States shall be treated on a strictly equal footing as regards determination of the sequence of, and the time spent by, their nationals as members of the Commission.”

142. On the decision-making process within the Commission, see Arndt Wonka, *Decision-Making Dynamics in the European Commission: Partisan, National or Sectoral?*, 15 J. EUR. PUB. POL’Y 1145 (2008).

concerns over the democratic accountability of the Commission and the politicization of its decision-making process within the College of Commissioners, where the collegiality principle remains, in most cases, a mere black letter.<sup>143</sup>

The socio-psychological perspective sheds new light over these issues that are defined by specific behavioral patterns. The decision-making structure of the Commission follows the principle *one-person equals to one-vote* within the College. This indicates that the EM shapes the qualitative dimension of interpersonal relationships and operates as a mechanism for social influence. It follows that when individuals receive a favor or a concession they feel obliged to reciprocate in order to ensure balance and equality among group members.<sup>144</sup> This in turn may discourage formal discussions; questioning the decisions proposed by one or more Commissioners may be perceived to slowdown the realization of the Commission's objectives, affecting the overall balance of interpersonal relationships. To put it differently, this form of sociality, governed by reciprocity and equality, encourages exchanges and a, more or less explicit, bargaining process, that has been observed in the College of Commissioners.<sup>145</sup>

Traditional game theory would explain this phenomenon as a repeated game, in which players know that a momentary concession will correspond to a "side payment" or compensation in the future. Under this light, players aim at getting the best personal outcome and maximize their utility functions by making choices in consideration of any future compensation. Fiske's models provide for a more sophisticated and, possibly, complete explanation. The ultimate goal within an EM relational mode is the equilibrium of the entire social group. As noted, such an end also encompasses considerations over the fairness and the equality of the outcomes — rather than being limited to the maximization of two (or more) players' utility functions. The activity of the group and its very existence is determined by such a tension towards an overall balance, where lack of reciprocity or a perceived unfairness could result in social sanctioning, given that they ultimately compromise the survival and the operability of the group. Hence, what from an outsider's viewpoint might be perceived as politicization based on a series of concessions, within the group, it is the essence of a structured

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143. See, eg., Fabio Franchino, *Delegating Powers in the European Community*, 34 B. J. POL. S. 269 (2004); Susanne K. Schmidt, *The European Commission's Powers in Shaping Policies*, in THE CHANGING EUROPEAN COMMISSION 105 (Dionyssis G. Dimitrakopoulos ed., Manchester University Press 2004).

144. See Karen S. Cook & Eric Rice, *Social Exchange Theory*, HANDBOOK OF SOCIAL PSYCHOLOGY 61 (John DeLamater & Amanda Ward eds., Springer 2013).

145. See Wonka, *supra* note 142.

cooperation that justifies the existence of the group and its decisions.

The EM relational mode can also be found in the ECB governing organs. Within the ECB there are three decision-making organs, namely: i) the Governing Council, which is entrusted with the power of formulating monetary policy for the Eurozone, defining guidelines for national central banks operating in the European Central Banks System, and, under the newly established SSM, setting the general framework under which supervisory actions are conducted and objecting the decisions proposed by the Supervisory Board; ii) the Executive Board, whose role is to implement the guidelines established by the Governing Council and coordinates national central banks; and iii) the newly established Supervisory Board that coordinates the supervisory activities under the SSM. The Supervisory Board is composed of eighteen country's representatives plus a Chair, a Vice-Chair and four representatives of the ECB not involved in monetary tasks. The aim is to create a Supervisory Board that is in line with the EU constitutional framework that attributes, under TFEU Article 127(6), supervisory functions to the ECB, and independent enough from the monetary policy tasks conducted by the ECB in order to avoid conflict of interests between banking supervision and monetary stability.<sup>146</sup>

The Governing Council is the primary decision-making body and is composed of the governors of the national central banks that are a part of the Eurozone, plus the members of the Executive Board (President, Vice-President and four other independent individuals).<sup>147</sup> Governors shall not represent the interests of their country and they are members in their capacity as independent experts. Members of the Board are independent and are appointed for eight years,<sup>148</sup> which exceeds the terms of any national government as well as the terms of any other European institutions. In order to avoid coalitions among Member States the Executive Board sets the agenda and, since Lithuania's accession to the Eurozone as of 2015, the voting follows a rotating system capped at twenty-one voters. Governors are allocated to different groups based on the size of their country's economy and financial sector. As long as the Eurozone has between eighteen and twenty-one participating countries there are two groups. The five largest countries constitute the first group and they share a total of four voting rights that rotate monthly.<sup>149</sup> Thus, every month one of the

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146. A mediation mechanism has been also established, when the Governing Council and the Supervisory Board are in disagreement.

147. TFEU, *supra* note 15, at art. 283(1).

148. *Id.* at art. 283(2).

149. The countries in this group are France, Germany, Italy, the Netherlands, and Spain.

governors of the five largest countries would not vote, but may participate in the discussion. The remaining governors share a total of eleven voting rights, which also rotate on a monthly basis. The six members of the Executive Board are permanent voters. This creates a system based on a collective decision-making process where one person is equal to one vote; although non-voting countries are determined through a frequency that changes depending on the dimension of the country. Members of the Governing Council may predict when they will not vote, but they are naturally unaware of the decisions on which they will be asked to vote. Hence, decisions are taken under what resembles a 'veil of ignorance' that sustains the EM form of relationship.<sup>150</sup>

#### *iv. Non-Treaty-Based Institutions and Market Pricing Form of Sociality*

The ESAs and the ESRB have been established under TFEU Article 114, which allows treaty-based institutions to delegate specific task to *ad hoc* created authorities, as long as they are devices to serve the community's interest of protecting the single market through the harmonization of EU law. It follows that the ESAs and the ESRB are, from a constitutional perspective, means to achieve the general interest and, following the categorization offered in Part II, they operate the common interest by ensuring regulatory and supervisory convergence.

We argue that these institutions, which are not included in the pantheon of EU institutions enshrined in the Treaties, operate mainly under the MP form of sociality. We focus mainly on the example of the ESMA, which has broad powers. It drafts technical standard, advances proposals, and issue 'comply or explain' notices, which hardens non-binding guidelines and recommendations that could be also adopted.<sup>151</sup> ESMA shares common elements with EU agencies, including a strong reliance on technical expertise, legal personality, degree of independence, and procedures to be followed by its governing organ.<sup>152</sup>

These features, together with ESMA's broad powers, are of particular relevance to analyze the sociopsychological model of this institution. Whereas the treaty-based inter-institutional lawmaking process is designed

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150. Fiske, Four Forms of Sociality, *supra* note 16, at 705.

151. ESMA Regulation, *supra* note 33, at art. 16.

152. For a thorough analysis over the mechanisms and the functioning of ESMA, see Moloney, *supra* note 91.



to produce high-level principles and is inspired in its dynamic by common ideals,<sup>153</sup> administrative rule-making in the securities and markets sphere, produced with a major role of ESMA, is more technical and inspired by economic considerations. This characteristic is likely to tip the culture at ESMA toward Market Pricing. Overall, it can indeed be observed that securities and market regulation is primarily directed to the support of market efficiency, transparency and integrity as well as to the protection of consumers and investors.<sup>154</sup> The traditional justification for regulatory intervention, in financial as well as other markets, relies on the idea that a regulatory intervention is necessary to correct *market failures*.<sup>155</sup> Those are situations in which markets fail to reach an optimal equilibrium and, as a consequence, allocation of resources ceases to be efficient. This may occur for various reasons. For instance, when financial instruments may not be correctly priced by market participants due to asymmetric information, or when “the well-being of one economic agent (consumer or firm) is directly affected by the actions of another” that results in negative externalities.<sup>156</sup> It also occurs when a diffused financial instability is generated by a market participant’s failure. Following this rationale, a regulatory intervention is thus required and justified. Conduct of business rules, consumers and investors protection standards as well as regulations affecting the governance of financial institutions, their solvability and possible failures are grounded on this rationale and necessarily impose a level of expertise to draft detailed provisions that are intended to correct markets’ imperfection, by steering the behaviors of financial entities while ensuring their economic viability.

The hypothesis that an MP mode of sociality characterizes ESMA is further confirmed by the structure of the institution. ESMA’s primary decision-making organ is the Board of Supervisors, composed of the heads of Member States’ supervisors, defined as National Competent Authorities (NCAs). The Chairperson of ESMA sits on the Board and chairs the meeting, although with no voting right. The Board also includes

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153. The treaty-based inter-institutional lawmaking process elements are intergovernmental (the Council), representative (the European Parliament), and supranational (the Commission).

154. Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets* 48 UCLA L. REV. 781 (2001). See also, for the policy perspective, *Mitigating Systemic Risk. A Role for Securities Regulators*, International Organization of Securities Commissions (IOSCO) (Feb. 2011), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD347.pdf>.

155. On the rationale (and its limits) of markets failures to justify regulation, see, e.g., Baldwin et al. *supra* note 10; ANTHONY I OGUS, *REGULATION: LEGAL FORM AND ECONOMIC THEORY* (Bloomsbury Publishing 2004).

156. John Kay & John Vickers, *Regulatory Reform An Appraisal*, DEREGULATION OR RE-REGULATION: REGULATORY REFORM IN EUROPE AND THE UNITED STATES, 221—226 (Giandomencio Majone ed., St. Martin’s 1990).

representatives (with no voting rights) of: the Commission (as for any EU agency), the ESRB, EBA, and EIOPA. With such a configuration, the Board combines the scientific expertise functions with political oversight, two functions that are usually separated. The Board gives guidance to the work of ESMA, adopts opinions, recommendations, decisions and advice. The Board operates under a simple majority vote; each Board member has one voting right and they are all required not to advance the interest of their respective Member States.<sup>157</sup> Alongside the Board of Supervisors, there is the Management Board which is composed of the Chairperson and six members of the Board of Supervisors. The members of the Management Board are elected by the voting members of the Board of Supervisors.<sup>158</sup> Also in this case, the Commission and the Executive Director participate in meetings, but have no voting rights.<sup>159</sup> The Management Board operates on a simple majority rule basis. The Management Board has to propose for adoption by the Board of Supervisors an annual and multi-annual work program. In addition, to facilitate consultation with stakeholders, ESMA has established a consultative Securities and Markets Stakeholder Group (SMSG).<sup>160</sup> It is consulted in practice by ESMA on various matters, including technical aspects. The dialogue with stakeholders and experts evidences the importance granted to market participants in defining the rules through which financial markets may function.

This description enables us to understand the double nature of ESMA, and the other two ESAs in general.<sup>161</sup> First, it is a body in charge of building EU common rules and as such it should “protect the public interest by contributing to the [ . . . ] stability and effectiveness of the financial system, for the Union economy, its citizens and businesses.”<sup>162</sup> Moreover, ESMA should act independently and autonomously “in the sole interest of the Union as a whole” without seeking instructions from other European institutions or from Member States.<sup>163</sup> In its 2011 annual report, ESMA identified the six characteristics as to how it achieves its mission and objectives: independently, cooperatively, with accountability, professionalism, and effectiveness.<sup>164</sup> The identification of specific operational rules and guiding principles against which

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157. ESMA Regulation, *supra* note 33, at art. 44(1).

158. *Id.* at art. 45(1).

159. *Id.* at art. 45(2); However, according to Article 45(3), the representative of the Commission has voting rights on matters related to the ESMA's budget.

160. *Id.* at art. 37.

161. The provisions here analyzed are also contained in the regulations establishing the EBA and the EIOPA.

162. ESMA Regulation, *supra* note 33, at art. 1(5).

163. *Id.* at art. 42 para 1.

164. European Securities and Markets Authority Annual Report 9, (2011).

ESMA regulatory activity is benchmarked points towards a prominence of a modus operandi characterized by an MP relational mode.

Second, notwithstanding the intergovernmental ethos, representatives of NCAs on the Board of Supervisors are naturally incentivized to take into account, if not promote, their national positions. In fact, ESMA's resources are limited and its working model is dependent on NCAs resources.<sup>165</sup> The pressure for adopting certain measures, and to allocate resources in a manner that is in line with national interests, ensures the necessity for a decision making process based on negotiation among the members of the Board, i.e. the representatives of NCAs. The resulting organizational structure naturally leads to a bargaining culture that is a primary characteristic of MP, whereby motives based on the pursuit of individual interests may overbear the search for an overall balance. This is further evidenced in some of the observations advanced in the 2013 Mazars ESA Review.<sup>166</sup> The Review stressed the importance of reaching a balance between EU-wide and national interests.<sup>167</sup> As earlier noted, similar considerations have been advanced towards another ESA, i.e., the EBA. Also in this case, the socio-psychological perspective advanced here reveals that bargaining is a natural manifestation of a group dynamic in which multiple individual interests are more prominent (and tangible) than the pursuit of an idealized common interest. The problems related to the growing role of the ESA, hence, appear to reside in the compromise between the interests of Member States and those of the Union. Absent an institution that represents the common interest also in the processes of regulatory and supervisory convergence, an "exchange relationship," either based on EM or MP, is expected.

#### **IV. Regulators in Crisis: a Sociological and Psychological Perspective**

The relational models appear to be useful, not only to describe more accurately the dynamics driving the decision-making process of EU bodies involved in financial regulation; they also offer a conceptual framework that sheds light over the development of conflicts amongst Member States, or groups thereof, when their representatives participate in collective structures. Conflicts appear to arise and be managed following specific behavioral patterns that can be ascribed to each dominant form of sociality.

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165. ESMA Regulation, *supra* note 33, at art. 62(1).

166. See generally, *The European Supervisory Agency, Review of the New European System of Financial Supervision*, Mazars (2013).

167. *Id.* Part 1 at 14.

This is to say that, for a given disruption in the expected relational dynamics within an institution, direct or indirect consequences within the group may be isolated. For instance, if one or more members of the group characterized by the CS or the EM relational archetypes does not follow the appropriate group norm, other members of that group are likely to sanction them or the group is likely to fracture into sub-groups. In this schema, it is assumed that the group continues to operate and the collective structure does not immediately cease to exist.

In this respect, the current Brexit debate — preceding and following the result of the referendum of June 23, 2016, when the UK voted to leave the EU — offers a perfect case study to examine how different, and often antithetic, positions advanced by EU Member States influences the group dynamics operating within different EU institutions and bodies.<sup>168</sup> At the time of writing (October 2016), the UK has signaled that it does not share the common interest upon which the Union is constructed. As further elaborated below, this emerges not only from the result of the June referendum, it also transpires from the official talks preceding the public vote. However, given that the formal withdrawal procedure enshrined in TEU Article 50 has not been activated, the UK is still a member of the Union. Hence, the UK is still participating in most of the official meetings of the European Council and its representatives still hold positions in EU institutions, such as the Commission and the ESAs. EU officials and governments of Member States have made clear on multiple occasions that no informal negotiation over the future UK-EU relationships will be held before the UK will formally notify its intentions of leaving; a possibility that seems likely to occur by the end of March 2017.<sup>169</sup> From that moment, pursuant to TEU Article 50, there is a window of two years to define the UK-EU relationships, after which the UK will be effectively out of the Union, with or without a deal with the Union of twenty-seven countries.<sup>170</sup> In this context, while the Union still performs its tasks and functions relying on an institutional setting designed for twenty-eight countries, the

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168. For a first assessment of the possible implications of Brexit, see Niamh Moloney, *Financial Services, The EU, and Brexit: An Uncertain Future For The City?* 17 GER. L.J. 75 (2016).

169. Jenny Gross & Nicholas Winning, *U.K.'s Theresa May Pledges to Set EU Divorce in Motion by End of March*, WALL ST. J. Oct. 2, 2016.

170. In particular, TEU art. 50 para 3 states: “The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification [...], unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.”

For an analysis over the mechanism put forward by TEU art. 50, see European Parliament, Brief: Article 50 TEU: Withdrawal of A Member State From The EU, European Parliamentary Research Service PE 577.971 (Feb. 2016).

position of the representatives of the UK in different decision-making organs is peculiar. A black-letter analysis of the constitutional framework governing the EU is not sufficiently equipped to grasp such a complex and uncertain political situation.<sup>171</sup> In turn, by enriching the legal analysis with a socio-psychological perspective over the group dynamics within institutions provides a much deeper understanding of an unfolding debate that will have ripple effects in the years to come.

### A. The Development of A Divide

In general terms, the primary source of tension in EU institutions derives from the emergence and the consolidation of two groups of countries, notably Eurozone countries and non-Eurozone countries. This divide may be observed in different instances ranging from the closed borders of a common monetary policy to reach critical aspects of financial regulation and crises resolution. Within the EU, the interests of the Eurozone and those of the single markets are not necessarily aligned. Distinguished commentators have noted that the decisions taken to safeguard the former also have an impact on the latter, although the input of non-Eurozone countries in the decision-making process is limited, if not absent.<sup>172</sup> This situation may be described as a misalignment within the various possible definitions of the contents of the common interest: the recent financial, euro, and sovereign debt crises accentuated centrifugal forces potentially separating non-Eurozone countries from the rest of the Union.

The inclusion of financial stability within the perimeters of the common interests is particularly pronounced for Member States that are taking part in the SSM. The preservation of financial stability is constructed as deriving from the maintenance of the integrity of the single market. However, the interconnection between the banking sector, sovereign debts, monetary policy, and the single currency required Eurozone countries to design responses that are tailored to preserve the monetary union, mostly through further integration. For Eurozone countries the primary concern has been to break the link between the banking sector and sovereign states, whereby public funds are required to

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171. For an overview of the different political positions and their possible implications on the UK financial industry, see Thomas F. Huertas, *Brexit v the City: A Fight With One Winner*, FINANCIAL TIMES, Oct. 26, 2016.

172. Paul Craig & Menelaos Markakis, *The Euro Area, Its Regulation and Impact on Non-Euro Member States*, RESEARCH HANDBOOK ON THE LAW OF THE EU'S INTERNAL MARKET (Edward Elgar ed., 2016) (on file with author).

bail out troubled banks by deepening the national debts and compromising monetary stability.<sup>173</sup> Hence, the establishment of the Banking Union has strengthened supervisory convergence through an increased attribution of powers at the supranational level. Drawing from the relational archetypes and with reference to the three main layers that posit EU institutions at different distances from the common interests, it is possible to examine how this divide within the Union affects the decision-making process and, more generally, the relational dynamics within institutions.

When CS operates, there is equality among members, which are units with the same weight and not ranked or organized under a hierarchical structure. As a result, the decisions made are unitary, in the sense that they represent the whole rather than the result of bilateral bargaining. This equivalence derives from a group norm that determines a sense of belonging towards the group or the community and, ultimately, legitimizes its very existence.<sup>174</sup> Prolonged dissent may weaken the strength of the whole community in two intertwined fashions. First, dissent shows a disagreement towards the group norm upon which the collective structure is established. This makes the participation into the group less rewarding and may ultimately lead one or more individuals to withdraw from the group.<sup>175</sup> Second, constant dissent leads to undermining the relational equivalence among members and signals a lack of sense of belonging.<sup>176</sup> Hence, the principles of proportionality and equality among members of groups operating under EM relational modes also enter into crisis. Within the European institutional framework earlier described, this means that if the existence of the common interest stipulated in the Treaties and justifying the existence of supranational apparatus is compromised, decision-making organs entrusted with the powers to define the contents of such a common interest are also compromised.

The problem emerges clearly from the impact that the UK vote to leave the EU had immediately on the College of Commissioners. The Commissioner for the UK, Lord Hill, held the crucial role of advancing the financial regulatory agenda of the Union, being Commissioner for Financial Stability, Financial Services and Capital Markets Union. After the results of the referendum, Lord Hill, who was one of the key promoters of the Capital Markets Union, resigned

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173. In the landmark Euro Area Summit, Eurozone countries stated: "We affirm that it is imperative to break the vicious circle between banks and sovereigns." Euro Area Summit Statement, at 1, June 29, 2012, available in full at [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/ec/131359.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/131359.pdf).

174. Allport, *supra* note 127, at 14.

175. *Id.* at 11.

176. Fiske, Four Forms of Sociality, *supra* note 16, at 697.

and Mr. Dombrovskis (Latvia), Vice-President of the Commission and Commissioner for the Euro and Social Dialogue, has taken over his position.<sup>177</sup> Given that the UK is still part of the EU a new UK Commissioner for the Security Union has been appointed, Sir Julian King.<sup>178</sup> However, from the Mission Letter from the President of the Commission, it emerges that the new Commissioner will be mostly in charge of implementing “concrete operational measures,”<sup>179</sup> rather than focusing on policymaking. Moreover, Sir Julian will not represent the Commission in the European Parliament and at meetings of national ministers; a crucial role maintained by the previous Commissioner.<sup>180</sup> It is clear that the representative for the UK in the College of Commissioners is not anymore considered as formally equal, i.e., with the same powers and prerogatives, to the other Commissioners. His role has been ultimately curtailed, thus weakening the equality paradigm that characterizes a group dominated by the EM form of sociality.

Such an epitomic case explains a broader dynamic. Once the common interest is understood as the group norm bonding the Union together as a legal community and driving the decisions of treaty-based institutions, the socio-psychological standpoint explains how a sharper distinction between Eurozone and non-Eurozone countries polarizes the decision-making process in two sub-groups. As a result, a conflict between “insiders” and “outsiders” in the Eurozone may emerge in institution where all Member States are called on to cooperate, even when the decision making process is dominated by a relational mode that is not CS. Within such groups, the existence of a profound dissent not only affects the political relationships among Member States, but it is likely to call into question the very existence of both a shared bond and the equal relation that ensures the cooperation among its members. The erosion of the common interest — real or idealized — upon which the EU is constructed has therefore cascading consequences throughout the different decision-making centers of the EU institutional framework.

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177. Jim Brunsten, *UK's EU Commissioner Lord Hill Quits as British Departures Begin*, FINANCIAL TIMES, June 25, 2016; Jim Brunsten, *Brexit Gives Valdis Dombrovskis Big Sway Over Banks*, FINANCIAL TIMES, June 30, 2016.

178. Mehreen Khan, *Juncker To Appoint New UK Commissioner As 'Security' Chief*, FINANCIAL TIMES, Aug. 2, 2016.

179. Mission Letter from Jean-Claude Juncker, President of the European Commission, to Julian King, Member of the European Commission at 4 (Aug. 2, 2016), available at [http://ec.europa.eu/priorities/sites/beta-political/files/king\\_en.pdf](http://ec.europa.eu/priorities/sites/beta-political/files/king_en.pdf).

180. *Id.* at 5.

## B. The Experience of Centrifugal Tensions: “Insider vs. Outsider”

The existence of Member States that partake in only some features of the Union is not new in the history of the EU and is often referred to as a phenomenon of *differentiated integration*. Accordingly, Member States may opt for different levels of integration ensuing different levels of abdication of state prerogatives, on specific matters, towards the supranational institutional apparatus.<sup>181</sup> Differentiation characterizes the genesis of the EU that from a small group of founding members progressively enlarged and conflated different communities into a supranational union. In this process different opt-out clauses, notably to the Schengen Agreement and to the monetary union, have been granted to Member States. Nonetheless, the division between countries that adopted the euro and countries that opted out is becoming more pronounced. Following the recent crises and the establishment of the Banking Union the risk of a two-speed Europe has been particularly strong. There is even a risk for differentiation to evolve into fragmentation, as already witnessed in the discontent that has animated the debate over the UK leaving the Union. With the Brexit vote, fragmentation is now becoming a tangible risk that the EU has to tackle.

Aside from any speculation over the possible future of the UK and the EU as a whole, the theory of the forms of sociality applied to EU financial regulators helps to identify an increasingly sharp division within groups of individuals entrusted with decision-making powers. Such a division implies that outsiders, i.e., countries not participating in a given project harden their positions, while insiders, i.e., countries partaking in the new project, expect the former to join.<sup>182</sup> Beyond this, a sociopsychological standpoint indicates that the differentiation between outsiders and insiders may induce insiders to concentrate around a new shared interest that defines a new bond, or even a new common identity, which, in turn, is further legitimized by the existence of outsiders not sharing such a bond, whose common interest may harden as well towards a new shared objective.<sup>183</sup>

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181. See Benjamin Leruth & Christopher Lord, *Differentiated Integration in the European Union: A Concept, a Process or a Theory?* 22 J. EUR. PUB. POL. 754 (2015); Frank Schimmelfennig, Dirk Leuffen & Berthold Rittberger, *The European Union as a System of Differentiated Integration, Politicization and Differentiation*, 22 J. EUR. PUB. POL. 764 (2015); Jean-Francois Jamet, *The Optimal Assignment of Prerogatives to Different Levels of Government in the EU*, 49 J. COMMON MRKT. STUD. 563 (2011).

182. Thierry Chopin & Christian Lequesne, *Differentiation as a Double-Edged Sword: Member States' Practices and Brexit*, 92 INT'L AFF. 531 (2016).

183. Fiske notes that CS, in its extreme form, may imply “a contrast between the subjective ‘we’ and the objectified ‘they.’” Fiske, *Four Forms of Sociality*, *supra* note 16, at 699.



The unfolding events concerning Brexit offer a powerful illustration of such a group dynamic. A progressive crystallization of different positions around new or reinforced shared objectives emerges from the declarations of European politicians during the current talks, preceding the formal commencement of the EU-UK negotiations. In particular, reports over the alleged stance of EU negotiators to use French, rather than English, as the official language of the negotiation process regarding the EU-UK relationships signals, other than a possible pre-negotiation tactic, the search for a new group identity for EU Member States.<sup>184</sup> Likewise, the polarization of a group around a hardened common interest, towards which individual interests converge and are superseded, is apparent if one considers that negotiations will be conducted between the EU — a block of twenty-seven countries that is expected to act, by virtue of the legal obligations established in the Treaties, as a unitary entity protecting its existence — and the UK, a single sovereign state. This polarization is exemplified by the fact that the first meetings of the European Council after Brexit — on June 29, 2016 (Brussels) and on September 16, 2016, (Bratislava) — were held informally, without the participation of the UK. They led to what has been labeled as the Bratislava Declaration and Roadmap that deals with the new institutional setting of the Union.<sup>185</sup> The Declaration reaffirmed the necessity of pursuing a common interest and of also correcting the flaws of the EU, but without putting forward any concrete policy decision.<sup>186</sup> In contrast, during the recent official meeting of the European Council with all twenty-eight Member States (Brussels, October 20 and 21, 2016), Brexit talks were left at the end of the agenda and itemized as reflections “on the future of the EU with twenty-seven member countries.”<sup>187</sup>

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184. Francesco Guarascio, *Parlez-vous Brexit? EU Negotiator Wants Brits to Talk French*, REUTERS, Oct. 21, 2016.

185. European Council, Bratislava Declaration, 1 (informal meeting, Sept. 16, 2016), available at <http://www.consilium.europa.eu/en/meetings/european-council/2016/09/16-informal-meeting/>.

186. In particular, the Bratislava Declaration opens with the following statement: “Although *one country* has decided to leave, the EU remains indispensable for *the rest of us*. In the aftermath of the *wars and deep divisions* on our continent, the EU secured peace, democracy and enabled our countries to prosper. [...] We are determined to make a success of the EU with 27 Member States, building on this *joint history* [emphasis added].” *Id.* at 1. Two crucial aspects may be noted from this incipit. First, the locutions “one country” contraposed to “the rest of us” (or “our continent”) point towards a hiatus between a de-individualized outsider and the subjective insiders; on that aspect see Juncker’s Speech, *supra* note 173. Second, reference to the “wars and deep divisions” (as well as to the “joint history”) echoes the Schuman declaration of 1950; see *supra* note 44 and accompanying text.

187. See Donald Tusk, President of European Parliament, *Remarks of The President of The European Parliament Following The European Council Meeting* (Oct. 20—21, 2016).

Leaving aside the current debates concerning Brexit, the dynamics and legal implications of which are beyond the scope of this work, the agreement, reached by the UK Prime Minister during the European Council (February 18 and 19, 2016) as a condition for the UK to remain, already signaled a misalignment between the interests of the EU and those of the monetary union.<sup>188</sup> Such a separation is sustained by the general opt-out for the UK on an ever closer Union.<sup>189</sup> Even more, it is expressly stated that reference to an ever closer Union contained in the Treaties does not constitute a legal basis for expanding the scope, the competencies, or the powers of the EU and of its institutions.<sup>190</sup> Among the various items of that agreement, of particular interest for the purposes of this analysis are those defining the perimeters of the Banking Union and the relationships between Eurozone and non-Eurozone countries. In this respect, the agreement advocates for a stronger protection for the latter group of Member States; and, hence, a sharper separation between the two groups. The agreement, albeit recognizing the necessity to deepen the monetary union supported by a Banking Union, reaffirms the already established principle of nondiscrimination towards non-Eurozone Member States and the possibility of creating a European Union where the regulation and supervision of banking institutions follows two separate paths. Moreover, the agreement also reaffirms a principle already encountered in the *OLAF* decision and according to which the EU institutions involved in the governance of the Eurozone should be subjected to EU Law at large, and their decisions should involve non-Eurozone Member States when affected. What is certain is that the completion of the Brexit process calls into question the applicability of the protections against discrimination based on location and currency for the UK financial services industry.<sup>191</sup>

The legal implications and the effective departures from the existing EU legal framework if the agreement would have been enforced are impossible to ascertain; ultimately, given the current circumstances, the

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188. European Council, *Conclusions*, Brussels (Feb. 19, 2016).

189. The agreement commences the section titled "Sovereignty" with the following statement: "It is recognised that the United Kingdom [...] is not committed to further political integration into the European Union. The substance of this will be incorporated into the Treaties at the time of their next revision [...] so as to make it clear that the references to ever closer union do not apply to the United Kingdom." *Id.* at Annex 1, p.16.

190. *Id.*

191. On the possible impacts on and opportunities for the UK financial services industry following the completion of Brexit see Eilis Ferran, *The UK as a Third Country Actor in EU Financial Services Regulation* (University of Cambridge, Faculty of Law Legal Studies Research Papers, Paper No. 47/2016, 2016), available at [https://papers.ssrn.com/sol3/paper.cfm?abstract\\_id=2845374](https://papers.ssrn.com/sol3/paper.cfm?abstract_id=2845374).

document represents a legal memorabilia. As such, however, the agreement may be interpreted as a request for enhanced transparency and participatory accountability amongst Member States with different priorities. Nonetheless, a divide within the Union emerges distinctively when the agreement and its language are juxtaposed to the agenda set forth in the Five Presidents Report issued by the Commission in 2015.<sup>192</sup>

The Report, which still marks the agenda of the EU, posits a greater level of integration to strengthen economic and monetary union as primary items of the EU agenda. It is envisaged as an action plan in three steps to establish a fiscal union, a capital markets union, and, more generally, a financial union that should be paired with a reinforced representation of Eurozone Member States in international fora, e.g., at the IMF, and within the EU, with more structured governance bodies; and, interestingly, culminates with a 2025 goal of having a stronger single currency that is “attractive for other EU Member States to join if they are ready to do so.”<sup>193</sup> The resulting division amongst different groups of Member States seems to progressively polarize, as the theory of social relations would predict, around two group norms. One is represented by the pursuit of a common interest that, in order to achieve financial stability and monetary union, requires further integration; whereas the second group intends the common interest as more limited and primarily based on economic and trade interests that are necessarily shared. The latter group includes Bulgaria, Croatia, Czech Republic, Denmark, Hungary, Poland, Romania, and Sweden,<sup>194</sup> but it may also include the UK, shall the UK continue to have access to the single market, or to be part of it. The exact contents of such a more contained common interest depends on many variables that may open to different future scenarios.

It may already be noted that the establishment of a Banking Union and the project for a Financial Union, may be understood as a reinforcement of the group norm bonding (some) members of the EU legal community, which

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192. Jean-Claude Juncker et al., President of the European Commission, *The Five Presidents Report: Completing Europe's Economic and Monetary Union* (2015).

193. *Id.* at 5.

194. Under the Maastricht Treaty, any country joining the EU is obliged to adopt the euro provided that they fulfill the convergence criteria (including price stability, soundness and sustainability of public finances, durability of convergence, and exchange rate stability). Denmark and the UK obtained an opt-out to the Maastricht Treaty. Hence, since the moment Brexit will be effective, only Denmark is exempted from joining the Eurozone. Thus, Bulgaria, Croatia, Czech Republic, Hungary, Poland, Romania, and Sweden will join the Eurozone eventually. However, the Global Financial Crisis has halted this process of convergence rendering uncertain when these will adopt the single currency. For a review of the different levels economic integration and the legal framework of these countries, see *Convergence Report 2014*, EUROPEAN CENTRAL BANK (Frankfurt, 2014).

encompasses sovereign entities as well as regulated industries. This greater level of integration is usually justified by the necessity of increasing the resilience of European markets towards financial crises. From a sociopsychological perspective, a reinforcement of the group norm also represents a step against the possibility of fragmentation of the community (especially felt after the UK referendum) whether it arises from either external factors, or dissent within the group, or a combination of both. It follows that members participating in the Banking Union, or in any new project leading to a stronger integration, are subjected to an “enhanced group norm,” according to which the common interest is achieved also through regulatory and supervisory convergence.

The emerging divide is carried through the decision-making process of EU bodies and agencies involved in financial regulation. The different priorities and understandings of the group norm are to influence the relational dynamics both between and within EU institutions, where the representatives of Eurozone and non-Eurozone states cooperate. Hence, widening the gap with nonparticipating countries may result in a higher level of dissent and in a weakened equivalence relationship in the EU architectural framework for financial regulation.

## V. Conclusion

Attempts to describe the behaviors and the group dynamics driving the decision making process of regulators — and, in particular, EU financial regulators — have been sketchy and disappointing, as the minute comparison of different regulatory approaches or the game metaphor, albeit offering useful insights, do not enrich our understanding. Our work uses the rich vocabulary and conceptual frameworks of psychology as it approaches financial regulation in the EU from a sociopsychological perspective. Regulators are considered as collective groups of individuals and, as such, they respond to the fundamental forms of sociality defining any human interaction. Through these lenses, principles for interpersonal and inter-institutional cooperation, membership criteria, organizational structures as well as shared goals and objectives shape decision-making for regulators. Such principles are formalized in the legal framework, primarily through the definition of regulators’ remits and procedural provisions.

In turn, the legal framework appears to have an impact on the fashions in which social interactions occur. Dominant forms of sociality may be identified and specific behavioral patterns emerge for each of the institutions here examined. This explains, under a novel perspective, some of the common issues affecting the EU governance apparatus, such as the

expanding definition of the common interest, the politicization of the Commission, the issues related to the new supervisory agencies (ESAs), and the impact of Brexit on the intra-institutional decision-making process of financial regulators. Moving from this first attempt to apply social psychology to shed some light on regulators, it is our hope that further investigations will be conducted in what appears to be a new approach to regulation studies.

In the context of financial regulation, it emerges that the relational structures of EU bodies and institutions are affected by their constitutional status, membership rules, and the functional relation they perform vis-à-vis the common interest. Furthermore, different interpretations and understandings of the common interest that have been coexisting are now generating a divide between Eurozone and non-Eurozone Member States now emphasized by the results of the UK referendum. Such a divide may undermine the core bond that characterizes the collective decision-making process when both groups of countries are involved in the same decision-making process.

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