The 'Union of Independent Regulatory Authorities' of the European Internal Market

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CHAPTER 10

THE 'UNION OF INDEPENDENT REGULATORY AUTHORITIES' OF THE EUROPEAN
INTERNAL MARKET

1 Introduction

1. There are many public entities in the European internal market (IM). Among them, this paper focuses on a distinct sort: Independent Regulatory Authorities (IRAs), both national (NIRAs) and European (EIRAs). Of the various legal-administrative issues posed by these independent authorities, we shall now pay attention to the relational perspective, i.e., how are the IRAs, both national and European, connected within the single internal market. The specific legal matters posed by each relational category shall also be analysed herein. To achieve this analytical goal we can draw a distinction between two structural models of IRAs in the internal market: the symmetrical and the asymmetrical model. The structure or configuration shall be considered symmetrical inasmuch as there are IRAs both at the national and European market levels. However, we will be confronted by an asymmetrical configuration insofar as IRAs exist at national level but not at European level. Hypothetically, there would still be room for a second kind of asymmetrical configuration, if there was an IRA only at European level and not in the Member States. This second variant of ‘asymmetrical regulatory union’ typically appears in secondary sector-specific spheres of regulatory policy. In other words, it arises in areas where public administrations do not pursue economic objectives in a strict sense (the well-functioning of competition within the internal market), but rather aim for ‘social’ or ‘political’ goals which have indirect legal implications for economic operators. This is the case with EIRAs established for food, medicines or environmental control purposes. This asymmetrical alternative is tending to disappear, as a close examination shows that Member States increasingly create NIRAs where EIRAs already exist. This kind of asymmetrical regulatory union remains outside the scope of this study due to its temporary or contingent nature.

2. IRAs do not follow a single pattern, nor there is a sole cause or political or economic consideration underlying their creation. There are functional reasons (utility), sociological causes (imitation of organisational forms within a State and among various States) along with historical-institutional factors (degree of resiliency of the existing administrative structures vis-à-vis the new IRAs). However, none of these considerations accounts for every single sector-specific IRA example. In fact, all of these considerations account, to some degree, for the establishment of every specific IRA, yet with a particular explanatory relevance for each agency. In my view, there is a decisive functional reason for creating IRAs: IRAs’ inherent utility for market governance. From then onwards, imitation (or ‘isomorphism’) as well as historical-institutional contexts may simplify, speed up, or delay the establishment of IRAs.

3. In fact, nowadays it seems indisputable that market supervision and market operational regulation shall be performed through independent autho-

1 Gilardi (2005) 86.
ties. One could even argue that the market, although in need of institutions and authorities in order to correct its failures and ensure its very existence, technically requires that these authorities regard it as an end in itself and not as an element subject to public policies. This does not mean that IRAs are meant to be apolitical (they are not), or that they should act with judge-like impartiality (they do not). Indeed, the foregoing means that IRAs shall be independent from the Government and from the ruling party at all times. Independent authorities govern the markets within the limits of the law. However, they do so at the service of the market, uncommitted to the political objectives of a given Government. This statement, as persuasive as topoi, owes much to the pattern provided by independent regulatory agencies in the US. Nevertheless, when we try to bring over the North American model, the fact that the American regulatory agency (as a form of government) is a national product rather than a universal one is usually overlooked.

4. American regulatory agencies come in response to a particular constitutional allocation of power, they are drawn from a very specific set of political beliefs (economic liberalism), and they are deeply rooted in the federal structure of the United States. On the one hand, the long-standing ‘small government approach’ (applicable to the Federal Government versus the State Government) has led to a functional expansion of the Federal Government developed on an ad hoc basis, by means of sector-specific agencies (whether independent or not) which are assigned ‘new’ specific public tasks. On the other hand, purely ‘independent’ North American agencies portray the existing tensions and balance of power issues between Congress and President. These become particularly evident as congressional supervision of independent agencies is carried out through committees and subcommittees of Congress. Finally, the legal neutrality and independence of independent regulatory agencies in the US show the distinct political compromise reached between the hitherto almost absolute freedom of the economic agents and the historically new Federal Government intervention on the markets. This political compromise is displayed, firstly, by means of the anti-party programme of the ‘Progressive Movement’ in the late 19th century, and subsequently by the federal expansion brought along by the New Deal in the 1930s. The essence of the said compromise was rooted in a federal intervention of a ‘regulatory,’ ‘technical,’ and ‘bipartisan’ nature. The foregoing truly accounts for the core elements of the American independent regulatory agencies.

3 See: Majone (2001) 57-78. Nevertheless, some empirical studies question this tenet. Regarding the independent banking authorities, see Jordana and Rosas (2014) 672.
4 For all: Baldwin and Cave (1999) 9 ff.
5. Regulatory agencies in the European Union are somewhat different. In Europe, with regard to the establishment of liberalised and increasingly integrated markets, the independent regulatory agencies model is adopted and traditional bureaucratic bodies are reshaped as ‘independent administrations,’ i.e., public administrations with regulatory functions (not necessarily rule-making powers yet effectively governing the economic operators), organically and operationally separate from the Government. In addition, they remain neutral towards market operators. This definition of independent administrations in Europe partially contrasts with the North American experience. In the first place because its first appearance occurs in the Member States, not in the Union. Secondly, because national independent administrations do not unfold ex nihilo; on the contrary, they stem from the remodelling of an existing administrative bureaucracy, closely tied to each country’s government. Thirdly, as we shall see, (infra §§ 25 and 26), one of the main features of the IRAs in the European internal market is that they perform their tasks cooperatively and in a coordinated manner (in relation to other States authorities and EU institutions). 8

6. As it has been stated, there are various and very diverse independent administrative authorities within the European internal market. There needs to be clarification on how the internal market is a single reality with several operational thresholds (local, regional, national and European), 9 which are duly identified and legally connected through undefined legal notions (‘less significant banks,’ ‘systemic risk,’ ‘cross-border implications’). Properly identifying each market threshold determines the greater or lesser presence of the relevant regulatory authorities, whether national or European. As the internal market is a single economic reality -although with different thresholds or levels of relevance- it shall be understood that administrative authorities within the internal market must act through cooperative or integrated arrangements. This is the core idea of the ‘administrative European Union,’ 10 admittedly applicable also to the internal market. Given the unitary essence of the European internal market, the existing administrative authorities are to perform their tasks in an associated or integrated fashion. Not only as a ‘networked administration,’ but beyond that: in an integrated manner. This organizational reality, the ‘administrative union’ of the internal market, constitutes the focus of this paper. As we shall see, one of the defining features of the ‘administrative union’ within the European internal market is precisely the creation of European (independent) agencies, where national sector-specific authorities and the European institutions shall be integrated.

7. The activity of a number of authorities or administrative entities, both general and sectoral as well as national and European, is projected onto the European internal market. The scope of this study is limited to the IRAs, i.e., administrative organizations, normally independent legal persons, which carry

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8 Hofmann (2011) 4.
9 For example, as to the energy market: Strielkowski, Mirvald and Pedersen (2014) 506-15.
out market governance and supervision functions with a high level of autonomy with respect to the economic operators and each country's government as well as with respect to the EU institutions. The designations and scope of these independent authorities amongst countries are very diverse. However, the fact that a given entity is formally labelled as 'independent' does not always mean that the entity in question is an autonomous regulatory authority. In the EU, IRAs are regulated as a unique type of agency. However, not every European agency is 'independent,' in the same way as not every autonomous or independent agency plays a regulatory role.\(^\text{11}\)

2 The asymmetrical regulatory union

8. We can often find IRAs at the internal market's *national level*. The Commission will show up at a European level of the market. This outcome can be grounded on different legislative foundations.

a) **Without being required by** European law, Member States often create IRAs in order to regulate and ensure competition in the national markets. European competition law\(^\text{12}\) does not impose on Member States the duty to establish general IRAs seeking national market oversight and supervision. Nevertheless, Member States still create these general independent authorities.\(^\text{13}\) On the European side, pursuant to the provisions of Article 103(2) d) TFEU, Regulation No 1/2003 gives the Commission -together with national authorities- competition supervision tasks in the internal market as a whole. Attempts to create a *European independent agency* to ensure competition oversight have failed, precisely due to the open and forceful Commission’s opposition.\(^\text{14}\)

b) Some other times European law *requires* certain national sector-specific markets to be governed by independent authorities created by Member States. However, these European law provisions fail to require the existence of independent authorities at European level of the same market. This is particularly the case for the postal sector, where secondary law requires Member States to designate one or more national regulatory authorities ‘operationally independent,’ from postal operators\(^\text{15}\), although it does not provide for the existence of

\(^{11}\) Maggetti (2009) 450.

\(^{12}\) Article 35 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 04.01.2003, p.1) does not impose on Member States the creation of independent authorities. For a different opinion, see Codini and Frego (2014) 504.


\(^{14}\) Thatcher (2011) 800. See also Fuentetaja (2014) 223.

an ‘operationally independent’ European authority. This is also the case for the
electronic communications market, where at national level there must be independ-
ent authorities,\(^{16}\) whereas at European level alongside the Commission there is
only a consultative body, the **Body of European Regulators for Electronic Commu-
nications (BEREC)**.\(^ {17}\)

9. There are several legal issues posed by this form of regulatory union.

a) First of all, the asymmetrical character of the relevant authorities in each
sector-specific regulatory union could appreciably affect the Commission’s institu-
tional and operational position. As is the nature of the so-called ‘single-purpose
administrations,’\(^ {18}\) NIRAs naturally strive towards a high level of performance
(since their very existence is grounded on their regulatory effectiveness) thus
constraining the Commission’s operational sphere,\(^ {19}\) particularly when this
sphere is not clearly defined by the relevant rules. In addition to the foregoing,
the operational position of the NIRAs is sometimes strengthened vis-à-vis the
Commission through the establishment of coordination committees within
the NIRAs. This is the case for the **Body of European Regulators for Electronic
Communications (BEREC)**. This European body does not reach an agency’s level
of formalization, autonomy and stability, but there is no doubt that it weakens
the Commission’s operational position,\(^ {20}\) since, as it happens with agencies, it
must provide assistance in the context of the relevant market analysis, and may
have direct (technical) communication with the Parliament and the Council.\(^ {21}\)
On the other hand, integrating the Commission within a regulatory union right
by the NIRAs, where priority is given to ‘technical’ or ‘standardized’ perfor-
mances, highlights the Commission’s administrative or technical dimension at
the expense of its political side.

b) Secondly, the coexistence of NIRAs with the Commission, as for the appli-
cation of the same regulatory law, may lead to **distortions and inconsistencies**. As
we shall see below, in the symmetrical regulatory union these distortions and
inconsistencies are solved by integrating NIRAs in a European agency. Concern-
ing the asymmetrical regulatory union, **interferences** are solved -partially, at
least- by setting out thresholds or other operational demarcation criteria for both
NIRAs and Commission (for instance, in terms of competition), and by regulat-
ing joint procedures where both NIRAs and Commission are involved.\(^ {22}\)

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a common regulatory framework for electronic communications networks and services (Framework

establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office

18 Bahón and Carrillo (1997) 68.


20 Thatcher (2011) 802.


answer for any possible *inconsistency*, a natural consequence of the prevailing diversity among the entities applying the relevant rules and regulations (particularly given those entities' different nature) is twofold. The first solution is based on deepening the operational standards shared by Commission and NIRAs. The second response has an organic nature, and lies in the creation of a third cooperative entity within the relevant 'administrative union: 'a board of regulators' (composed of NIRAs representatives). This is the case for the abovementioned *European Regulators for Electronic Communications*.

c) Finally, two issues arise if European law provides for the existence of NIRAs. The first relates to the compatibility of the said duty imposed on the States with the principle of organisational autonomy. In this regard, lacking specific case law on NIRAs, it must be asserted that current European case law is not highly deferential to Member States regarding their organisational obligations laid down by European law. To the point that the actual existence of the organisational autonomy principle may be questioned. 23 The second substantial legal issue pertains to the Member States' obligation to create independent authorities. In the absence of specific case law on this point, yet with appropriate differentiation, European case law on independent national data protection authorities may be brought up. According to the Court of Justice: 'It is true that Member States are free to adopt or amend the institutional model that they consider to be the most appropriate for their supervisory authorities. In doing so, however, they must ensure that the independence of the supervisory authority (...) is not compromised'. In this regard, independence shall be construed as a status that 'precludes inter alia any directions or any other external influence in whatever form, whether direct or indirect, which may have an effect on their decisions [of the Independent Authority]'. 24 In accordance with this jurisprudence, it may be considered that the Court of Justice does not require any particular legal form for independent authorities. However, it does specifically set forth that it must comply with certain legal aspects considered to be ideal for the purpose of ensuring operational independence, regardless of the organisational structure adopted by the relevant national authority. Namely, regarding the appointment and removal of members (or the head) of the independent authority. One could argue that the independence of an authority intended to protect fundamental rights (such as the national data protection authority) shall be substantially different from that of a *market regulatory authority*. Notwithstanding the foregoing, it is easy to assert that the general independence criteria set forth by the ECJ to this date (relating to data protection) are also applicable to independent regulatory authorities due to the general and minimal nature of these criteria.

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24 Case C-285/12 Commission v Hungary (2014) 157 r., para. 60 and 51, respectively.
3 Symmetrical regulatory union

3.1 Description of the administrative organisation

10. A second possible combination of IRAs occurs when at the national level of the market there is an administration or independent regulatory authority (NIRA) and at European level there is also some sort of independent authority (EIRA). Those administrative entities, whether national or European, which are not purely operationally autonomous, or that even if they are do not perform regulatory functions, do not fall within the scope of this study.

11. A very particular example is provided by industrial property protection and registration offices. At European level, for the purpose of protecting industrial property an agency was established, and it could tentatively be considered an IRA: the Office for Harmonization in the Internal Market (OHIM). On the other hand, in Member States it is not uncommon for the relevant industrial protection offices to be part of a department or ministry. In other words, they are not actual independent regulatory authorities. The unique nature of these national offices resides in the fact that, although they shall not be construed as independent authorities - operationally and organically speaking - they have traditionally carried out registration and decision-making duties (on trademarks and trade names) with a high degree of impartiality. These registration functions qualify as adjudication, meaning that they are both substantially and in terms of their procedural regulation very close to the exercise of judicial power. These offices do not exercise market management or technical regulation duties, but they carry out supporting functions for the purpose of ensuring legal certainty in trade relationships for the benefit of the internal market. Therefore, although they are part of the ordinary administration or bureaucracy of their respective States, industrial property offices are not subject to government instructions in the exercise of their duties. Also, their decisions are not subject to governmental review. Precisely because they do not adopt governmental options on the structure or power in the markets (not even those that could be labelled as technical),

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26 Neither the British Office of Intellectual Property nor the Spanish Oficina de Patentes y Marcas are properly independent (although in the case of the former, a number of its decisions may be appealed before an independent administrative tribunal, namely, the Company Names Tribunal). The German Patent- und Markenamt is statutory labeled as ‘independent’ (Article 26 of the German Law of Patents [1980]) though that independence refers to the quasi-judicial nature of the office and not to the characteristic administrative autonomy of the regulatory agencies.

27 See nevertheless the classification of the aforementioned agencies, together with other agencies that in this Paper are labeled as regulatory ones, in: Chiti (2013) 95.
their legal organization as independent authorities has not been deemed necessary. These offices are, rather than properly independent, simply impartial.

12. At the institutional level of the European Union, independent authorities are normally labelled as agencies. However, not every European agency, not even those within the internal market, may qualify as independent regulatory agencies (IRAs). This is the case with the European Railway Agency. Although the objective of the Agency is to foster competition in the railway sector, its powers are completely internal; they do not have a direct impact on the market. Its power is limited to addressing recommendations to the Commission and issuing opinions to the Commission or the Member States railway authorities. These agencies do not have an effect on the institutional balance of the EU and particularly not on the powers of the Commission. Thus, they do not trigger the problems specific to IRAs.

7. Having provided these clarifications, this study analyses national and European IRAs within two complex and leading markets: the financial market and the energy market.

a) Let’s begin with the energy market. At national level, Member States have an independent authority or administration as is expressly required by European law. As for the European (transnational) energy market, the Union has created the Agency for the Cooperation of Energy Regulators (ACER).

b) Concerning financial markets, three European agencies have been established in 2010: the European Banking Authority (EBA), the European Insurance

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28 On this distinction, see Miletto (2007) 33 and ff.
30 Thatcher (2011) 800.
33 Established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12). This Regulation was later partially amended by the Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank (ECB) pursuant to Council Regulation (EU) No 1024/2013 (OJL 287, 29.10.2013, p. 5). The purpose of Regulation (EU) No 1022/2013 was to adapt the European Banking Authority to the new supervisory powers of the European Central Bank over the financial institutions, as provided by Regulation 1024/2013. Today, according to Regulation 1024/2013, the ECB wields supervisory powers akin to the ones conferred on the EBA by Regulation 1093/2010 (Recitals 2 and 80 of Regulation 1024/2013). However, the arguments and findings of the present study are not applicable to the ECB, mainly because the ECB is not a European agency, but an Institution of the EU (Article 13.1
and Occupational Pensions Authority (EIOPA)\textsuperscript{4} and the European Securities and Markets Authority (ESMA).\textsuperscript{5} All of these agencies have predecessor agencies in somewhat informal prior intergovernmental committees. Nowadays they serve, among others, the objectives of the internal market.\textsuperscript{6} They act ‘independently, objectively and in a non-discriminatory manner’ and they are part, among other entities and committees, of the European System of Financial Supervision (ESFS).\textsuperscript{7} In contrast to the energy market, there is neither a transnational scope nor a specific threshold for European agencies (systemic risk is just an area of intervention for agencies), so these European authorities may take action in parallel with national financial supervision administrations, which in itself calls for strong cooperation and coordination instruments. Furthermore, although European law does not expressly and strictly establish that national financial oversight has to be performed by ‘independent authorities,’ it does require national financial supervision authorities to act ‘objectively and independently.’\textsuperscript{8} In practice, Member States generally confer oversight duties upon central banks or other independent administrations.\textsuperscript{9}

13. It can be considered that the IRAs symmetry at national and European level of the internal market favours operational cooperation amongst the various agencies. Precisely because of the step backwards taken by governmental inter-


\textsuperscript{6} Article 51 a) of Regulations 1093/2010, 1094/2010 and 1095/2010.

\textsuperscript{7} Article 1(5) of Regulations 1093/2010, 1094/2010 and 1095/2010.


\textsuperscript{9} E.g., in the United Kingdom the Prudential Regulatory Authority was created by the Financial Services Act (2012) and is a part of the Bank of England. It operates alongside another independent authority outside the Bank of England, namely, the Financial Conduct Authority. In Spain, the supervision is carried out directly by the Bank of Spain (Article 7.6 of the Law 13/1994, on Autonomy of the Bank of Spain).
ferences in IRAs' rather technical activity, even when this activity accounts for 'quasi-rule-making'. That said, there are several remarkable legal issues posed by this combination of authorities.

I. The first matter to be addressed is the real nature of the symmetry between the relevant national authority and the EIRA. At first glance, the said symmetry is more restricted than it would appear. In the first place, the nature of the independence granted to EIRAs and NEIRAs differ in structural terms. Whereas NIRAs seek independence with respect to national governments, EIRAs seek independence from the Commission,\textsuperscript{41} which is not \emph{per se} EU government. Moreover, the incompatibility and ineligibility rules concerning the members of the management boards of the IRAs, though formally akin, can determine different real levels of independence, when taking into account the real context in which the several IRAs operate. Conversely, where there are previous NIRAs in place, the relevant European agency has a \emph{limited operational scope}. When NIRAs exist before the European agency, they tend to cover most of the sector-specific regulatory domain, leaving limited scope for European agencies.\textsuperscript{42} In addition, the NIRA's \emph{degree of operational independence}, inasmuch as it results directly from the law, is considerably higher than the 'independence' of a European authority. As we shall see in detail (infra \S\ 15), the EU institutional system set out in the treaties hampers the conferral of relevant powers upon 'agencies' or other European bodies other than the Commission through secondary legislation (directives, regulations, decisions). In this connection, national legislation has more scope to create independent authorities than secondary law provisions adopted by EU institutions. Consequently, EIRAs' activity is at least partially different from that of national independent authorities. European regulatory agencies are basically going to issue guidelines (addressed to the Commission), to deliver recommendations to the economic operators, and to draft public monitoring reports. Regulatory rule-making (implementing technical regulations) and case by case decision-making duties, although they exist, are very limited.\textsuperscript{43} In view of these duties, the utility and applicability of the very concept of independent regulatory authority to these EIRAs (which exercise limited or secondary direct functions over economic operators) could be questioned.\textsuperscript{44} Despite these reasonable concerns, the actual economic impact on the markets of the non-decision making administrative activity (simply informative or admonitory),\textsuperscript{45} allows for maintaining these 'proposal and soft law-generating administrative structures' within the concept of independent authorities. This is

\textsuperscript{40} Moloney (2013) 8.

\textsuperscript{41} This fundamental distinction is very precise in Shapiro (1997) 282.

\textsuperscript{42} Thatcher (2011) 790.

\textsuperscript{43} See, e.g., for the European Supervisory Agencies: Articles 8 to 10 of Regulations 1093/2010, 1094/2010 and 1095/2010, and regarding these agencies, Chamon (2011) 1069.

\textsuperscript{44} Chihii (201) 94; Malaret (2013) 4.

\textsuperscript{45} Majone (1997); Shapiro (1997) 285.
due to the fact that these authorities, although lacking decision-making nature, have a remarkable and direct influence on the operation of the market.\footnote{E.g., 'Draft of Inter-institutional Agreement on the Operating Framework for the European Regulatory Agencies': COM (2005) 59 final, p. 4. This draft was withdrawn by the Commission and replaced with a more realistic proposal of inter-institutional discussion: Communication from the Commission to the European Parliament and the Council. European agencies: The way forward. COM (2008) 335 final, 8.}

3.2 The Meroni doctrine and the lack of legal legitimacy of the EIRAs

15. Since 1958, when the Meroni judgment\footnote{Case C-9/56 Meroni v High Authority [1958] ECR 133.} was delivered, European law sets a clear limit for the transfer of powers (delegation) from European institutions to agencies created by them. The Meroni judgment does not prevent the Commission from delegating powers to agencies on a general basis. However, it does prevent these delegations from encompassing fully discretionary powers. As the Court of Justice stated, such delegations 'can only relate to clearly defined executive powers, the use of which must be entirely subject to the supervision of the High Authority [of the already extinct European Coal and Steel Community]' (page 153). This doctrine has not been reviewed by the Court, yet it has been reaffirmed in the Romano judgment (1980)\footnote{Case C-98/90 Romano [1981] ECR 1241. This judgment was partially overruled in the ESMA case (Case C-270/12, United Kingdom v Parliament and Council [2014] n.y.r., which turned on whether Union agencies may adopt acts of general application under Articles 163 and 277 TFEU. The Court had also mentioned the Meroni Ruling in several prior cases, though concerning issues no directly related with delegation to agencies: e.g., Case C-19/67 Van der Vecht [1967] ECR 345.} and much more recently in the ruling on certain decision-making powers delegated to the ESMA (2014).

16. However, it is true that in the current context of the European Union some objections may be raised in relation to the Meroni doctrine.\footnote{Schneider (2009) 32; Hofmann and Türk (2006) 89.} Firstly, because of the unique nature of the Meroni case (since it was about a sub-delegation from the High Authority [of the former European Coal and Steel Community] and it was raised at a very initial stage of the Community's legal existence).\footnote{In this sense, regarding the ESMA, see: Case C-270/12, United Kingdom v Parliament and Council [2014] n.y.r., para. 43.} Secondly, due to the economic, social, and institutional evolution undergone by the European Union. The complexity featured by the contemporary European society as well as the remarkable expansion of EU powers since 1958, calls for new forms of administrative action. Thirdly, due to the actual evolution experienced by EU law, particularly because current Article 263 TFEU expressly provides that European agencies shall be subject to judicial review (which was not the case-back in 1958, and it played a very prominent role in the Court's reasoning in the Meroni judgment).\footnote{Chamon (2011) 1056.} However, and while updat-
ing this doctrine would be desirable, the truth is that its original sense is still present within the applicable EU law,\textsuperscript{52} as it has been restated by the Court of Justice in relation to the ESMA.\textsuperscript{53} The main issue here revolves around preserving the original Treaty allocation of powers, as was the case when the Court delivered the \textit{Meroni} judgment in 1958. In terms of the applicable UE law this has the following implications: it is lawful to grant a delegation of powers even if this delegation is not expressly foreseen in the Treaties (Articles 290 and 291 TFEU),\textsuperscript{54} but the delegation in question is \textit{strictly limited}: it cannot include discretionary powers conceding a wide margin of discretion; it must allow for a strict review -to be performed by the EJC according to Article 263 TFEU\textsuperscript{55}- on the exercise of the delegated powers in the light of the objective criteria determined by the delegation authority; and it must respect the \textit{institutional balance} as was shaped by the treaties, especially with regard to the preferential position of the Commission according to Articles 290 and 291 TFEU.\textsuperscript{56}

17. In the light of the \textit{Meroni} doctrine, understood within the context of the EU law in place, it can be asserted that despite the EIRAs' \textit{formal} lawfulness (\textit{validity}) they initially show a low level of \textit{legal} legitimacy.\textsuperscript{57} This is precisely because they stem from a very limited power of the Council and the European Parliament to delegate functions to bodies or entities other than the Commission. However, this initially little legal legitimacy does not imply the delegation's invalidity, since, as it has been said, it is possible to delegate powers to European agencies. This 'low level of initial legitimacy' does not relate to the twofold assessment 'validity-invalidity,' but to a scale or degree of legal legitimacy,\textsuperscript{58} based on the extent to which the European agency complies with EU law as a whole;\textsuperscript{59} not only with its principles or rules applicable to the delegation of powers, but also with other substantive \textit{principles or values} embedded in primary law. Insofar as the Regulation establishing every single EIRA strengthens diverse EU law principles, values or legal interests, the final legitimacy of each unique EIRA can also vary.\textsuperscript{60}

18. The legal analysis suggested herein, which focuses on each EIRA's 'degree of legitimacy,' takes a critical look at the \textit{concept of delegation} as the most

\textsuperscript{52} Hofmann (2011) 10.
\textsuperscript{53} With regard to the ESMA, see Case C-270/12, United Kingdom v Parliament and Council [2014] n.y.r., para. 41.
\textsuperscript{54} Stelkens (2013) 27, According to Case C-270/12 United Kingdom v Parliament and Council [2014] n.y.r., para. 85, by expressly mentioning the acts of the 'bodies' and 'agencies' of the Union as possible object of judicial review, Article 263 TFEU allows delegations of the Council to the European agencies. But see Ziller (2014) 904.
\textsuperscript{55} Case C-270/12 United Kingdom v Parliament and Council [2014] n.y.r., para. 53.
\textsuperscript{56} Chamon (2011) 1070; García Álvarez (2014) 94.
\textsuperscript{57} This is precisely the starting point of the Commission in its 'Draft of Inter-institutional Agreement on the Operating Framework for the European Regulatory Agencies': COM (2005) 59 final, p. 6.
\textsuperscript{58} Velasco (2010) 92.
\textsuperscript{59} See Schneider (2009) 39, though referring only the different levels or grades of \textit{democratic} legitimacy.
\textsuperscript{60} Ves (2000) 1123.
suitable conceptual category in order to legally classify the EIRAs. The legal and political constructions on delegation and the principal-agent relationship still have much bearing in the long-standing explanations and legal assessments of independent administrations. The academic influence of the United States could have been important on this point, since North American independent agencies (as it normally happens with every infra-constitutional allocation of power) are construed as forms of power delegation. This approach suffers from explanatory shortcomings when applied to EU regulatory agencies.\(^\text{61}\) According to the political and public law approach, the concept of delegation refers to an empowerment between two subjects: one of them holds a function or power (principal) and the other one is invested with the other subject’s power (agent). The boundaries encountered by an agency (delegated entity), as well as the control maintained by the principal, can be explained on the basis of this empowerment rationale. However, this categorisation does not fully explain what accounts for a very distinct political phenomenon in the EU (infra § 25), where the EIRA, strictly speaking, is not a subject different from the principal. It is not even a subject which is granted delegations from other principals,\(^\text{62}\) but an instrumental entity shared by various organizations or bodies, both EU institutions (Commission, Council, European Central Bank) and national authorities. In accordance with the foregoing, independent regulatory agencies can be better explained if subsumed under the so-called ‘European regulatory union,’ i.e., under an organisational model of cooperative interaction among various primary law entities, both at national and European level.

3.3 Recomposition of the EIRAs’ legal legitimacy

19. In accordance with the foregoing, those European independent agencies analysed herein (ACER, EBA, EIOPA, and ESMA) initially display a low level of constitutional legitimacy. There are two main options in place, stemming from regulation, to try to overcome this legitimacy shortfall. The first is based on diminishing, to the greatest extent possible, the impact of the EIRA on the institutional balance (infra § 20). The second option departs from the premise that the mere creation of a European regulatory agency entails a serious disruption for the EU institutional balance. However, it tries to compensate (yet not to solve) such disruption by getting the most out of other EU structural principles (infra § 22).

3.3.1 Constriction of delegated power

20. As it has been stated, European regulations attempt to diminish the institutional balance disruption brought along by the very existence of a European Regulatory Agency (EIRA). This option is developed in the context of the Meroni doctrine, emanated from the ECJ.\(^\text{63}\) As it was explained

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\(^{62}\) See the theoretical proposal of Coen and Thatcher (2008) 50.

\(^{63}\) See for the European Supervisory Agencies (ESAs): Moloney (2011) 74.
above, in the mentioned judgment, the Court stated that the delegation of power to bodies other than those which the Treaties have established shall be narrowly limited. Along these judicial provisions, the rules governing EIRAs lay down a rather precise operational outline applicable to agencies. They do not only provide for limited powers through concrete fact situations, but also by means of objectives or ends which guide the exercise of these powers. It is also stated that the powers conferred upon agencies have a technical nature, yet not a political character, and safeguard clauses are set out in order to shield the Commission's institutional position. It must be clarified that the Commission is the European institution which is most affected by the establishment of independent regulatory agencies. In this connection, ESAs regulations emphasize that agencies powers do not challenge or aimed at restricting the powers of the Commission pursuant to Article 258 TFEU and it is reaffirmed that the Commission's final decision-making power remains unaffected. Some other times, an explicit statement is made as to how the powers conferred upon independent agencies have a delegated nature (from the Council or from both the Council and the European Parliament). It is also stated that these powers are revocable and even limited in time, that they are subject to delegated or implementing regulations issued by the Commission, as it is declared that the agency in question shall be accountable to the European Parliament and to the Council.

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64 'Regulatory technical standards shall be technical, shall not imply strategic decisions or policy choices and their content shall be delimited by the legislative acts on which they are based' (Article 10(1) of Regulations 1093/2010, 1094/2010 and 1095/2010).

65 Articles 1(4), 18(4) and 19(4) of Regulations 1093/2010, 1094/2010 and 1095/2010.

66 Regarding the 'Regulatory Technical Standards' that can draft the supervisory agencies: Article 10(3) of Regulations 1093/2010, 1094/2010 and 1095/2010.

67 Regarding the power yielded to the supervisory agencies to draft 'Regulatory Technical Standards': Article 11(1) of Regulations 1093/2010, 1094/2010 and 1095/2010. On the relevance of the possible revocation of the delegation, as a means of control on delegated powers, according to the Meroni doctrine, see Moloney (2011) 67 and 75.

68 With regard to the extraordinary powers endowed to the ESMA, the previously mentioned Regulation No 236/2012 (Article 10) empowers the Commission to adopt delegated acts which are to be followed by the ESMA when wielding its delegated powers (As an example of the delegated rules passed directly by the Commission, see: Commission Delegated Regulation (EU) No 918/2012 of 5 July 2012 supplementing Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps with regard to definitions, the calculation of net short positions, covered sovereign credit default swaps, notification thresholds, liquidity thresholds for suspending restrictions, significant falls in the value of financial instruments and adverse events [OJ L 274, 9.10.2012, p.1]. This narrow submission of the ESMA to the criteria set up by the Commission was a critical founding of the EJC when applying the Meroni doctrine in Case C-270/12 United Kingdom v Parliament and Council [2014] n.y.r., para. 51.

21. The oversight of EIRAs' delegated power is also reinforced by means of legal control instruments. Therefore, we are first confronted with the specific internal remedies system, before boards of appeal, for those decisions issued by EIRAs. This is the case of the Joint Board of Appeal, which has been introduced to protect effectively the rights of parties affected by decisions adopted by the three agencies which make up the European Supervisory Authority (ESA). These internal legal remedies systems optimise the accountability of the EIRAs' decisions, and thus the compliance with the relevant limits set on every agency regarding delegated powers. Besides, all agencies are subject to the ordinary judicial review provided for in Article 263 TFEU.

3.3.2 A quest for legitimacy through organisational forms

22. The second option to rebuild EIRAs' legal legitimacy consists in providing them with an organisational or operational design aimed at optimising other legal interests, principles, or values arising from European primary law. The means to be considered herein as for enhancing EIRAs' initial legitimacy are going to be the inclusion of EU institutions and national authorities in EIRAs' management bodies as well as the regulation of open and participating procedures in their operation.

23. EIRAs' characterization as 'technical' or 'expert' agencies shall not be considered as a way of enhancing their initial legitimacy. 'Technical' qualification is a priori or a defining feature for EIRAs, which -precisely because it expresses independence or political separation with respect to EU institutions-has to be offset with other legal legitimacy sources stemming from EU Treaties.

24. A first legislative option is based on compensating the undisputed initial legal legitimacy shortfall of EIRAs by means of organisational structures encompassing every public entity within the material scope of each EIRA. Hence, as opposed to executive agencies dependant on the Commission, EIRAs are regulated as stable instruments. Within them, all the organizations, authorities, or institutions (whether national or European) competent in the given EIRA's sector-specific area shall cooperate. Therefore, we are confronted with a stable cooperative structure between Member States and EU institutions, rather than with a truly distinct entity dependant on the principal (in terms of the theory of delegation). This organisational scheme departs from the premise that various administrations, authorities, or institutions act within the relevant sector-specific market; sometimes provided with well-defined thresholds or spheres of action (cross-border implications, systemic risk situations) and others -most

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71 Hofmann and Morini (2012) 35.
of the time—with undefined spheres of action. In these operational overlap domains, national authorities and EU institutions act associatively and in an integrated manner, as a ‘regulatory union.’ Precisely the EIRA accounts for the ultimate organisational expression of this regulatory union.

25. The legal legitimacy enhancement occurs, in the first place, due to the strong presence of Member States in the governing bodies of European regulatory agencies through NEIRAs’ representatives. Since the European institutions powers stem from Member States by means of the conferral principle and Article 4(3) TEU provides for the general application of EU law by Member States, the EIRAs will have all the more legitimacy if national authorities are present therein. Thus, power partially returns to its original source (States). In this connection, it could be stated that integrating national authorities within each EIRA serves a similar purpose as that served by comitology. This is the case, in which Member States play a prominent role, of the ESAs’ Board of Supervisors. This organisational scheme, markedly intergovernmental, lies in the lack of determination of a characteristic operational scope (supranational) for ESAs, which in principle may take direct action on financial markets, and not only in cases of systemic risk. The potentially broad scope of the European agency (and thus its difficult position within the narrow framework provided by the Meroni doctrine) is offset by a complementary source of legal legitimacy, such as the distinctive EU conferral principle.

26. Secondly, organisational legitimacy may be also attained by means of the involvement of EU institutions (Council, Parliament, Commission, and, where appropriate, the European Central Bank) in the governing bodies of European agencies. If those powers ‘delegated’ to the EIRA originally belong to EU institutions (to the Council and Parliament), the presence of these institutions within the European agency’s governing body entails a partial recovery of original power belonging to EU institutions, and thus an enhancement of every EIRA’s legal legitimacy.

27. Once we have seen that the integration of EU institutions and NIRAs may, at least in a complementary fashion, enhance EU agencies’ legitimacy, it also has to be highlighted that each and every EIRA shall integrate, to a greater or lesser extent and with a somewhat prominent role, the various actors according to the economic and political particularities of each relevant market.

a) Hence, in the energy market a far-reaching integration occurs. Both national independent authorities and European institutions are included in ACER’s organisational structure, which results in a complex balance: on the European institutional side (among the Council, the Commission and the European Parliament) and at national level (among the national independent

74 Hofmann (2011) 3; García Alvarez (2014) 93.
75 Hofmann (2011) 2.
Chapter 10: The 'Union of Independent Regulatory Authorities' of the European Internal Market

Authorities and their governments represented in the European Council.\textsuperscript{79} On this point, ACER reproduces the organic balance of the European Central Bank,\textsuperscript{80} which allows to speak of some sort of 'composite administration'.\textsuperscript{81} The said integration among European authorities and national authorities is performed by means of three bodies, among which ACER's functions are allocated: an 'Administrative Board' (with a majority of members appointed by the Council and also including members appointed by the Parliament and the Commission), a 'Board of Regulators' (with representatives from national regulatory authorities); and a Director (elected by the 'Administrative Board' following approval by the 'Board of Regulators'). In short, ACER's organic structure comes in response to the various kinds of cooperation purposes which the agency serves: internal and external cooperation. Regarding ACER, to the extent that it is conferred upon a limited and properly supranational sphere of action (the transnational energy market), the involvement of national authorities (in the Board of Regulators) is more balanced if the EU institutions (Commission, Council, and Parliament) take part in ACER's Administrative Board.

b) The cooperative integration model featured by EU financial oversight agencies (EBA, EIOPA, and ESMA) is partially different. These agencies purposefully include national independent authorities, and each of them has a voting representative in the Board of Supervisors (which is the main governing body).\textsuperscript{82} However, the integration of European institutions has a more limited range: only the Commission and the European Central Bank have one representative each in the EIRA Board of Supervisors.\textsuperscript{83} Moreover, within the Board of Supervisors the European Central Bank is non-voting, and the Commission can only vote on the agency's budgetary issues.\textsuperscript{84} It shall also be pointed out that, since the Commission has limited budgetary powers over the ESAs, the in other domains informal dominant position exercised by the Commission over other independent agencies (by means of the availability of financial resources) could not take place.\textsuperscript{85} The Commission's secondary role in the ESAs could probably be explained by the non-existence of prior relevant powers of the Commission. Similarly, NIRAs' prominent role, as well as the Commission's weak position, account for the leading operational position of ESAs.\textsuperscript{86}

\textsuperscript{79} Thatcher (2011) 803.
\textsuperscript{80} Malaret (2013) 4.
\textsuperscript{81} Diez Sastre (2008) 155.
\textsuperscript{82} Articles 47 and 53 of Regulations 1093/2010, 1094/2010 and 1095/2010.
\textsuperscript{83} Article 40(1) of Regulations 1093/2010, 1094/2010 and 1095/2010.
\textsuperscript{84} Article 63 of Regulations 1093/2010, 1094/2010 and 1095/2010.
\textsuperscript{85} This informal power is nevertheless considered by Busuioc (2009) 612.
\textsuperscript{86} Moloney (2011) 49. Chamon (2011) 1068.
3.3.3 A quest for operational legitimacy

28. There are various ways by which EIRAs' operational regulations may account for a source of legitimacy. Only those operational rules which enhance a given agency's initial legitimacy are considered herein, such as transparency (publicity of statements, work programmes and minutes of internal meetings) as well as the involvement of private subjects in the agency's performance. We are referring to either public participation (by means of open public consultations), or specific and qualified participation of certain economic agents representing relevant interests. ACER is particularly characteristic on this point. In addition, as for agencies within the European System of Financial Supervision (EBA, EIOPA, and ESMA) the relevant regulations insist on the publicity of monitoring or inspection schemes on national authorities and private financial entities. These same regulations provide for consultations (of a mandatory nature in certain matters) with a non-governmental group which represents relevant interests (Banking Stakeholder Group, for EBA; Insurance and Reinsurance Stakeholder Group and Occupational Pensions Stakeholder Group, for the EIOPA; and Securities and Markets Stakeholder Group, for the ESMA).

4 Conclusion

Independent Regulatory Authorities (IRAs) proliferate in the European Internal Market, both at the European and at the national thresholds of the single market. Those independent authorities act with a remarkable level of functional integration, which allows us to speak of a 'European Regulatory Union.' The strong integration of the IRAs, both European (EIRAs) and national (NIRAs) authorities, shows up in several different ways. In this study attention has been given to a twofold outline of independent authorities: symmetrical and asymmetrical. The so-called 'asymmetrical regulatory union' integrates the Commission, on the one side, and independent national authorities, on the other. Instead, the 'asymmetrical union' is made up of national independent authorities and European independent agencies. The symmetrical-asymmetrical distinction, taken as an analytical cornerstone, makes sense for the diversity of legal problems that arise in each of these two different 'regulatory unions.'

The 'asymmetrical regulatory union' does not raise serious constitutional concerns as long as the Commission remains formally stable in its institutional position. Nevertheless, the integration of the Commission in the 'regulatory union,' alongside with the national IRAs, indirectly affects its performance, by imitating the more objectively technical patterns of NIRAs.

88 Article 10(1) of Regulations 1093/2010, 1094/2010 and 1095/2010
89 Article 37(2) of Regulation 1093/2010, 1094/2010 and 1095/2010, respectively.
More complex and relevant are the legal issues arising in the 'symmetrical regulatory union,' all of them deriving from the presence of European independent agencies within the Union. These European regulatory agencies encounter the same constitutional legitimacy problems common to all European agencies. They are concerned, above all, with the limits to delegated powers established by the Court of Justice in the so-called Meroni doctrine, lately reaffirmed by the Court in 2014. Taking the samples of European agencies in the energy and financial markets, it can be concluded that the primary legitimacy objections are overcome in legislation by two complementary ways. Firstly, through agency regulations that put real limits and controls to delegated powers to the EIRAs. And secondly, by means of rules that activate complementary sources of legitimacy, that is, organizational and procedural rules that optimize other principles and objectives of the European treaties. A principal form of organizational legitimation of the EIRAs is the integration of the independent national authorities and the European institutions within the management boards of the EIRAs. On the other hand, rules regarding transparency and participative functioning of the EIRAs can be accounted as tools to reinforce their legal legitimacy.
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