

Capital Market Supervision and Investor Protection: Romania in the European Context

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Abstract: *The core aim of this article is to give an overview of the domestic public supervision of securities markets in Romania and in the European Union in order to understand the role of Romania in the European context, taking investor protection as a study case. To this aim, the first part of the article offers an account of the institutional arrangements for financial supervision in Romania, and it gives an overview of the state of the art of retail investor protection in this important South-East European country. The goal is to discover how the Romanian capital market supervisor is designed, and whether the existing public enforcement instruments offer appropriate responses to solve the problems encountered by retail investors. Then, the second part of the article provides a description of the new EU overseeing agency for financial markets, the way it works and how it deals with the protection of retail investors. The goal here is to see how the Romanian securities regulator fits within the European design. The results seem to suggest that the Romanian regulator is not likely to have a strong voice at European level and the current public setting for investor protection is yet to spread its wings.*

Keywords: *ESMA, ASF, investor protection, public supervision*

1) Public Financial Supervision and Investor Protection in Romania

1.1. The Architectural Model of Financial Supervision in Romania

Public supervision has become increasingly important as financial markets have gained more and more weight vis-à-vis the so-called real economy in the last decades. All in all, it is possible to distinguish four macro families of financial supervisors¹:

(1) *Centralized or integrated model*: where a single supervisory authority is responsible for all financial markets and sectors (like the former UK *Financial Services Authority*).

(2) *Vertical or institutional model*: supervision is divided along the traditional categorization of the financial system in three main sectors (banking, securities, insurance)

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¹ For an exhaustive exposition of different financial architectures, see: Eddy Wymeersch, 'The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors' 8 *European Business Organization Law Review* 237

(like the *Comisiòn Nacional del Mercado de Valores* in Spain, the national securities sector supervisor).

(3) *Twin peaks' model*: with just two regulators: the first one supervises the soundness of the financial system, while the second deals with the conduct of business regulation (E.g. the *Autoriteit Financiële Markten* in the Netherlands).

(4) *Hybrid models*: There is a quite wide variety. Usually, in this model, a supervisory function (such as conduct of business, stability, competition, etc.) is under the scope of a specified authority. However, these function-specific authorities often operate alongside sectoral-specific bodies, who supervise specific subjects such as banks, insurance companies, and listed firms. So, in a hybrid model, we have a reproduction of supervisors, both in functional and sectoral terms. (European countries following this model are France and Italy. In Italy, for instance, sector-related authorities, like CONSOB for the securities industry, do not deal with particular issues such as competition, left to specific administrative bodies, namely the *Autorità Garante della Concorrenza e del Mercato*. Also the one in the US may be considered a hybrid model).

This picture may not be as complicated as it looks, especially if we consider the consumer protection issue. This is because the protection of financial services consumers may be given to: 1) the national financial regulator (which may be centralized or vertical – and in the latter case we would have, at least three authorities working on the protection of at least three kinds of financial consumers – banking, insurance, securities); 2) the national central bank; 3) a separate agency tasked with the protection of all consumers; 4) a separate agency tasked only with the protection of financial consumers; 5) a specialized semi-independent office established either at the Central Bank or at the national financial regulator. Finally, we should bear in mind the salient difference between micro and macro-supervision: while the first one monitors individual financial firms, the second one focuses on the stability of the entire financial system. Central Banks usually play a more important role in macro-supervision.

As regards the financial institutional architecture of Romania, it can be said that it follows a hybrid model, classifiable as a semi-vertical or semi-institutional structure, with the Financial Supervisory Authority (*Autoritatea de Supraveghere Financiară* - ASF) supervising the domestic capital, the insurance and private pension funds markets, and the National Bank of Romania (*Banca Națională a României* - BNR) taking care of the banking sector. Given the fast development of the Romanian financial markets, the choice of having a unified supervisor, handling the two very close sectors of insurance and securities, seems to be a good one. However, with the development of cross-sectoral financial conglomerates, a structural reform rationalizing supervisory powers in one single domestic regulator (thus merging banking supervision with insurance and securities supervision) may be needed in the coming years.

The banking system still remains the most important component of the financial sector and it falls under the supervision of the National Bank of Romania. The Bucharest Stock Exchange – BVB is the publicly run stock exchange of the country and, like all its neighbours which experienced the Soviet occupation², it reopened after the collapse of communism

² An example is the Bulgarian stock exchange which reopened in 1991 after the collapse of communism, even if it was officially authorized by the State Securities and Exchange Commission (then Financial Supervision Commission) to operate as a stock exchange on October 9, 1997. See: http://www.bse-sofia.bg/?site_lang=en&page=AboutBSE

pushed the 1989 Romanian Revolution, in April 1995³. In 2005 the BVB merged with the RASDAQ, which had been founded in 1996 as the national securities market dedicated to trading the stocks of those formerly public companies that were undergoing a large privatization process during the '90s⁴.

The Romanian National Securities Commission (in Romanian: *Comisia Națională a Valorilor Mobiliare - CNVM*) has been for more than a decade the national administrative agency tasked with supervising the Romanian capital market, stock exchange and financial intermediaries. It was originally established in 1994 but its structure and powers were widely reformed in 2002 by the Government Emergency Ordinance n° 25/2002⁵, adopted after the huge financial scandal involving the FNI – National Investment Fund in 2000. By *Ordonanța nr. 93/2012*⁶ adopted by the Romanian Government in December 2012, the CNVM was merged with the Insurance Supervisory Commission and with the Commission for the Supervisory of the Private Pension System and the new Financial Supervisory Authority – ASF was officially established in April 2013 by Law 113/2013 (*Legea nr. 113 / 2013 pentru aprobarea Ordonanței de urgență a Guvernului nr. 93/2012*)⁷.

The ASF is characterized as independent from Government interference but accountable before the Romanian Parliament. It has wide prudential powers over the national securities market, like enforcing both insider trading and disclosure requirements, controlling marketing materials, authorizing market players to operate, training representatives agents, and the like⁸. Moreover, the ASF has the administrative authority to impose fines, issue legally binding regulations addressed to financial market participants, and it is charged with monitoring the takeovers occurring in the country. The ASF is the ESMA member from Romania and also member to some supervisory bodies worldwide,⁹ it is not funded by the State but it receives revenues from the fees and tariffs paid by the financial market players when they operate in capital markets.

However, despite the apparent completeness of ASF's powers and supervision functions, and even if the market conduct is supervised by the ASF itself, the consumer protection is carried out by another authority, the National Authority for Consumer Protection (in Romanian: *Autoritatea Națională pentru Protecția Consumatorilor – ANPC*). The separation of the consumer protection sphere from its original economic sector does not only apply to securities markets but to all financial sectors: on the one hand, the domestic sectoral supervisors carry out the supervision regarding all financial activities, including those operated by credit institutions and credit intermediaries; while, on the other hand, the ANPC deals with consumer protection across the financial sectors.

The choice of leaving the domestic supervisor for securities markets without the direct task of investor protection does not seem to be the best option for Romania, at least for one

³ See: <http://www.bvb.ro/About/Presentation.aspx?t=1>

⁴ See: World Bank, *Romania Diagnostic Review of Consumer Protection and Financial Capability vol II* (2009). At 50.

⁵ The Ordinance was approved by Law 514/2002. For the English version of the Ordinance, see: <http://www.cnvmr.ro/pdf/oug/en/geo-25-2002.htm>

⁶ The text of the ordinance is available only in Romanian at the following website: <http://www.cnvmr.ro/ro/legislatieASF.htm>

⁷ The text of the Act is available only in Romanian at the following website: <http://www.cnvmr.ro/ro/legislatieASF.htm>

⁸ See: World Bank. At 49.

⁹ A good example can be the US Office of Thrift Supervision – OTS which was financed through fees paid by the market participants. However, the OTS ceased to exist on October 19, 2011.

important reason, that is expertise both in sectoral supervision and staff. Firstly, by carrying out supervisory tasks the ASF is in the natural position to find out conduct of business which may eventually be of detriment to retail investors. Even if, from a theoretical viewpoint, it can be said that this “know-how” can be conveyed to the ANPC, on a practical stand this kind of inter-agency exchange hardly succeeds. Secondly, the ASF staff are highly specialized and have thorough knowledge of how the securities and insurance markets function, in a way that they know how to interpret whether a market behaviour is malpractice or not. The same cannot apply to the ANPC staff, whose specialization is consumer protection.

Notwithstanding this operational division, it is worth noting that the ASF official website hosts a section named “*Informații pentru investitori*” (*Information for investors*). It has been built in order to provide investors with useful contact information regarding the possibility to notify complains about financial intermediaries, and with explanations about *Fondul de compensare a investitorilor S.A.*, a Romanian version of the US Securities Investor Protection Corporation (SIPC).

1.2. The State of the Art of Financial Consumer Protection and the Public Enforcement of Investor Protection Rule in Romania

Romania joined the EU in 2007¹⁰ and since then it has been constantly implementing EU legislation, including directives dealing with investor protection, such as MIFID. As regards consumer protection in general, the very first legal act aimed at protecting consumers was the 1992 Government Ordinance No. 21¹¹ on consumer protection. In the same year, by Government Decision No. 755¹², a new national consumer protection agency was established: the National Authority for Consumers’ Protection (ANPC), in charge of protecting all consumers, including all financial services consumers, namely both mortgage/loan takers and retail investors. At the beginning of the 2000s, the Government Decision No. 755/2003, as amended by Government Decision No. 209/2005, restated that ANPC is responsible for both coordinating and implementing the national governmental strategy on consumer protection, and preventing and combating practices that endanger the life, health, security or economic interests of consumers¹³.

In 2004 the Romanian Parliament adopted the so-called Consumption Code, Law 296/2004¹⁴, which reorganized the consumer protection subject into a more coherent body of law. In 2008, the Government Emergency Ordinance No. 174 amended the 2004 Consumer Credit Law for individuals and reaffirmed the position of ANPC: this monitors

¹⁰ As regards important aspects of Romania’s accession to the EU, see: Alan Mayhew, ‘The financial settlement in the enlargement of the European Union: lessons for Romania?’ in *Romanian Journal of European Affairs* Vol. 3, no. 2, July 2003, European Institute of Romania; Alan Mayhew and Witold Orlowski, *The impact of EU accession on enterprise adaptation and institutional development in the countries of central and eastern Europe* (2001); Alan Mayhew, *Enlargement of the European Union: An analysis of the negotiations with the Central And Eastern European Candidate Countries* (2000).

¹¹ See: (World Bank, *Romania Diagnostic Review of Consumer Protection and Financial Capability vol I* (2009). At 44, Annex 3: Key Laws and Institutions for financial consumer protection in Romania.

¹² See: *ibid.* At 45.

¹³ See: *ibid.* At 13.

¹⁴ The Code was published in the Official Monitor of Romania 593/2004 and it was subsequently modified by the Law 363/2007.

compliance with consumer protection rules and the Central Bank oversees activities of creditors and credit intermediaries.¹⁵

However, apart from the mere transposition of EU directives, the actual quality of information disclosure does not seem to be particularly good¹⁶. Indeed, neither of the supervisory agencies concretely ensures that useful comparative information, such as the requirement that all financial institutions publish annual audited financial statements and the names of their directors and significant beneficial owners, is made available for consumers¹⁷. Furthermore, the establishment of a registry which publicly collects all certified financial advisors is yet to be done¹⁸, even if a public certification is a basic professional guarantee for retail consumers.

As regards the public enforcement of financial consumer rights, the situation is not excellent at all. Indeed, even if the ASF enforces the investor protection rules provided by the Capital Markets Law and the regulations adopted under it¹⁹, when the ASF imposes sanctions or fines, or even when it withdraws licenses, it does so without receiving and solving complaints from investors. This is because the ASF does not solve customer complaints taking binding decisions²⁰, instead it just reviews client complaint files of each financial institution when it carries out on-site inspections²¹. The resolution of disputes and complaints are left to the courts and the ANPC, which tries to solve them and, if not possible, it forwards them to a court²². However, ANPC does not look to be really incisive as it does not even have a *special department* dealing with financial services issues²³. Unfortunately, the ASF does not publish statistics on complaints, and the ANPC does not carry out systemic analyses of the complaints it handles²⁴.

Concerning the extrajudicial dispute mechanisms in the securities market, the CNVM Decision No. 372/2006 (now incorporated into the ASF rulebook) authorized the establishment of the Arbitration Court at the Bucharest Stock Exchange, made up of a President and twelve members and following a well defined procedural code. The key weakness is that this “court” cannot impose binding decisions and these can be even appealed in real courts. In practice, this Arbitration Court has been rarely used by investors²⁵.

As regards the financial institutions’ internal procedures for handling complaints, they must be established as stated by Article 77 of Regulation 32 of CNVM (now incorporated into the ASF rulebook). These procedures must be transparent and effective and must have

¹⁵ See: World Bank, *Romania Diagnostic Review of Consumer Protection and Financial Capability vol I*. At 15.

¹⁶ See: *ibid.* At 19-20.

¹⁷ See: *ibid.* At 19-20.

¹⁸ See: *ibid.* At 22.

¹⁹ See: World Bank, *Romania Diagnostic Review of Consumer Protection and Financial Capability vol II*. At 50.

²⁰ Actually, the CNVM/ASF published on its website a general procedure to submit complaints to be followed by customers. Before sending a complaint to the CNVM/ASF, a customer must warn the financial institution and they both must try to solve the problem through the institution’s internal procedure. If the customer is not satisfied, then s/he can take her/his complaint to the CNVM/ASF which will evaluate the case and, when it is deemed necessary, contact the financial institution. If the client is still not satisfied, s/he can go to a court. *Ibid.* At 53. However, the CNVM/ASF does not have compensation powers and complaints are used to carry out its supervisory tasks.

²¹ See: World Bank, *Romania Diagnostic Review of Consumer Protection and Financial Capability vol I*. At 24.

²² See: *ibid.* At 24.

²³ See: World Bank, *Romania Diagnostic Review of Consumer Protection and Financial Capability vol II*. At 13.

²⁴ See: World Bank, *Romania Diagnostic Review of Consumer Protection and Financial Capability vol I*. At 28.

²⁵ See: World Bank, *Romania Diagnostic Review of Consumer Protection and Financial Capability vol II*. At 53.

a compliance officer approved by the ASF in charge of registering all the complaints. During its annual audit, the ASF reviews both the complaint register and the internal procedure²⁶.

Finally, it is worth noting that in 2006 the Special Project Initiative Romania, a public-private partnership, was established by the National Bank of Romania, the Romania Banking Association, and the Romanian Ministry of Economy and Finance²⁷. This program has planned two important projects: the first one concerning the availability to set up a financial ombudsman in order to settle disputes in the retail financial sector; and the second one regarding a nation-wide financial literacy program. Even if these were useful proposals, their implementation is yet to be concretely seen. However, it is worth mentioning that the Special Project Initiative has been very active in conducting studies and researches about financial services in Romania²⁸.

Unfortunately, even if the general situation is increasingly improving, the Romanian legal system does not provide for effective administrative redress mechanisms for retail investors. Public enforcement is still very weak and ADRs are not fully fledged, thus making the legislative progresses something existing only on paper but still far from the types of problems daily experienced by small investors.

2) The New EU Financial Authority for Securities Markets and the Role of the Financial Oversight Authority

2.1. The European Securities and Markets Authority

The European Securities and Markets Authority – ESMA was established by Regulation 1095/2010²⁹, alongside two other authorities, the European Banking Authority – EBA³⁰, and the European Insurance and Occupational Pensions Authority – EIOPA³¹. Article 1(5) clearly states that ESMA has “to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system”. ESMA should be doing all this by improving and ensuring the integrity, transparency, efficiency and orderly functioning of financial markets, contributing to a sound, effective and consistent level of regulation and supervision; strengthening international supervisory coordination; preventing regulatory arbitrage and promoting equal conditions of competition; ensuring appropriate regulations and supervision for assuming the investment risk and other risks³². Coherently with these very high-profile aims, Regulation 1095/2010 is based on Article 114 TFEU, and this confirms that ESMA basic objective is that to “improve the conditions for the establishment and functioning of the internal market”³³.

²⁶ See: *ibid.* At 53.

²⁷ With the support of the World Bank and partly funded by the Italian Ministry of Finance.

²⁸ See: World Bank, *Romania Diagnostic Review of Consumer Protection and Financial Capability vol I*. At 10.

²⁹ OJ L 331/84, 15.12.2010.

³⁰ Established by the EU Regulation 1093/2010 of the European Parliament and of the Council. OJ L 331/12, 15.12.2010.

³¹ Established by the EU Regulation 1094/2010 of the European Parliament and of the Council. OJ L 331/48, 15.12.2010.

³² Article 1(5), Regulation 1095/2010. OJ L 331/84, 15.12.2010.

³³ Case C-217/04, *United Kingdom vs. European Commission and Council*, ECR [2006] I-3771, para. 42.

A crucial point is the nature of ESMA as an EU agency. Traditionally speaking, European agencies³⁴ cannot enjoy full decision-making and rule-making powers, although they are bodies of secondary Union law, have legal personality, and are permanent and relatively independent subjects³⁵. Indeed ESMA has legal personality³⁶ as well as administrative and financial autonomy from other European institutions³⁷, and it does enjoy a certain degree of organizational autonomy³⁸ from the Commission, even a larger autonomy, in terms of governance and independence, than traditional European agencies³⁹.

However, all these aspects cannot hide the existence of some serious hurdles. This is because some restrictions to the EU agencies' powers were firmly established by the ECJ in 1957⁴⁰, at the very outset of the European integration process. In the *Meroni* case the ECJ stated four important principles: first, coherently with the idea that *nemo plus iuris transferre potest quam ipse habet*, the ECJ excluded the possibility for a delegating authority to delegate on other bodies' powers different from those already possessed by the delegator under the Treaty⁴¹. Second, a delegation of powers cannot be presumed, but the delegating authority must make an express delegation⁴². Third, a delegation of "discretionary powers" is unlawful because it can "make possible the execution of actual economic policy"⁴³ thus replacing "the choices of the delegator by the choices of the delegate"⁴⁴, and causing "an actual transfer of responsibility"⁴⁵. Finally, a delegation of "discretionary powers" is unlawful because it would jeopardize the balance of powers between the European institutions⁴⁶. Since then, ECJ case law has not authorized the creation of European agencies endowed with "discretionary power to translate broad legislation guidelines into concrete instruments"⁴⁷. This is the main reason why we can better define ESMA as a "strong" pre-decision-making authority rather than a regulatory agency.⁴⁸

Finally, it is important to note that ESMA is not so much a "pure" agency, as it is a kind of a *mélange* between an agency and a coordinator made up of national regulators. So, the delegation of the decision-making powers from the Commission is not only towards ESMA

³⁴ Moreover, it should be borne in mind that "no one common definition of an agency may be identified" [Michelle Everson, 'Independent Agencies: Hierarchy Beaters?' 1 *European Law Journal* 180] and the literature has not unanimously agreed on it yet.

³⁵ See: Stefan Griller and Andreas Orator, 'Everything under control? The "way forward" for European agencies in the footsteps of the *Meroni* doctrine' 35 *European Law Review* 3.

³⁶ Regulation 1095/2010. Article 5.

³⁷ Regulation 1095/2010. Rec (14)

³⁸ See: Griller and Orator.

³⁹ See: Eddy Wymeersch, 'The reforms of the European Financial Supervisory System – An Overview' 7 *European Company and Financial Law Review* 240. At 253.

⁴⁰ *Meroni SpA v ECSC High Authority (Meroni I)* (9/56) [1957 and 1958] E.C.R. Spec. Ed. 133.

Meroni SpA v ECSC High Authority (Meroni II) (10/56) [1957 and 1958] E.C.R. Spec. Ed. 157.

⁴¹ See: Griller and Orator. At 10.

⁴² See: *ibid.* At 10.

⁴³ *Meroni I* [1957 and 1958] E.C.R. Spec. Ed. 133, at 152.

⁴⁴ *Meroni I* [1957 and 1958] E.C.R. Spec. Ed. 133, at 152.

⁴⁵ *Meroni I* [1957 and 1958] E.C.R. Spec. Ed. 133, at 152.

⁴⁶ On this point see: Xenophon A. Yataganas, *Delegation of Regulatory Authority in the European Union – The Relevance of the American Model*. (2001). At 27.

⁴⁷ Damien Geradin and Nicolas Petit, *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform* (2004). At 49.

⁴⁸ For the categorization of EU agencies, see: Griller and Orator.

but also “towards” national regulators (which are bodies created under sovereign national laws): this implies a constant flux of decision-making powers moving throughout the EU multilevel system. Eventually the problem is to stop this flux somewhere, for Europe to be able to protect itself from hidden dangers likely to jeopardize the functioning of its financial system.

All this description of ESMA’s limited powers and wide functions is extremely important in order to understand that, formally speaking, national supervision agencies are still the main players when it comes to regulating securities and capital markets. Considering ESMA from the prospective of domestic regulators, like the Romanian ASF, it may look like they are granted some voice in the decision-making process. However, when we look at how ESMA is governed, agencies coming from small-midsized countries like Romania can hardly enjoy such a large leeway.

2.2. The Position of ASF in ESMA’s Governance Structure and Decision-Making Procedure

Concerning ESMA’s governance structure, this new Authority is made up of: a Board of Supervisors, a Management Board, a Chairperson, an Executive Director, and a Board of Appeal⁴⁹. The Board of Supervisors is the core element of ESMA. It is in charge of making the decisions referred to in Chapter II of the establishing Regulation, and, particularly, it has to deal with the primary tasks and powers set out in Article 8 (see below). The board is made up of the Chairperson (chosen by the Board and with non-voting power), the heads of the 27 national public financial authorities (with voting powers), one representative of the Commission (with non-voting power), one representative of the ESRB (with non-voting power), one representative of each of the other two European Supervisory Authorities (with non-voting power).

The decisions of the Board of Supervisors are usually taken by a simple majority of its members⁵⁰, whereas in some cases a qualified majority of its members is required⁵¹. Importantly, Article 42 of the establishing Regulation provides the independence requirement for the members of the Board. Given that the Board members are the national financial authorities, this requirement indirectly affects national regulators when they meet at ESMA level. Here the ASF might encounter a potential hurdle, the one stemming from its funding system. As said above, the ASF is funded through fees paid by the supervised entities, thus depending upon the correct, well and efficient functioning of the domestic securities market. Even if an analysis of the relationship between the industry and the regulator is out of the scope of this paper, it is worth noting that a funding system simply based on fees paid by market players can raise a potential problem of regulatory capture⁵².

⁴⁹ Regulation 1095/2010, Article 6

⁵⁰ Regulation 1095/2010. Article 44 (1)

⁵¹ Regulation 1095/2010. Article 44 (1)

⁵² As regards the meaning and the scope of regulatory capture see: Michael E. Levine and Jennifer L. Forrence, ‘Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis’ 6 *Law Economics & Organization* 167; Daniel Hardy, *Regulatory Capture in Banking* (2006); Sidney A. Shapiro, ‘The Complexity of Regulatory Capture: Diagnosis, Causality and Remediation’ 102 *Roger Williams University Law Review*; Stefano Pagliari (ed) *The Making of Good Financial Regulation: Towards a Policy Response to Regulatory Capture* (Grosvenor House Publishing 2012).

The Management Board is the watchdog of ESMA: it has to ensure that ESMA carries out its mission and performs its tasks, as laid down in the establishing Regulation⁵³. The Chairperson⁵⁴ is the one who represents the Authority and is responsible for preparing the work of the Board of Supervisors and s/he chairs the meetings of the Board of Supervisors and the Management Board⁵⁵. While the Executive Director is a full-time independent professional⁵⁶, in charge of the management of the Authority, of the preparation of the work of the Management Board, and responsible for implementing the ESMA annual work program under the guidance of the Board of Supervisors and under the control of the Management Board⁵⁷. Other organs, such as the Board of Appeal⁵⁸ and the Joint Committee⁵⁹ are intrainstitutional structures that ESMA share with the EBA and EIOPA.

Finally, as regards the Standing Committees, they were already established under the CESR regime and their task is to develop proposals for approval by the Board of Supervisors. The Standing Committees work by taking into account the goals of strengthening the network of European authorities in their own area, so as to improve enforcement cooperation between national regulators and to strengthen the network of regulators in a given regulatory area, and this is why most of their work takes place at the Level 3 of the Lamfalussy procedure⁶⁰. These Committees are chaired by senior national representatives, usually a Member of the Board of Supervisors, and they gather national experts who are supported by the ESMA staff,

⁵³ Regulation 1095/2010. Article 47 (1). The Board is made up with the Chairperson and six other members coming from of the Board of Supervisors, and elected by and from the voting members of the Board of Supervisors (Regulation 1095/2010. Article 45).

⁵⁴ Regulation 1095/2010 specifies that the Chairperson is a full-time independent professional, appointed for 5 years, by the Board of Supervisors on the basis of merit, skills, knowledge of financial market participants and markets, and of experience relevant to financial supervision and regulation, following an open selection procedure.

⁵⁵ Regulation 1095/2010. Article 48. Article 49 clearly states the level of independence enjoyed by the Chairperson: "the Chairperson shall neither seek nor take instructions from the Union institutions or bodies, from any government of a Member State or from any other public or private body" This independence should be guaranteed by the fact that the Chairperson may be removed from office only by the European Parliament following a decision of the Board of Supervisors: the role of the European Parliament may look quite in contrast with the alleged independence of the Chairperson. However, it was necessary to link such an important institutional role to a democratic-elected body, like the Parliament.

⁵⁶ S/he is appointed for 5 years by the Board of Supervisors, after being confirmed by the European Parliament, and, like the Chairperson, the Executive Director should be elected on the basis of merit, skills, knowledge of financial market participants and markets, and experience relevant to financial supervision and regulation and managerial experience, following an open selection procedure. See: Regulation 1095/2010. Article 51 (2).

⁵⁷ Moreover, the Executive Director is also in charge of preparing a multi-annual work program and of drafting a report with a section on ESMA's regulatory and supervisory activities and a section on financial and administrative matters. Finally, s/he is responsible for drafting the ESMA preliminary budget. See: Regulation 1095/2010. Article 53.

⁵⁸ The Board of Appeal is a joint body of all the ESAs. It is composed of six members and six alternates, "individuals of a high repute with a proven record of relevant knowledge and professional experience, including supervisory, experience to a sufficiently high level in the fields of banking, insurance, occupational pensions, securities markets or other financial services". See: Regulation 1095/2010. Article 58 (2). A quite complex designation system is laid down in Article 58 (3). Parties affected by decisions adopted by ESMA have the right to appeal a ESAs joint body. However, given the nature of this body, legal expertise is particularly relevant for its correct functioning.

⁵⁹ The Joint Committee is a forum established in order to avoid cross-border micro-prudential oversight problems. (Regulation 1095/2010. Article 60 (1)).

⁶⁰ On the Lamfalussy process, please see the following official working document: European Commission, *The Application Of The Lamfalussy Process To EU Securities Markets Legislation* (November 15, 2004).

acting as *rapporteurs* for the Committees⁶¹. At the moment there is no Standing Committee chaired by representatives coming from Romania and Bulgaria, the two countries that joined the EU in 2007.

Generally speaking, the FAS seems to be very unlikely to have a big voice in ESMA. The way the Board of Supervisors is composed, the procedures through which its financial guidelines are enacted contribute to reinforcing the idea of a constant flux of decision-making powers moving throughout the EU multilevel system. In this picture, Article 3's statement of an ESMA accountable before the European Parliament and the Council⁶² becomes blurred, and this is because it is not clear how far ESMA should be held accountable: it is not clear who decides what, whether the Authorities themselves (i.e. their technocratic apparatus) or only the members of their Boards, such as the national regulators. And it looks even more vague when it comes to figuring out what kind of role can agencies from small-midsized countries play.

Moreover, even Article 4 of the ESMA Rule of procedures⁶³ which provides that the most important regulatory areas are covered by a qualified majority voting system⁶⁴, does not seem to be an effective guarantee for ASF, because it is supposed to deal with regulators with a deep traditional expertise and coming from countries whose financial markets are much more developed, and national interests are stronger, and, supposedly, better organized. Moreover, in all residual areas, the Board of Supervisors works by simple majority in accordance with the principle where each member has one vote⁶⁵.

Significantly, the way ESMA is funded reflects its key feature of being a hybrid object of national and supranational nature: it receives 40% of the necessary resources from the EU and 60% from national authorities' funds⁶⁶. Considering that funds coming from the national supervisors will be allocated according to the weighted voting rights established under the Union Treaties, the four largest European economies (Germany, France, the United Kingdom, and Italy)⁶⁷ may have the chance to play a more prominent role, while the regulators coming from small-midsized countries are very unlikely to have a big voice.

⁶¹ See: <http://www.esma.europa.eu/index.php?page=workingmethods&mac=0&id=>. Moreover, the Standing Committees usually establish their Consultative Working Groups with the aim to assist the Committees in their works and provide technical advice during the normative drafting process. These Groups are made up of market participants (like practitioners, consumers and end-users) chosen from across the EU not as "voice-persons" of national or specific firm interests, but as advisers.

⁶² Regulation 1095/2010. Article 3. ESMA has to appear before the Committee on Economic and Monetary Affairs (ECON) of the European Parliament at its request for formal hearings. Moreover, ESMA is also accountable before the Council of the European Union and the European Commission by regularly reporting on its activities and through an Annual Report.

⁶³ ESMA/2011/BS/1, available at http://www.esma.europa.eu/system/files/2011_BS_1.pdf

⁶⁴ Article 44, Regulation 1095/2010, states that this qualified majority follows the requirements provided for by Article 16(4) of the Treaty on European Union and Article 3 of the Protocol (No 36) on transitional provisions.

⁶⁵ Regulation 1095/2010. Article 44 (1).

⁶⁶ See: European Securities and Markets Authority - ESMA, *Frequently Asked Questions: A Guide to Understanding ESMA* (2011) See: Regulation 1095/2010, CHAPTER VI – FINANCIAL PROVISIONS.

⁶⁷ These countries are the European members of the G20 and they are also the stable members of the IOSCO Board. This is the key body of the International Organization of Securities Commissions – IOSCO, the international standard setter for international finance made up of public regulators from all around the world. It currently has 115 Members covering 95% of the world financial markets. See: www.iosco.org

2.3. ESMA Regulations and the Potential Influence of ASF

Article 8 (1) offers an overview of the ESMA tasks, such as working in order to establish high-quality common regulatory and supervisory standards and practices, or contributing to the consistent application of legally binding Union acts and monitoring and assessing market developments. However, first and foremost, ESMA's most important task is the development of regulatory technical standards, as provided by Article 10 and issued by the ESMA Board of Supervisors through a qualified majority system⁶⁸.

In case of adoption of regulatory technical standards, the European Commission exercises the delegation of powers envisaged by Article 290 TFEU, by doing so ESMA can adopt regulatory drafts which, later on, will be endorsed by the Commission. These standards must be purely technical without implying any strategic decisions or policy choices. Moreover, their content must be limited by the delegation legislative acts on which they are based. Importantly, ESMA technical standards are "binding" to a certain degree, and their "binding" feature is given by the fact that the Commission must tell ESMA either the reasons why its drafts are not endorsable or what should be amended⁶⁹.

As regards the implementation of financial regulations by Member States, ESMA has the power to issue implementing technical standards. Article 15 specifies that these implementing technical standards must be "technical", without implying strategic decisions or policy choices. The content of these implementing standards must determine the conditions of application of EU financial regulations. As already showed in the case of technical standards, ESMA's draft implementing technical standards must be submitted to the Commission in order to be endorsed. The issuance system is rather the same as that of drafted technical standards, and the implementing technical standards are adopted as regulations or decisions as well.

When a national regulator fails to comply with EU financial regulations, in particular when it does not guarantee that a financial market participant satisfies the requirements provided by EU law, ESMA can be called upon to investigate the alleged breach or non-application of Union law. ESMA can act upon the request coming from one or more competent authorities, the European Parliament, the Council, the Commission or the Securities and Markets Stakeholder Group, or on its own initiative. This is a fast track procedure⁷⁰ provided by Article 17 and aimed

⁶⁸ Article 44, Regulation 1095/2010.

⁶⁹ Regulation 1095/2010. Article 10. When a "collision" between the Commission and ESMA happens, a 6-week period of talks between ESMA and the Commission starts and at the expiration of that period, the Commission still retains the power to reject the proposed standards. However, Article 10 clearly states that the Commission cannot "change the content of a draft regulatory technical standard prepared by the Authority without prior coordination with the Authority". Finally, Article 10 (4) states that regulatory technical standards must be adopted as either Commission's regulations or decisions and published in the Official Journal of the European Union.

⁷⁰ ESMA has a two-month time period to issue a recommendation to the national regulator in which actions to be performed in order to comply with EU laws are suggested. If the national regulator does not comply in a-month's time, the Commission, taking into account ESMA's recommendations, can issue a formal opinion requiring the competent authority to take the action necessary to comply with the Union law. In case of non compliance and where it is necessary "to remedy in a timely manner such non compliance in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system" [Regulation 1095/2010, Article 17 (6)], ESMA can "adopt an individual decision addressed to a financial market participant requiring the necessary action to comply with its obligations under Union law including the cessation of any practice" [Regulation 1095/2010, Article 17 (6)]. This ESMA decision has the power to prevail over previous decisions adopted by the national regulation on the same issue.

at ensuring the concrete application of Union law, so as to overcome the hurdles spawned by the lengthy procedure for breach of EU law led by the Commission before the European Court of Justice. Article 18 establishes specific rules for emergency situations⁷¹, while Article 19 provides ESMA with the power to settle disagreements between competent authorities in cross-border situations, replacing the CESR mediation mechanism⁷². Finally, Article 21 states that when a college of supervisors is established in order to monitor European cross-border banks, ESMA staff can participate in the activities of the college, including on-site examinations⁷³.

As regards the impact ESMA regulatory technical standards will have in coming years on financial regulation of Romania, it is likely to be quite deep, for at least three main reasons. First, financial markets are becoming more and more globally interconnected and, in the last four-five years, Europe has been emerging as a single player in the international financial law landscape⁷⁴. Second, in the last 10 years the European Commission has been more and more active in proposing legislation in order to build a more integrated and harmonized European internal financial market, and there is no sign it is willing to call it quits. Third, financial markets in Romania started developing only 20 years ago, after the fall of Communism.

This means that, if compared to western European economies, Romanian markets are still in an emerging phase and, consequently, financial regulators have not been able to develop the same expertise as their colleagues from Western Europe are supposed to have done in the last 60 years or so. This suggests that ESMA technical standards are very likely to easily

⁷¹ Article 18 provides that when the ESRB or ESMA considers that an emergency situation may happen, it must send a confidential recommendation with an assessment of the situation to the Council. On the base of this assessment, the Council determines whether an emergency situation exists or not and, if so, it must inform the European Parliament and the Commission. When the situation turns out to be so serious that its developments are likely to jeopardize the orderly functioning and integrity of financial markets or the stability of the whole or of part of the financial system of the European Union, the Council can permit ESMA to adopt individual decisions requiring national regulators to take the necessary action. If a national regulator does not comply with ESMA's decision, ESMA can jump in and adopt an individual decision directly addressed to financial market participants, in which the European Authority lays down the necessary actions and/or the cessation of any practice.

⁷² In these cases, ESMA can now issue binding legal decisions in order to compel national regulators to either take or refrain from specific actions necessary to settle the issue. When the national authority does not comply, and, for this reason a supervised financial market participant ends up not complying with the EU law, ESMA can issue an individual decision addressed to that financial market participant in which necessary and required actions are described.

⁷³ Moreover, ESMA should ensure a consistent and coherent functioning of colleges of supervisors for cross-border institutions across the Union, taking account of the systemic risk posed by financial market participants [Regulation 1095/2010. Article 21 (2)]. Within colleges of supervisors ESMA can: collect information in order to facilitate the work of the college; initiate and coordinate EU-wide stress tests in order to assess the resilience of financial market players; promote effective and efficient supervisory activities; oversee the tasks carried out by national regulators; "request further deliberations of a college in any cases where it considers that the decision would result in an incorrect application of Union law or would not contribute to the objective of convergence of supervisory practices" [Regulation 1095/2010. Article 21 (2)e].

⁷⁴ From 2007 onwards the European Commission has been invited to join important fora concerning International financial regulation, like, in 2008, the IASCF Monitoring Board (made up of the Emerging Markets Committee and the Technical Committee of IOSCO, the European Commission, the Financial Services Agency of Japan, and US Securities and Exchange Commission); in 2008, the Monitoring Group for international auditing (made up of SCO, the Financial Stability Forum, the Basel Committee on Banking Supervision - BCBS), the International Association of Insurance Supervisors (IAIS), The World Bank and the EU Commission); in 2008, the Monitoring Group for Central Counterparties (where the EU is an observer); in 2009, the OTC Derivatives Working Group (made up of the Committee on Payment and Settlement Systems, IOSCO, and the European Commission); and in 2010, the Task Force on OTC Derivatives Regulation (where the EU is an observer). See: Antonio Marcacci, *The EU and IOSCO: An Ever Closer Cooperation?* (2013)

penetrate into a relatively pristine area, although without guaranteeing a successful adaptation to local conditions.

2.4. ESMA and Consumer Protection: Any Role for the ASF?

Consumer protection has become an essential tool to make the single market function efficiently, and ESMA is supposed to promote the protection of retail investors through “transparency, simplicity and fairness”⁷⁵. Article 8 clearly states that ESMA must have the powers to “develop common methodologies for assessing the effect of product characteristics and distribution processes on the financial position of financial market participants and on consumer protection”⁷⁶.

However, the establishing regulation⁷⁷ designs ESMA not so much as a Consumer Protection agency, but as a “data analyzer” (by collecting, analyzing and reporting the data on consumer trends); as a coordinator of national financial education projects; as a “trainer” for the industry (by developing uniform training standards for the industry); and, most importantly, as the coordinator for more harmonized disclosure rules. Both “supervisory” and “regulatory” powers are granted in order to carry out these tasks: the monitoring of new and existing financial activities and the adoption of guidelines and recommendations, the official aim being to promote “the safety and soundness of markets and convergence of regulatory practice”.

Thus, the *raison d'être* of ESMA's consumer protection function is to guarantee the efficient functioning of the (wholesale) European financial market. And it could not be any different: ESMA is based on Article 114 TFEU. This characteristic is confirmed by several facts: Article 9 puts together consumer protection, financial activities and financial innovation, as if consumer protection were the justification to let ESMA jump in “regulating” financial activities⁷⁸ and, above all, financial innovation (which is thought by some⁷⁹ to be one of the causes of the 2008-09 financial crisis). Moreover, the possibility to issue “warnings” is envisaged for situations in which a financial activity poses a serious threat to ESMA's basic objectives, such as the protection of the public interest through “the short, medium and long-term stability and effectiveness of the financial system”⁸⁰.

In this framework where ESMA's functions concerning investor protection are ancillary to the main task of macro financial regulation, the ASF is on an even weaker position compared to its regional counterparts. As said above, the ASF does not have the regulatory powers covering investor protection, thus its input into the European consumer protection dialogue is likely to be quite poor. This lack of competence will easily affect not only the interests of Romanian consumers, but also the entire national financial sector, because it weakens the regulatory capacity of ASF itself. Indeed, as investor protection is used to design financial regulation from a macro viewpoint, then those domestic regulators lacking this regulatory competence enjoy

⁷⁵ Regulation 1095/2010, Article 9

⁷⁶ Regulation 1095/2010, Article 8 (2) i

⁷⁷ Regulation 1095/2010, Article 9 (1)

⁷⁸ As George Benston says: “[the justification for financial regulation is] protection of consumers from the loss of their investments, fraud and misrepresentation, unfair treatment and insufficient information, incompetent employees of financial-services providers, and invidious discrimination.” See: George J. Benston, *Regulating Financial Markets: A Critique and Some Proposals* (1999). At 15.

⁷⁹ See for instance: Anna J. Schwartz, ‘Origins of the Financial Market Crisis of 2008’ 29 *Cato Journal* 19.

⁸⁰ Regulation 1095/2010, Article 1 (5).

a reduced general regulatory leeway vis-à-vis other domestic regulators who, instead, are endowed with this competence.

Final Remarks

From the beginning of the 2000s until the outset of the global financial crisis in 2008, Romania experienced high rates of economic growth⁸¹, and its public financial supervision still seems to be on the right track, especially after the creation of the ASF. However, as regards the relationship between the ASF and the ESMA, the former is very unlikely to have a big voice in the latter. The way the Board of Supervisors is composed, the procedures through which the agency's regulatory standards are enacted, the voting method, and the funding system lead to assuming that the biggest and most developed countries will enjoy the benefits of a dominant position. On the other hand, the impact on Romanian financial regulations of the ESMA's regulatory production is likely to be quite penetrating. In particular because ESMA's technical standards are likely to easily penetrate into the relatively virgin area of securities regulations of Romania, thus accelerating a process which, instead, needs more time to fully develop.

Moreover, given the gap in terms of financial market development between the core area of the EU (which is mainly represented by the London and Frankfurt securities markets) and the emerging ex-communist economies, it is hard to believe that any of the central-eastern European countries will be able to significantly affect the EU regulatory outcome, at least in the short-mid run. In this context, the second part of the article also suggests that the case of Romania does not only apply to this important South-Eastern European country, but it is a good example for the entire area.

As regards the internal institutional framework for investor protection in Romania, it looks quite weak. It is relatively clear that the public enforcement instruments for retail investor protection do not provide appropriate responses to resolve the problems encountered by consumers. The fact that the ASF does not have a real competence concerning investor protection and that it cannot issue compensations or binding conciliation decisions is highly likely to discourage retail investors to report potential malpractices to the ASF itself. This structural weakness is made even worse by the absence of effective mediation/ADR/arbitration mechanisms. Ultimately, the lack of a full competence of the ASF in investor protection may end up damaging not only Romanian investors' interests, but also the entire national financial sector, because it weakens the regulatory capacity of the domestic regulator.

⁸¹ Public data provided by the World Bank. See: http://www.google.com/publicdata/explore?ds=d5bncppjof8f9_&met_y=ny_gdp_mktp_cd&hl=it&dl=it&idim=country:ROM:BGR:GRC#!ctype=l&strail=false&bcs=d&nselm=h&met_y=ny_gdp_mktp_cd&scale_y=lin&ind_y=false&rdim=region&idim=country:ROM&ifdim=region&hl=it&dl=it&ind=false

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