

Actions and inactions in the investigation of breaches of Union law by the European Supervisory Authorities

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1. Introduction

The European System of Financial Supervision (ESFS) is the offspring of the EU's attempt to deal with the great financial crisis.¹ As part of the ESFS, new European Supervisory Authorities (ESA) were established in 2011: the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational

* Durham University, School of Law. Parts of this paper were presented at the Annual Conference on Financial Supervision in the EU, Academy of European Law, Brussels, 7-8 December 2017. I wish to thank the organisers of the conference and especially Maria Todorof. I would also like to thank the anonymous referees for their very insightful comments.

¹ On the ESFS, see the contributions by Moloney, "The European Securities and Markets Authority and Institutional Design for the EU Financial Market – a Tale of Two Competences: Part (1) Rule-making" 12 *EBOR* (2011), 41-86; Moloney, "The European Securities and Markets Authority and Institutional Design for the EU Financial Market – a Tale of Two Competences: Part (2) Rules in Action" 12 *EBOR* (2011), 177-225; Schammo, "EU day-to-day supervision or intervention-based supervision: which way forward for the European System of Financial Supervision" 32 *OJLS* (2012), 771-797; Fischer-Appelt, "The European Securities and Markets Authority: the beginnings of a powerful European securities authority?" 1 *Law and Financial Markets Review* (2011) 21-32; Conac, "De CESR à l'ESMA: le rubicon est franchi" (Novembre – Décembre 2010) *Bulletin Joly Bourse* 500-508 ; Tridimas, "Financial Supervision and Agency Power: Reflections on ESMA" in Nic Shuibhne and Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John Usher* (OUP 2012) 55-83; Howell, "The Evolution of ESMA and Direct Supervision: Are There Implications for EU Supervisory Governance?" 54 *CMLR* (2017), 1027-1058.

Pensions Authority (EIOPA).² The ESAs became participants in the EU rule-making process, but they were also vested with powers in the supervisory field. Among other things, they were given powers to police breaches of Union law by national competent authorities and where necessary to intervene at the national level in order to address such breaches.³ The ‘breach of Union law’ procedure under Article 17 of the ESA Regulations is an important part of the ESAs’ effort to work towards supervisory convergence. However, it has been given comparatively little attention in the literature.⁴ That is unlike other enforcement procedures: say, the infringement procedure of Article 258 TFEU or the Commission’s enforcement actions in competition law.

Admittedly, the breach of Union law procedure has so far never fully unfolded. The ESAs have rarely taken formal action under this procedure.⁵ Many decisions that have been

² 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 [2010] OJ L331/12, as amended (EBA Regulation); Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC [2010] OJ L 331/84 (ESMA Regulation); Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC [2010] OJ L 331/48 (EIOPA Regulation). When appropriate, I will refer to the regulations together as the ‘ESA Regulations’.

³ Art 17 ESA Regulations.

⁴ Tridimas’s early assessment remains one of the most insightful. See Tridimas *op. cit. supra* note 1.

⁵ However, on various occasions, issues have been addressed informally. EBA issued two recommendations so far. See Recommendation to the Bulgarian National Bank and Bulgarian Deposit Insurance Fund on action necessary to comply with Directive 94/19/EC (EBA/REC/2014/02, 17 October 2014); Recommendation to the

taken to date appear to concern decisions *not* to open an investigation following a request by a complainant who alleges that a competent authority is failing to discharge its Union law obligations. Some of these decisions have been followed by appeals before the ESAs' Joint Board of Appeal (BoA) and, in the case of *SV Capital*, before the Court of Justice of the European Union.⁶ The ESFS is now facing its first major overhaul since it was established. The Commission came forward with legislative proposals in September 2017.⁷ These proposals are currently going through the legislative process. It is against this background that this article aims to take stock of the breach of Union law procedure and, by shining a light on the decisions of the BoA and the EU judiciary, to ask questions about ESAs' inactions: that is, their decisions not to initiate an investigation under Article 17. Specifically, this article focuses on two aspects of the Article-17 procedure: firstly, the ESAs' very substantial discretion not to initiate an investigation; secondly, the procedural position of 'ordinary' complainants under Article 17 who ask an ESA to investigate an (alleged) breach of Union law by a competent authority.

Maltese Financial Intelligence Analysis Unit (FIAU) on action necessary to comply with the Anti-Money Laundering and Countering Terrorism Financing Directive (EBA/REC/2018/02, 11 July 2018).

⁶ Case T-660/14 *SV Capital OÜ v EBA*, ECLI:EU:T:2015:608 para 47. Confirming the judgement of the General Court, see Case C-577/15 P *SV Capital OÜ v EBA*, ECLI:EU:C:2016:947.

⁷ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority); Regulation (EU) No 345/2013 on European venture capital funds; Regulation (EU) No 346/2013 on European social entrepreneurship funds; Regulation (EU) No 600/2014 on markets in financial instruments; Regulation (EU) 2015/760 on European long-term investment funds; Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds; and Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (COM(2017) 536 final, 20 September 2017).

With respect to the ESAs' discretion, it is worth pointing out that whilst the question of the lawful bounds of agency discretion has been discussed at length (sometimes by reference to the requirements, conditions or criteria which will typically circumscribe decisions to take action),⁸ less has been said about those specific situations where an ESA uses its discretion to decline to act. This article will ask questions about how such a power can be reconciled with case law such as *Meroni*, as re-affirmed in *UK v Parliament and Council (short-selling)*.⁹ Since what is at issue in this case law is the *discretion* to make choices and since policy can generally be shaped by both actions *and* inactions, there is prima facie no reason to exclude inactions from the scrutiny of this case law.

With respect to the procedural position of ordinary complainants under the Article-17 procedure,¹⁰ it is worth noting that whilst the BoA and the EU judiciary have been steady in affirming the right of an ESA to refuse to open an investigation and to decide to shelve

⁸ See generally, Dehousse, "Misfits: EU law and the transformation of European governance" in Joerges and Dehousse (eds.), *Good Governance in Europe's Integrated Market* (OUP 2002), pp. 207-229; Gerardin, "The development of European regulatory agencies: what the EU should learn from American experience", 11 *Columbia Journal of European Law* (2005), 1-52; Yataganas, "Delegation of regulatory authority in the European Union" (2001), Jean Monnet Working Paper 3/01; Schneider, "A common framework for decentralized EU agencies and the *Meroni* doctrine", 61 *Admin. L. Rev.* (2009), 29-44; Griller and Orator, "Everything under control? The "way forward" for European agencies in the footsteps of the *Meroni* doctrine", 35 *ELR* (2010), 3-35; Schammo "The European Securities and Markets Authority: lifting the veil on the allocation of powers" 48 *CMLR* (2011), 1879-1913; Chamon, *EU Agencies – Legal and Political Limits to the Transformation of the EU Administration* (OUP 2016); Chamon, "Granting powers to EU decentralised agencies, three years following Short-selling" *ERA Forum* (2017) 1-13.

⁹ Case 9/56 *Meroni v High Authority* [1958] ECR 133. Case C-270/12 *United Kingdom v European Parliament and Council of the European Union* ECLI:EU:C:2014:18.

¹⁰ By ordinary complainants, I mean complainants who are not specifically identified in Article 17(2) ESA Regulations. I will elaborate hereinafter.

complaints, the BoA has been initially more hesitant to take a clear position on the admissibility of appeals against such decisions by ordinary complainants. However, there has been a notable evolution in the way in which the BoA approaches these appeals. More recent decisions clearly show the impact of the Court's decision in *SV Capital*, as the BoA no longer looks favourably on such appeals. With fewer opportunities for scrutiny of the ESAs' decisions to shelve complaints, it is fair to say that the ESAs' discretion to decide the fate of the breach of Union law procedure when refusing to initiate an investigation is now formidable. This article will consider arguments for revisiting the procedural position of ordinary complainants, notably by highlighting the normative context in which the breach of Union law procedure must be seen.

This article hopes to contribute to the literature on EU financial law but also EU administrative law. For scholarship interested in EU administrative law, the ESFS offers an entirely new context for examining familiar administrative law questions. Thus, by lifting the veil on the breach of Union law procedure, this article hopes to move the debate on the ESFS as a new branch of administrative activity forward. The article proceeds as follows. Section 2 begins by offering an overview of the ESAs' activities in the supervisory field. Section 3 focusses on the breach of Union law procedure and offers a first assessment. Section 4 turns next to the ESAs' power to decline to initiate an investigation and to shelve complaints. It will examine relevant decisions by the BoA and the Court. Section 5 will ask whether the procedural position of ordinary complainants should be revisited. Section 6 concludes.

2. The European Supervisory Authorities: overview

The ESAs have a wide range of tasks and powers. In the regulatory field, they draft technical standards which require endorsement by the Commission to be legally binding.¹¹ Technical

¹¹ Arts 10-15 ESA Regulations.

standards are part of the EU's effort to create a single rule-book and are supposed to contribute to ensuring a level playing field between Member States. The ESAs also have a range of powers in the supervisory field. The aim of this section is to present these powers in a more conceptual manner by identifying three distinct 'modes of supervision': coordination, intervention and substitution (2.1.). In each of these modes, the ESAs can take a range of actions. However, when approaching these modes, it is important to not only focus on the ESAs' actions, but also to consider their inactions: that is, their decisions not to act (2.2).

2.1. Modes of supervision

In the supervisory field, the ESAs activities are diverse. As noted, they can be conceptualized as taking place in three distinct modes of supervision: 'coordination', 'intervention' and 'substitution'. Each mode provides information on the relations, capabilities and the distribution of powers between the ESAs and national competent authorities.

I will begin by describing 'coordination'. In this mode, national competent authorities are responsible for supervising market actors/activities, but the ESAs can affect supervisory practices among competent authorities by using soft law powers. Typically, these powers take the form of guidelines, recommendations or, say, opinions, but coordination can also be fostered in other ways (e.g. through training programmes). Thus, under Article 29 of the ESA Regulations, the ESAs can for example issue opinions to competent authorities or develop 'as appropriate' new practical instruments and convergence tools.¹² They can conduct peer reviews under Article 30 and they generally have a coordination role to play under Article 31 (e.g. by performing non-binding mediation among disagreeing members). Under Article 16, they can

¹² EBA is also tasked with developing an EU wide supervisory handbook (see Art 29 final paragraph, EBA Regulation). Under the Commission's current proposals, EIOPA and ESMA would also be tasked with developing supervisory handbooks. See Commission, cited *supra* note 7.

issue guidelines and recommendations to competent authorities or market actors. Whilst these instruments are not binding, addressees of Article-16 guidelines/recommendations must nevertheless make ‘every effort to comply’ with them and explain their reasons if they do not comply.¹³

‘Intervention’ is the second mode of supervision. In this mode, supervision of market actors or market activities continues to be a matter for national competent authorities, but the ESAs can in certain defined circumstances intervene at the national level and exercise binding powers over national authorities and/or market actors/activities. The important point is that exercising these powers does not lead to a permanent transfer of supervisory competence from the national to the EU level. Intervention powers play an important role in the ESFS in that they aim to remedy a failure of some sort at Member State level. They were among the true innovations of the ESFS since the predecessors of the ESAs – the so-called level-3 committees – did not have binding powers. Articles 17, 18 and 19 of the ESA Regulations are among the main provisions. They target breaches of EU law by competent authorities, emergency situations, and disagreements between competent authorities. These provisions have in common that they allow the ESAs to direct an individual decision to a market actor, but only as a second line of defense: that is after a competent authority has refused to abide by a decision taken by an ESA or, in the case of breaches of Union law, after ignoring a formal opinion by the Commission.

Besides the intervention powers in Article 17, 18 and 19, a fourth intervention power allows the ESAs to act in order to temporarily ban or restrict financial activities.¹⁴ This power can be exercised either in the context of an emergency situation under the conditions laid down in Article 18 of the ESA Regulations, or if so provided for in sectoral legislation such as the

¹³ Art 16(3) of the ESA Regulations.

¹⁴ Art 9(5) of the ESA Regulations.

short-selling regulation.¹⁵ It must be added that quite extensive conditions and requirements can be attached to the exercise of these powers.¹⁶ Unsurprisingly, the effectiveness of some of these powers has been questioned.

Finally, in the case of ‘substitution’, day-to-day supervisory competence rests at European level. Whilst supervisory *tasks* can be carried out by EU or national authorities, the point is that EU *competence* has been substituted to national competence. Substitution is the most radical response to issues affecting supervision at national level. It is mostly associated with the Single Supervisory Mechanism and the role of the ECB as micro-prudential supervisor in the banking field.¹⁷ Within the ESFS, it is only ESMA which is vested with day-to-day supervisory competence over credit rating agencies and trade repositories.¹⁸ However, substitution might in the near future become a more widespread mode of supervision in the ESFS. The Commission has made proposals to this effect.¹⁹ For the time being however, substitution continues to be a strict exception in the ESFS.

¹⁵ See Article 28 of Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps [2012] OJ L86/1 (hereinafter, the ‘Short Selling Regulation’). For another example, see Arts 40 and 41 of Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 [2014] OJ L 173/84.

¹⁶ For details, see Schammo, *op. cit. supra* note 8.

¹⁷ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/63.

¹⁸ Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies [2009] OJ L 302/1 (as amended); Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories [2012] OJ L201/1.

¹⁹ Commission, *op. cit. supra* note 7.

2.2. Actions and inactions

When acting in each supervisory mode, an ESA will need to make decisions about whether or not to act: that is, whether to exercise the powers vested in it under its founding regulation, in accordance with various sectoral acts.²⁰ In modes such as intervention or substitution, the choice between action or inaction will often be guided, or be dependent on more or less loose criteria, conditions or requirements. For example, when deciding whether to use its intervention power in relation to short-selling, ESMA will be required to have regard to the requirements set out in the Short Selling Regulation and its subordinate acts.²¹ Among other things, it will need to satisfy itself that its measures address ‘a threat to the orderly functioning and integrity of financial markets’ or ‘to the stability of the whole or part of the financial system and there are cross-border implications’.²² In taking a view on whether these conditions are met, it will need to abide by Commission rules which flesh out the meaning of the above concepts.²³ It will need to consult other actors; it will need to notify relevant competent authorities; it will be required to review its measures at least every 3 months.²⁴ It will only be able to act if no competent authority has acted or, where measures have been taken, if these measures are inadequate to address the threat.²⁵ For the Court, ESMA must thus consider ‘a significant

²⁰ Art 1(2) ESA Regulations.

²¹ Art 28 Short Selling Regulation. See also Art 24(3) of Commission Delegated Regulation (EU) No 918/2012 of 5 July 2012 supplementing Regulation No 236/2012 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 [2012] OJ 2012 L274/1.

²² Art 28(2)(a) Short Selling Regulation.

²³ Art 24(3) Commission Delegated Regulation (EU) No 918/2012.

²⁴ For details, see Art 28 Short Selling Regulation.

²⁵ Art 28(2)(b) Short Selling Regulation.

number of factors'.²⁶ It will not be in a position to act until the (admittedly loose) conditions or requirements are met.

Plainly, however there will be instances where inaction is not the outcome of a failure to meet specified requirements that are set out in a legislative or subordinate act. For one thing, a lack of action might not be the result of a conscious act. It might be because of a lack of awareness or simply because of incompetence. On other occasions, an actor might consciously decide against action: say, at a preliminary stage before launching proceedings or, as in our case, a full investigation. Reasons for such *decisions* not to act can also be diverse. It might be because of uncertainty about, say, the scope of an actor's powers. It might also be because an actor has limited resources and accordingly must set priorities when considering which actions to pursue. The important point is that such decisions can be rich in consequences. Like actions, inactions might come to shape policy. Think of an enforcement actor that decides, as matter of discretion, not to take certain enforcement actions or not to investigate certain alleged breaches. By deciding not to take action, an enforcement actor will *prima facie* be in a position to give markets signals about what behaviour it seeks to deter and what behaviour it is willing to tolerate, and by the same token, shape the orientations of its enforcement policy.

To be sure, the exercise of discretion, whether associated with actions or inactions, must always be lawful. This is a plain observation, but in the case of inactions, it can easily be overlooked. Indeed, as far as the ESAs are concerned, there is an added complication because of a long-standing doctrine on the delegation of wide discretionary powers. The doctrine is rooted in the Court's decision in *Meroni*.²⁷ It was more recently reaffirmed in *United Kingdom v Parliament and Council* (short selling).²⁸ In this latter case, the Court scrutinized the criteria

²⁶ *UK v Parliament and Council*, cited *supra* note 9, para 48.

²⁷ *Meroni*, cited *supra* note 9.

²⁸ *UK v Parliament and Council*, cited *supra* note 9.

and requirements of the Short Selling Regulation (and its subordinate acts) which were mentioned above, in order to determine whether ESMA's discretion to act on short selling went beyond lawful bounds. The Court confirmed the crux of its *Meroni* case law. It held that the powers that were vested in ESMA were 'precisely delineated and amenable to judicial review in the light of objectives established by the delegating authority'.²⁹ It found that ESMA's power to act on short selling was not couched in unlawful discretion. However, the matter would have been different if, in line with *Meroni*, the conferral involved a 'discretionary power implying a wide margin of discretion' which could 'make possible the execution of actual economic policy'.³⁰ Such a power would have been deemed unlawful.³¹ Clearly then, *Meroni's* grip on a conferral of decision-making powers to agencies is rather loose. Although *Meroni* (as reaffirmed in the short-selling case) prevents agencies from having policy discretion,³² *Meroni* will not deprive EU agencies from exercising wide discretion: most obviously when characterizing facts and circumstances in terms of the standards, requirements or objectives that an agency must uphold. These tasks might be characterized as a lawful exercise of 'discretion in application'³³ or as technical discretion justified by the complexities of the tasks

²⁹ Para 53.

³⁰ Para 41.

³¹ See the Court's reasoning in paras 41 to 55; See also *Meroni*, cited *supra* note 9, 152.

³² Hopefully the Court of Justice's position in the short-selling case will mean that the General Court will in the future avoid reasoning such as in Case T-96/10, *Rütgers and others v ECHA*, ECLI:EU:T:2013:109, para 134 in which the General Court stated that the ECHA can have 'a broad discretion in a sphere which entails political, economic and social choices on its part'. This essentially equates to saying that agencies can have policy discretion, which is contrary to the reasoning in the short selling case and *Meroni*. See for more details, Chamon, 'Granting powers' *op. cit. supra* note 8, 605.

³³ See the influential work of Galligan, *Discretionary Powers – a Legal Study of Official Discretion* (Clarendon Press, 1986).

at hand. However, plainly, the looser the requirements or standards, the greater the need to concretise them when considering facts and circumstances.³⁴ In this process, the boundary between lawful and unlawful discretion appears rather fluid in practice.³⁵

Hence, *Meroni*, as interpreted in the short selling case, applies to EU agencies such as the ESAs which are given decision-making powers. Moreover, since what is at issue in this case law is the discretion to make choices and since policy can be shaped by both actions and inactions, the case law will prima facie matter when scrutinizing both decisions to act and decisions not to act. I will return to the case law later.

3. The breach of Union law procedure

The aim of this section is to examine the breach of Union law procedure which is set out in Article 17 of the ESA Regulations. By all accounts, the procedure is convoluted. It provides for the ESAs to play a role in policing breaches of Union law: that is, when a competent authority fails to apply sectoral acts, including the subordinate technical standards that the ESAs draft and that the Commission adopts, or applies them in a way that appears to breach EU law, especially where a competent authority is failing to ensure that a market actor complies with its requirements under those acts.³⁶ The procedure involves different interlocking stages.³⁷

³⁴ Ibid, 35.

³⁵ Admittedly, when reviewing (and validating) ESMA's discretion in the short-selling case in light of the *Meroni* requirements, the Court highlighted the fact that ESMA was also required to consult other actors (the ESRB) before making decisions. However, the Court conveniently overlooked the fact that the body, which ESMA is meant to consult (the ESRB) and which is meant to play a part in ensuring that ESMA's discretion is limited, is itself an outside body.

³⁶ Art 17(1) ESA Regulations. For the relevant sectoral acts, which also extend to subordinate measures, see Art 1(2) ESA Regulations.

³⁷ See also rec (28) of the ESA Regulations which refer to a three-step procedure.

Each of these stages will be presented: the initiation of the procedure (3.1.), the investigation and possibly the issuance of an ESA recommendation (3.2.); the issuance of a Commission formal opinion where a competent authority fails to comply with the ESA recommendation (3.3.), and finally a possible intervention by an ESA against a market actor who fails to comply with Union law requirements as a result of the persistent non-compliance of its competent authority (3.4.). Besides the ESAs, a number of other actors are involved in one way or another in this procedure: the Commission, competent authorities, or so-called ‘requestors’. However, the ESAs and the Commission are the main actors. Each plays a distinct role but the procedure can only unfold fully if both play their part.

3.1. Initiating the procedure

The initiation of the procedure is in the hands of the ESAs.³⁸ Specifically, at the preliminary stage, the procedure is in the hands of the ESAs’ chairpersons. The Chairperson can decide to initiate an investigation (upon a request or not),³⁹ but s/he can also decide to close a case without opening an investigation.⁴⁰

³⁸ See Art 17(2). See also Case T-660/14 *SV Capital* cited *supra* note 6, para 47.

³⁹ In this case, the ESAs’ internal rules state that the Chairperson must inform the so-called Alternate Chairperson (or Vice-Chairperson in the case of ESMA) who can object. In case of objections, the Chairperson is supposed to review his or her decision. See Arts 6 of the Decision of the European Banking Authority adopting Rules of Procedure for Investigation of Breach of Union Law (EBA/DC/2016/174, 23 December 2016), hereinafter ‘EBA BoU law rules’; ESMA, Decision of the Board of Supervisors – Rules of Procedure on Breach of Union law Investigations (ESMA/2012/BS/87rev, 5 July 2017), hereinafter, ‘ESMA BoU law rules’; EIOPA, Decision of the Board of Supervisors – Internal Processing Rules on Investigation Regarding Breach of Union Law (EIOPA-BoS-11-017-rev2, 20 December 2017), hereinafter, ‘EIOPA BoU law rules’.

⁴⁰ Art 5 EBA BoU law rules; Art 5 ESMA BoU law rules; Art 5 EIOPA BoU law rules. See Section 4 for details on the reasons that justify a closure of a request without opening an investigation.

Whilst the decision to launch an investigation belongs to the ESAs, Article 17(2) makes it clear that certain actors can request – that is, suggest to – an ESA to open an investigation. The purpose of a request is to bring an alleged breach of Union law by a competent authority to the attention of an ESA. According to Article 17(2), these requesters (or complainants) are: a competent authority, the European Parliament, the Council, the Commission or an ESA stakeholder group. I will refer to this group as ‘privileged complainants’. They must be differentiated from other complainants – hereinafter referred to as ‘ordinary complainants’ – which are not specifically mentioned in Article 17(2). Ordinary complainants are legal or natural persons which decide to bring an alleged breach of Union law to the attention of an ESA. Their position is different from that of privileged complainants in two respects. First, if an ESA decides to initiate an investigation following a request by an ordinary complainant, an ESA will be deemed to have acted ‘on its own initiative’ under Article 17(2). This is because Article 17(2) does not include ordinary complainants among the group of actors that are entitled to request an ESA to investigate an alleged breach. Secondly (but related to this point), ordinary and privileged complainants have a distinct procedural position according to the EU’s judiciary.⁴¹ The Court only recognizes procedural safeguards, including a right of appeal, to privileged complainants.⁴² This point needs elaboration and there will be more to say hereinafter. Suffices to add here that complaints alleging breaches of Union law appear so far to have ranged widely. In its 2016 annual report, EBA reported for example that it had received complaints on issues relating to bank governance, deposit guarantee schemes, the Bank Recovery and Resolution Directive, the Mortgage Credit Directive, the security of internet

⁴¹ Case T-660/14 *SV Capital* cited *supra* note 6. It is worth noting that the ESAs internal rules do not differentiate between privileged and ordinary complainants. I will return to the point hereinafter.

⁴² *Ibid* para 49.

payments and the Payment Services Directive, and last but not least, anti-money laundering supervision.⁴³

3.2. The investigation and the recommendation

If the Chairperson decides to initiate an investigation, s/he will also be in charge of the investigation.⁴⁴ In the case of ESMA and the EIOPA, the Chairperson will also be competent to decide on whether to close the investigation without further action,⁴⁵ or to issue a draft recommendation that sets out the remedial action necessary to comply with Union law.⁴⁶ In the case of EBA, the launch of an investigation will give rise to the appointment of an ‘independent’ panel which includes members of the Board of Supervisors.⁴⁷ It will be up to the panel to decide whether to propose a draft recommendation to the Board of Supervisors or whether to close the investigation without any further recommendation.⁴⁸ A competent authority that is alleged to have breached Union law, will have a right to make its views heard before a decision on whether to submit the draft recommendation to the Board of Supervisors

⁴³ EBA, Annual Report: 2016, 92, available at <http://www.eba.europa.eu/about-us/annual-reports>.

⁴⁴ Art 7(1) EBA BoU law rules; Art 7(1) ESMA BoU law rules; Art 7(1) EIOPA BoU law rules.

⁴⁵ Art 8 ESMA BoU law rules; Art 8 EIOPA BoU law rules. In making a decision, the Chairperson will consult the Alternate Chairperson (or Vice-Chairperson in the case of ESMA). If the Alternate Chairperson/Vice-Chairperson objects, the Chairperson will review his/her position.

⁴⁶ Art 10 ESMA BoU law rules; Art 10 EIOPA BoU law rules.

⁴⁷ Art 8 EBA BoU law rules.

⁴⁸ Art 9 and Art 10 EBA BoU law rules.

will be taken.⁴⁹ The latter is the main decision-making organ of each ESA and has the ultimate authority to decide on whether to issue a recommendation.⁵⁰

It is clear that in the initial stages of the procedure, the procedure offers opportunities to settle matters informally.⁵¹ If no agreement can be found and if the Board of Supervisors decides to issue a recommendation, a competent authority will be expected to respond within a short period of time (ten working days) and inform the ESA of the remedial action that it has taken or of the steps that it intends to take to remedy the breach.⁵²

3.3. The Commission's formal opinion

Although the recommendation will have persuasive authority, Article 17 does not suggest that the true nature of the recommendation is to be binding on competent authorities.⁵³ To deal with the situation where a competent authority fails to comply with a recommendation, Article 17(4) turns to the Commission. Specifically, the Commission can in such a case take matters into its hands by issuing a 'formal opinion' requiring a competent authority 'to take the action

⁴⁹ Art 10 EBA BoU law rules, Art 10 EIOPA BoU law rules; Art 10 ESMA BoU law rules.

⁵⁰ In the case of EBA, see Recommendation to the Bulgarian National Bank and Bulgarian Deposit Insurance Fund on action necessary to comply with Directive 94/19/EC (EBA/REC/2014/02, 17 October 2014); Recommendation to the Maltese Financial Intelligence Analysis Unit (FIAU) on action necessary to comply with the Anti-Money Laundering and Countering Terrorism Financing Directive (EBA/REC/2018/02, 11 July 2018).

⁵¹ See for example Annual Report cited *supra* note 43, 92.

⁵² Art 17(3) ESA Regulations.

⁵³ Under Art 16 ESA Regulations, competent authorities must only 'make every effort to comply' with an ESA recommendation.

necessary to comply with Union law'.⁵⁴ The Commission's formal opinion will come to replace the ESA recommendation. The former only needs to 'take into account' the recommendation.⁵⁵ Under Article 17, the recommendation no longer plays a part in the procedure once the formal opinion is issued.

The issuance of a formal opinion is at the discretion of the Commission: the Commission may, but it has not duty, to do so. On the other hand, however, it is unlikely that the Commission can issue an opinion under Article 17(4) without that an ESA has first issued a recommendation which a competent authority has decided to ignore. This interpretation is supported by the text of Article 17(4),⁵⁶ as well as the general scheme of the Article-17 procedure which is based on interlocking stages.

To be clear, the powers of the Commission under Article 17(4) are distinct from, and without prejudice to, the Commission's powers under the Treaty based Article-258 infringement procedure. The formal opinion under Article 17 is directed at a competent

⁵⁴ Art 17(4). The opinion can be issued if a competent authority does not comply with Union law within a month from the receipt of the ESA Recommendation. If the Commission is minded to issue a formal opinion, it must do so 'no later than 3 months after the adoption of the recommendation' (which can be extended by a month).

⁵⁵ Art 17(4) ESA Regulations. Tridimas suggests that the Commission is bound by the recommendation (Tridimas *op. cit. supra* note 1, 73). But this reading does not square well with the language used in Article 17(4) ('take into account'), which language is also distinct from the more forceful language used elsewhere in Article 17: e.g. in Article 17(6) where it is made clear that the ESA decision addressed to a marker actor shall be 'in conformity' with the formal opinion.

⁵⁶ To be sure, Article 17(4) allows the Commission to act 'on its own initiative', but this appears simply to address the situation where an ESA has failed to inform the Commission of the fact that a competent authority has failed to comply with a recommendation. In other words, it is meant to ensure that prior notification by an ESA cannot be deemed to be a precondition for the Commission to act.

authority, not at a Member State as in the case of Article-258 proceedings.⁵⁷ What is not entirely clear is what awaits a competent authority if it does not comply with the formal opinion. Wymeersch suggests that the Commission's opinion has no binding force. He reasons by analogy to the Commission's reasoned opinion in Article-258 proceedings.⁵⁸ Tridimas on the other hand suggests that despite being entitled an 'opinion', the true nature of the formal opinion is to be legally binding on competent authorities. Tridimas's conclusions are more compelling since Article 17(7) states that competent authorities 'shall comply with the formal opinion'.⁵⁹ In fact, the opinion also appears to have binding effects on the ESAs. As we will

⁵⁷ For the sake of clarity, this is of course not to say that the unlawful conduct of a competent authority cannot be attributed to a Member State and engage the Member State's liability (e.g. Case 77/69 *Commission v Belgium* [1970] ECR 237 para 15).

⁵⁸ Wymeersch, "The European Financial Supervisory Authorities or ESAs" in Wymeersch, Hopt and Ferrarini, *Financial Regulation and Supervision – A Post-Crisis Analysis* (OUP 2012) 232-317, 260 (fn 108).

⁵⁹ Tridimas op. cit. *supra* note 1, 72-3 noting that whilst the relevant text is 'awkwardly phrased' the formal opinion is binding. Note that in the initial Commission proposal, the proposed text of Article 17 referred to a Commission decision, as opposed to a Commission opinion. It was changed during the negotiations. Moreover, initially, the actions of competent authorities had to be 'compatible' with the Commission decision. In the final version, this has been replaced by a requirement for competent authorities to comply with the Commission formal opinion. See European Commission, Proposal for a Regulation ... establishing a European Securities and Markets Authority (COM(2009) 503 final, 23 September 2009), Art 9. To be sure, as Tridimas points out, Article 17(7) para 2 is oddly formulated since it states that competent authorities shall '[w]hen taking action ...' either comply with the Commission's opinion or a decision by an ESA. The latter can pursuant to Article 17(6) act in case where a competent authority fails to abide by the Commission opinion (see section 3.4. for details). Because of the way in which Article 17(7) para 2 is formulated, it could be argued that a competent authority is only required to comply *if* it decides to act (i.e., '[w]hen taking action...'). However, such a literal reading should be rejected. It would lead to nonsensical results. Rather than to think of this passage as expressing a condition (i.e., *if* competent authorities take action), a more compelling interpretation is to think of it as merely reflecting the consideration that when (and not if) taking action, compliance will either be based on the Commission opinion or on the decision

see shortly, an ESA can in certain circumstances take a decision against a market actor in case where its competent authority ignores the Commission's opinion. Such an ESA decision against a market actor will need to be 'in conformity' with the Commission's formal opinion.⁶⁰

That said, details on a distinct mechanism to enforce the Commission's formal opinion against a competent authority that persists in failing to comply are not provided in the ESA Regulations. At any rate, the persistent failure by the competent authority to comply with its Union law obligations will in all likelihood lead the Commission to consider Article-258 infringement proceedings against the authority's Member State. As for Article 17, its solution to the persistent non-compliance of a competent authority is for an ESA to intervene against a market actor in case where the latter fails to comply with its Union law obligations because of the behavior of its competent authority.

3.4. An ESA decision against a market actor

As pointed out, where a competent authority fails to comply with the Commission opinion, Article 17(6) allows an ESA to sideline the non-complying competent authority and to intervene directly at national level in order to ensure that a market actor complies with its Union law obligations. Specifically, an ESA will be entitled to address an individual decision to this actor and this decision will according to Article 17(7) prevail 'over any previous decision adopted by the competent authorities on the same matter'. It is the existence of this power to

of the ESAs, as the case may be. It is also worth noting that Article 17(7) refers to competent authorities in the plural. The *raison d'être* of Article 17(7) para 2 could therefore also be to ensure that competent authorities that were not involved in the breach of Union law procedure do not ignore the Commission's formal opinion or an ESA decision (as the case may be) when acting in relation to issues which are subject to a formal opinion or an ESA decision.

⁶⁰ Art 17(6) para 2.

direct decisions at a market actor that makes Article 17 an intervention power in the above sense.⁶¹ However, the exercise by the ESAs of this power is meant to be exceptional.⁶² Various conditions must be satisfied. These are broadly phrased. Thus, it must be necessary to ‘remedy in a timely manner’ the 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’.⁶³ Importantly, the EU law requirements which an ESA seeks to enforce must be ‘directly applicable’.⁶⁴ Moreover, whilst the power to take these decisions is vested in the ESAs, it is clear that the Commission’s formal opinion will matter here as well since the ESA decision must be ‘in conformity’ with the formal opinion.⁶⁵ Hence, what an ESA will ultimately seek to enforce is not its recommendation; effectively it is the content of the Commission’s formal opinion – this time directed at a market actor – to the extent that the Commission’s conclusions are relevant for ensuring that a market actor complies with its Union law requirements.

4. The ESA’s power to shelve complaints

The previous section discussed the Article-17 procedure and, among other things, the powers that it vested in the ESAs to direct recommendations/decisions to competent authorities or market actors. This section focusses on the ESAs’ discretion not to act: that is, to decline to pursue an investigation following a complaint. Such a permanent ‘shelving’ of a complaint is a type of inaction in the enforcement field. This section begins by discussing the rationale for

⁶¹ See supra section 2.1.

⁶² Rec (29).

⁶³ Art 17(6) para 2.

⁶⁴ Rec (29) refers to ‘existing or future regulations’ in this context.

⁶⁵ Art 17(6).

shelving complaints since it is common among enforcement actors at national level and at EU level. This will also offer an opportunity to look at some case law in neighbouring fields (4.1.). Next the procedure governing the shelving of complaints by the ESAs will be examined (4.2.). This will be followed by an analysis of various rulings of the BoA or the EU's judiciary on this matter (4.3). A final section will look at the ESAs' discretionary powers to shelve complaints in light of the *Meroni* case law. (4.4.).

4.1. The rationale and the analogies

At the outset, it must be said that declining to investigate and shelving complaints is not unusual in the enforcement field. It is commonly justified on the grounds that an enforcement actor has the power to set priorities. A common consideration in this context is that enforcement actors have finite resources and that allocating these resources over the range of their activities requires hard choices to be made. Hence a key reason for not pursuing enforcement action is that action might not be deemed to be justified having regard to an actor's tasks/functions and the (limited) resources available for discharging them.⁶⁶

The precise process which underpins priority setting and the criteria which an enforcement actor will have regard to will naturally differ. The process can be more or less discretionary (even if never arbitrary); it can be more or less elaborate, more or less stringent in terms of its effects on case selection, and more or less transparent. To be sure, priority setting is not an unfettered privilege of enforcement actors. To be valid, the latter must act within the boundaries set by constitutional and statutory law. However, generally speaking, priority setting and/or resource allocation are legitimate grounds for shelving complaints. In the UK at least, courts have also on occasions explained their reluctance to interfere by reference to the

⁶⁶ In the US context, see also Sunstein, "The Law of "Not Now": when Agencies Defer Decisions" (2014) 103 *Georgetown Law Journal* 157-195, 161.

‘polycentric’ nature of decisions not to act.⁶⁷ This notion, originating from academic writings, is essentially meant to describe situations that are highly interconnected or ‘many centered’.⁶⁸ The point is that interfering in such a situation is bound to have wider implications and repercussions which might be difficult to foresee.⁶⁹

At EU level, case law on shelving complaints is commonly associated with the European Commission’s activities: say, in competition law or in the context of Article-258 infringement proceedings. Indeed, it is apparent that many decisions of the Court on the matter deal with competition law and the Commission’s powers to set priorities in its enforcement actions. Simplifying, the legal framework governing priority setting in competition law has two key characteristics. The first characteristic is that the Commission has wide discretionary powers to decide which cases to investigate on the basis of what is in the ‘EU interest’.⁷⁰ The latter notion was described by AG Colomer in *IECC v Commission* as ‘no more than an abbreviated formula, a shortcut, to describe, succinctly, the discretion ... which the Treaties confer on the Commission for its examination of a complaint alleging the existence of anti-

⁶⁷ In the UK for example, see *R (on the application of Grout) v Financial Conduct Authority*, [2015] EWHC 596 (Admin), para 35; *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60, [2009] 1 AC 756, para 31.

⁶⁸ See the original contribution on polycentricity by Fuller, “The Forms and Limits of Adjudication” (1978-1979) 92 *Harvard Law Review* 353. In the administrative literature, see King, “The Pervasiveness of Polycentricity” (2008) *Public Law* 101; Allison, “Fuller’s Analysis of Polycentric Disputes and the Limits of Adjudication” (1994) 53 *Cambridge Law Journal* 367.

⁶⁹ Referring to polycentricity as a limitation on the capabilities of courts, Lord Woolf, Jowell and Le Sueur, *De Smith’s Judicial Review*, 6th ed. (Sweet & Maxwell, 2007) paras 1-033 – 1-036. Taking a critical view, see for example King, *op. cit. supra* note 68; Allison, *op. cit. supra* note 68.

⁷⁰ See Case T-24/90 *Automec Srl v Commission* [1992] ECR II-02223, para 85 (referring to ‘Community interest’).

competitive practices’.⁷¹ Accordingly, the Commission can, within the bounds set by the law and the related case law, decide the order in which complaints will be assessed; it will also be entitled to reject a complaint – hence to decide not to take enforcement action – either prior to the beginning of an investigation or after taking investigative measures.⁷² The second characteristic is that complainants in competition law, who can show a legitimate interest,⁷³ benefit from a privileged position. Specifically, they are recognized procedural rights,⁷⁴ including a right to bring an action for annulment against the Commission decision which rejects their complaint.⁷⁵ Since these complainants benefit from a statutory right to lodge a complaint with the Commission, it is according to the Court ‘in the interests of a satisfactory

⁷¹ AG Colomer in C-450/98 P *IECC v Commission* [2001] ECR I-3875, para 57. The Commission has disclosed a non-exhaustive list of criteria to which it may have regard to when deciding whether a case lacks a sufficient EU interest. See e.g. European Commission, ‘Report on Competition Policy’ (2005) 26-7, available at http://ec.europa.eu/competition/publications/annual_report/2005/en.pdf; European Commission, Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, [2004] C101/65, 70; European Commission *Antitrust - Manual of Procedures* (March 2012), chapter 21, at para 3.1.1., http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf.

⁷² See Case T-114/92 *Bureau Européen des Médias de l'Industrie Musicale v Commission* [1995] ECR II-0014, para 81; Case C-449/98 P *IECC v Commission* [2001] ECR I-3875, para 37.

⁷³ See Commission Notice on the handling of complaints, cited *supra* note 71, paras 33-40 on the meaning of legitimate interest.

⁷⁴ See Art 7(2) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, [2003] OJ L1/1; Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] L123/18, fleshing out the procedural rights of such complainants.

⁷⁵ eg Case T-37/92 *Bureau Européen des Unions des Consommateurs and National Consumer Council v Commission* [1994] ECR II-00285, para 36; Case 210/81 *Demo-Studio Schmidt v Commission* [1983] ECR 3045, para 14.

administration of justice and of the correct application of Articles [101] and [102 TFEU]’ that they are able to institute proceedings ‘in order to protect their legitimate interests’ in case their request is not complied with.⁷⁶

The Commission also sets priorities in its other enforcement activities.⁷⁷ As the guardian of the Treaties, it can bring proceedings against a Member State in case where the latter fails to fulfill its obligations under EU law. It is settled case law that the Commission benefits from a wide discretion to decide whether or not to launch infringement proceedings under Article 258 TFEU.⁷⁸ Thus, like in competition law, the Commission is entitled to permanently shelve complaints. Unlike in competition law, it is settled case law that complainants do not benefit from procedural safeguards which could be enforced before the Court.⁷⁹ To be sure, the Commission has adopted internal rules for handling relations with complainants.⁸⁰ These include provisions that will benefit complainants (see e.g. the arrangements on time limits, on

⁷⁶ Ibid. See also Case C-26/76 *Metro v Commission* [1977] ECR 1875, para 13, confirming that in such a case a complainant ‘must be considered to be directly and individually concerned within the meaning of Article [263 TFEU]’.

⁷⁷ Commission, ‘EU law: Better results through better application’ [2017] OJ C18/10, noting that the Commission will adopt a more strategic approach to dealing with infringement proceedings and that whilst valuing complainants’ ‘essential role’ in identifying problems with the enforcement of EU law (p. 14), it will prioritise its enforcement efforts which might mean that complainants might be directed ‘to the national level’ to seek redress if legal protection is available at this level (p. 15).

⁷⁸ e.g. Case 247/87 *Star Fruit v Commission* [1989] ECR 291, para 11; Case C-422/97 P *Sateba v Commission* EU:C:1998:395 para 42.

⁷⁹ e.g. Case C-422/97 P *Sateba v Commission* EU:C:1998:395 para 42; Case T-83/97 (Order of the Court of First Instance) *Sateba v Commission* [1997] ECR II-1523 para 32.

⁸⁰ See the Annex to Commission, cited *supra* note 77; Commission communication to the European Parliament and the European Ombudsman on relations with the complainant in respect of infringements of Community law [2002] OJ C244/5.

keeping a complainant informed or allowing her to comment). However, these internal rules are to be differentiated from procedural rules under secondary legislation.⁸¹ According to the Court, the former are merely ‘administrative measures adopted by the Commission in the interests of the sound administration of the pre-litigation phase of infringement proceedings’.⁸² Hence the position of complainants in competition law proceedings and the position of complainants in the context of an Article-258 procedure is ‘completely different’.⁸³ There will be more to say on some of the case law later, for it has been cited by the General Court and by the BoA when deciding on the procedural position of complainants under the Article 17 procedure.

4.2. The procedure

The ESAs’ procedure for permanently shelving complaints is based on their internal procedural rules for investigating a breach of Union law.⁸⁴ Each ESA has its own set of rules, although they are mostly the same. These rules of procedure were adopted by the ESAs’ boards of supervisors ‘for reasons of transparency and legal certainty’.⁸⁵ They specify how the ESAs are supposed to handle complaints and set out criteria for deciding when to refuse to initiate an investigation following a complaint. It is noteworthy that the internal rules do not formally differentiate between privileged complainants and ordinary complainants. Under the internal rules, complainants (so-called ‘requestors’) are all treated the same.

⁸¹ Case T-247/04, *Aseprofar v Commission* (Order of the Court of First Instance), ECLI:EU:T:2005:327, para 56.

⁸² *Ibid.*

⁸³ Para 54.

⁸⁴ See *supra* note 39.

⁸⁵ Rec (2) EBA BoU law rules; rec (3) ESMA BoU law rules; rec (3) EIOPA BoU law rules.

The ESAs' procedure draws on the Commission's procedure for handling complaints in relation to an Article-258 infringement procedure.⁸⁶ As under the latter procedure, complainants do not have to show any formal interest in proceedings.⁸⁷ They also do not need to prove that they are 'principally and directly concerned' by a breach.⁸⁸ However, in comparison to the Commission procedure, the ESAs' rules have less to say on the interactions with complainants. Few provisions concern complainants. They are entitled to be notified the reasons for declining to initiate an investigation and to be told of 'appropriate alternative forms of redress'.⁸⁹ However, the ESAs' procedural rules have nothing to say about time deadlines for investigating complaints.⁹⁰ They do not require an ESA to give complainants an opportunity to explain or clarify their complaint where necessary.⁹¹ They also do not formalise any requirement to invite a complainant to comment in case where an ESA is minded to shelve a complaint.

⁸⁶ See the Annex to Commission, cited *supra* note 77.

⁸⁷ See *ibid* para 2; art 2(3) EBA BoU law rules; art 2(3) ESMA BoU law rules; art 2(3) EIOPA BoU law rules.

⁸⁸ *ibid*. It is debatable whether this is an important procedural concession given that what is at stake is purely the possibility for a person to bring a possible breach to the attention of the ESAs. Admittedly, it would be of significance if ordinary complainants benefited from enforceable procedural safeguards. This is however not the case.

⁸⁹ Art 5(2) EBA BoU law rules; art 5(2) ESMA BoU law rules; art 5(2) EIOPA BoU law rules.

⁹⁰ The ESAs appear to have internal deadlines, but these are not formalized in the BoU law rules. Note that the European Ombudsman has encouraged EBA to formalize its deadlines. See Decision of the European Ombudsman closing the inquiry into complaint 1561/2014/MHZ against the European Banking Authority (EBA), 6 July 2015. On a failure to reply to a respondent, see also European Ombudsman, Decision in case 480/2016/CEC on the alleged failure of the European Securities and Markets Authority to take action concerning alleged regulatory violations by a Cyprus online trading firm, 7 February 2017.

⁹¹ Under Art 4 of the ESA BoU law rules, the Chairperson can invite a requester (among others) to provide information. However, s/he is not under an obligation to do so.

An ESA (the Chairperson) can decide to shelve a complaint and by the same token refuse to initiate an investigation on two grounds. The first ground is because a complaint is deemed inadmissible.⁹² The ESAs' reasons for declaring a complaint inadmissible draw again on the Commission procedure for handling complaints in the context of an Article-258 procedure.⁹³

The second ground for shelving a complaint and deciding not to launch an investigation is far more noteworthy: an ESA can decide not to act because it deems that an investigation should not be initiated 'as a matter of discretion' after 'taking into account' a list of self-imposed and non-exhaustive investigation criteria.⁹⁴ This list differentiates between positive and negative factors.⁹⁵ As far as EBA is concerned, positive investigation factors focus on the gravity of the alleged infringement (in terms of its repeated or systemic nature or whether it reflects a general policy approach) and its impact on EBA's objectives. Negative investigation factors focus on matters such as whether a complaint is better dealt with elsewhere or by other

⁹² See Art 3(2), Art 5(1) and Annex 1 of the ESA BoU law rules. The annex states that a complaint can be declared inadmissible because it is anonymous and does not include the necessary contact details; because it does not include a grievance or the grievance is not within the scope of the acts under which an ESA can act; because the complaint does not mention, explicitly or implicitly, the competent authority which is alleged to have breached Union law; because the complaint regards the behaviour of a private actor, unless the complaint also reveals some relevant wrongdoing that can be attributed to a competent authority; or finally because the complaint sets out a grievance that is materially the same as one on which an ESA has already taken position (and informed the requester of this) or with regard to which an ESA has adopted a 'clear, public and consistent position'.

⁹³ See Annex to Commission, cited *supra* note 77.

⁹⁴ Art 5(1)(ii) EBA BoU law rules; art 5(1) ESMA BoU law rules; art 5(1)(ii) EIOPA BoU law rules.

⁹⁵ Note that the Commission's rules for handling complaints in the context of an Art-258 procedure merely provide that the Commission can decide 'within its margin of discretion' to open or close an infringement procedure. They do not include in addition a list of priority setting criteria. See the Annex to Commission, cited *supra* note 77.

means (say, peer review, mediation or guidelines); whether the request is frivolous or vexatious; or whether the complaint does not concern a ‘clear and unconditional obligation’ that is found in one of the acts within whose scope EBA can act.⁹⁶ Some of these factors are of a more technical nature (e.g. whether there has been a repeated or systematic infringement). Others however may, depending on how they are used, involve wider considerations: e.g. whether an alleged breach of Union law is better dealt with through mediation or through guidelines. At any rate, it is worth repeating that these criteria are not supposed to be exhaustive. The message of the ESAs’ procedural rules is that the ESAs can decline to initiate an investigation as a matter of discretion.

4.3. The decisions

Several ESA decisions refusing to open an investigation have been brought before the BoA.⁹⁷ The BoA’s role is to address grievances of parties affected by decisions taken by the ESAs.⁹⁸ Article 60 of the ESA Regulations governs the BoA’s competence to hear appeals. It states that a natural/legal person, including competent authorities, can launch an appeal before the BoA against a decision taken by an ESA that is referred to in Article 17 (breaches of Union law), Article 18 (emergency situations) and Article 19 (settlement of disagreements) or against a decision taken by an ESA in accordance with the sectoral acts found in Article 1(2) of the ESA

⁹⁶ Annex 2 EBA BoU law rules.

⁹⁷ The European Ombudsman also dealt with some issues relating to Article 17 proceedings. Decision of the European Ombudsman closing the inquiry into complaint 1561/2014/MHZ against the European Banking Authority (EBA), 6 July 2015; Decision in case 480/2016/CEC on the alleged failure of the European Securities and Markets Authority to take action concerning alleged regulatory violations by a Cyprus online trading firm, 7 February 2017.

⁹⁸ Rec (58) ESA Regulations.

founding regulations. The decision that is being appealed must be either addressed to the person that appeals or, if in the form of a decision addressed to another person, be of ‘direct and individual concern’ to her.⁹⁹ It is plain that this latter part draws on the language of Article 263 TFEU which deals with annulment actions.

The BoA has so far rejected all the appeals of ordinary complainants. Admittedly, in *SV Capital*, the BoA initially remitted the case to EBA, but on a second appeal it rejected it in its entirety.¹⁰⁰ *SV Capital* is of particular importance since it was appealed before the Court of Justice of the European Union.¹⁰¹ The General Court’s decision, which was later confirmed by the Court of Justice, has had a significant impact on the way in which the BoA approaches appeals by ordinary complainants. I will begin by looking at earlier decisions of the BoA, after which I will focus on the CJEU’s decisions in *SV Capital* and how this case law has affected the way in which the BoA deals with appeals by ordinary complainants.

SV Capital, Investor Protection Europe and Onix

Determining whether the BoA can hear appeals by ordinary complainants has not been straightforward. Specifically, earlier decisions show that the BoA had some difficulties in determining the legal nature of an ESA decision refusing to initiate an investigation following a request by an ordinary complainant and especially whether such a decision is a decision in the sense of Article 60 of the ESA Regulations. However, these rulings also reveal far less uncertainty and controversy on the issue of the ESAs’ discretion to refuse to initiate an investigation.

⁹⁹ Art 60(1) ESA Regulations.

¹⁰⁰ *SV Capital OÜ v European Banking Authority* (BoA 2013-002, 24 June 2013); *SV Capital OÜ v European Banking Authority* (BoA 2014-C1-02, 14 July 2014).

¹⁰¹ Case T-660/14 *SV Capital* cited *supra* note 6; Case C-577/15 P *SV Capital* cited *supra* note 6.

SV Capital was the first decision where the BoA was asked to consider an ESA decision to shelve a complaint. Specifically, the BoA was asked to review EBA's refusal to initiate an investigation against the financial supervisory authorities of Finland and Estonia following a complaint made by *SV Capital*. The first BoA decision remitted the case to EBA. Following this decision, EBA issued a formal 'decision of non-initiation of investigation' after examining *SV Capital*'s complaint in light of its investigation criteria.¹⁰² This decision was scrutinized in another appeal before the BoA. On the question of admissibility, the BoA ruled that EBA's decision of non-initiation was a reviewable decision under Article 60. It 'went beyond a mere communication of information or advice of non-action'.¹⁰³ It was a reviewable decision addressed to an appellant in accordance with the requirements of Article 60.¹⁰⁴ However, the BoA was careful to justify its ruling on 'the particular facts of the case', stressing that it did 'not imply a general conclusion' as to the admissibility of decisions to decline to initiate an investigation.¹⁰⁵ On the issue of EBA's discretion to decide on whether to initiate an investigation, the BoA showed no hesitation. Citing case law on priority setting in competition law, it noted that EBA was 'entitled to set priorities' as otherwise 'EBA could face an unmanageable number of complaints'.¹⁰⁶ However, when asked to decide the standard of review to be applied to EBA's decision, the BoA was more hesitant.¹⁰⁷ It simply noted that the

¹⁰² See Annex 2 of EBA BoU law rules.

¹⁰³ *SV Capital* BoA (2014-C1-02), cited *supra* note 100, para 34

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*, para 80.

¹⁰⁶ *ibid* at para 47 (note that the right in principle to set priorities was not disputed, but the claim was that in the case at issue EBA had incorrectly applied its discretion).

¹⁰⁷ *Ibid.*, para 53

material that *SV Capital* had provided was ‘on no view ... sufficient to show that the EBA had exercised its discretion wrongly’.¹⁰⁸ The BoA dismissed the appeal.¹⁰⁹

Investor Protection Europe followed the BoA’s decision in *SV Capital*.¹¹⁰ In this case, the BoA was asked to consider a decision by ESMA refusing to initiate an investigation following a complaint by *Investor Protection Europe*, a Brussels-based investor protection group. The latter alleged a breach of Union law by the Luxembourg financial sector commission.¹¹¹ ESMA’s decision to shelve the complaint was based on its view that initiating an investigation was within its discretion and that the complaint was better suited to be dealt with ‘by other means, including procedures under national law in Luxembourg’.¹¹² On the issue of admissibility, after a somewhat arcane assessment of the word ‘decision’ and its use by ESMA, the BoA concluded that the decision not to initiate an investigation was indeed a decision in the sense of Article 60.¹¹³ However, citing a series of cases on annulment actions, ESMA went on to conclude that *Investor Protection Europe*, an investor protection group, had failed to show an interest in the annulment of ESMA’s decision.¹¹⁴ The appeal was declared inadmissible.

¹⁰⁸ Ibid para 53.

¹⁰⁹ Ibid Para 54.

¹¹⁰ *Investor Protection Europe sprl v European Securities and Markets Authority* (BoA 2014 05, 10 November 2014).

¹¹¹ Ibid, para 15.

¹¹² Ibid, para 20; para 33.

¹¹³ Ibid, paras 41-49.

¹¹⁴ Ibid, paras 50-63.

The third decision is *Onix*.¹¹⁵ It involved a decision by EIOPA not to initiate an investigation following a complaint by an ordinary complainant. The case can by and large be left aside since the main issue turned on whether the deadlines for filing an appeal had been satisfied. The original decision not to initiate an investigation was outside the timeframe and the BoA concluded that subsequent correspondence between EIOPA and the appellant confirming the original decision could not change this.¹¹⁶ The appeal was inadmissible.

SV Capital (CJEU) and Kluge et al.

The BoA's decision in *SV Capital* was appealed before the General Court and the Court of Justice.¹¹⁷ The latter confirmed the General Court's decision.

The General Court dealt first with the admissibility of an annulment action against EBA's decision to refuse to initiate an investigation following the request of *SV Capital*. The Court found that the action was time barred.¹¹⁸ Nevertheless, it went on to address the issue of EBA's discretion to initiate an investigation 'for the sake of completeness'.¹¹⁹ The Court agreed that EBA's right to initiate an investigation – upon a complaint by a privileged or ordinary complainant – was discretionary and the language of Article 17 made this clear.¹²⁰ Importantly, it also clarified that ordinary complainants such as *SV Capital* did not benefit from procedural safeguards, including a right to challenge EBA's refusal to initiate an investigation before the

¹¹⁵ *Onix Asigurari SA and Simone Lentini v European Insurance and Occupational Pensions Authority* (BoA 2015 001, 3 August 2015).

¹¹⁶ *Ibid*, para 54.

¹¹⁷ Case T-660/14 *SV Capital* cited *supra* note 6; Case C-577/15 P *SV Capital* cited *supra* note 6.

¹¹⁸ Case T-660/14 *SV Capital*, *ibid*, para 41.

¹¹⁹ *Ibid* paras 45-49.

¹²⁰ *Ibid* paras 46-47. Art 17(2) of the EBA Regulation specifies that EBA 'may' investigate an alleged breach.

Court. The decision to refuse to launch an investigation was not a challengeable act according to the court.¹²¹ In drawing this conclusion, the General Court rejected an analogy with the position of complainants in competition law.¹²² For the Court, the analogy with competition law would only have mattered if *SV Capital* could claim to be among the list of privileged complainants that are entitled under Article 17(2) of the EBA Regulation to suggest to EBA to investigate a breach. Given that *SV Capital* was clearly not among these actors, the position of *SV Capital* had to be decided by analogy to the position of complainants in an Article-258 infringement procedure.¹²³ As a result, it was not open to *SV Capital* to challenge EBA's decision not to open an investigation.

Next, the Court went on to consider the BoA's decision in *SV Capital*. As a reminder, the BoA decided that *SV Capital's* appeal was admissible. The General Court drew an altogether different conclusion. It ruled that the BoA did not have competence to hear an appeal by *SV Capital*.¹²⁴ For the General Court, EBA's decision not to initiate an investigation on the complaint of an ordinary complainant was not a decision in the sense of Article 60. This was because this decision was neither taken in accordance with the sectoral acts in Article 1(2) of the EBA Regulation;¹²⁵ nor was it a decision referred to in Article 17 (breaches of Union law),

¹²¹ Ibid para 45.

¹²² Ibid paras 49.

¹²³ Ibid para 48, '[a]ccording to settled case-law, developed in the context of actions for annulment of Commission decisions refusing to initiate infringement proceedings, and applicable by analogy to the present case, where an EU institution or body is not bound to initiate a procedure, but has a discretion which excludes the right for individuals to require it to adopt a specific position, it is not open to persons who have lodged a complaint to bring an action before the EU judicature against a decision to take no further action on their complaint'.

¹²⁴ Ibid paras 63-73.

¹²⁵ There is some uncertainty about the language that the Court used in this context. It referred to a decision by EBA that was 'based on Article 1(2)' (ibid, para 67). It is likely that the Court meant to say that EBA's decision

Article 18 (emergency situations) or Article 19 (settlement of disagreements).¹²⁶ However, the General Court also appeared to suggest that EBA's refusal to initiate an investigation would have been a decision referred to in Article 17 if *SV Capital* had been a privileged complainant.¹²⁷ In this context, the GC noted that *SV Capital* did not claim to be part of the Banking Stakeholder Group, which is among the privileged complainants in Article 17(2).¹²⁸ A subsequent appeal before the Court of Justice confirmed the General Court's decision.¹²⁹

Hence, following *SV Capital*, the legal position of ordinary complainants appears now to be entirely different to that of privileged complainants. The decision of an ESA to shelve the complaint of a privileged complainant is a reviewable act before the courts. These privileged complainants will benefit from procedural safeguards by analogy to the procedural position of complainants in competition law proceedings.¹³⁰ The position of ordinary complainants is akin to those in infringement proceedings. They will not be able to bring an appeal before the EU judiciary where an ESA decides to shelve their complaint. Moreover, BoA will not be

was not a decision taken under the sectoral acts listed in Article 1(2). See also the BoA's interpretation in *Andrus Kluge and others v European Banking Authority* (BoA 2016 001, 7 January 2016), para 32.

¹²⁶ Case T-660/14 *SV Capital* cited *supra* note 6, para 66-72. Note that para 68 includes a rather odd passage in which the General Court noted that no breach of technical standards had been 'alleged' in support of *SV Capital*'s complaint. It is hard to see the added value of this statement.

¹²⁷ *Ibid* paras 69-71. On appeal, see paras 36-42.

¹²⁸ Recall that under Art 17(2) of the ESA Regulations, privileged complainants are the Council, the Commission, the European Parliament, the ESA stakeholder groups and competent authorities. Note that in *Kluge*, EBA suggested that any of the privileged complainants had a right of appeal to the BoA (paras 22-23). The BoA did not take issue with this contention (see in this context Art. 60(1) on the right to appeal to the BoA), although admittedly it was not necessary to resolve the case.

¹²⁹ Case C-577/15 P, *SV Capital*, paras 36-42.

¹³⁰ Case T-660/14 *SV Capital* cited *supra* note 6, para 49 (a contrario). Of course, Art. 263 TFEU will also need to be satisfied for a judicial challenge.

competent to hear an appeal under Article 60 either, unless they can distinguish their situation from the one in *SV Capital*.

SV Capital had expectedly a noteworthy impact on the BoA's views about the admissibility of appeals of ordinary complainants. In *Andrus Kluge and others*, EBA was asked to investigate alleged breaches by the Estonian Financial Supervision Authority.¹³¹ *Kluge et al.* were members of the supervisory board or shareholders of Krediidipank, a credit institution. It was alleged that the supervisory authority had breached requirements of Directive 2006/48 in relation to the supervision of the affairs of Krediidipank.¹³² After considering its (internal) rules on investigating breaches of Union law, EBA decided not to investigate. The BoA decided the appeal in light of *SV Capital*. It concluded that ordinary complainants had 'no right of appeal to the Board of Appeal' against a refusal by an ESA to initiate an investigation.¹³³ It found that the case before it could not be distinguished from *SV Capital* despite arguments to the contrary by the appellants. Among other things, the latter argued, in an attempt to differentiate their case, that the Court had failed to consider the effects of EBA's internal procedural rules on the rights of appeal of an ordinary complainant.¹³⁴ As noted, these rules do not differentiate between ordinary and privileged complainants: EBA's rules recognize all complainants – privileged or not – the same notification rights and rights to be informed about underlying reasons. The BoA dismissed the argument. It simply took the view that the General Court had referred to EBA's internal rules in its judgement.¹³⁵ In fact, the General Court had very little to say about EBA's internal rules. It did not provide views on them. In any event, these internal

¹³¹ *Andrus Kluge and others v European Banking Authority* (BoA 2016 001, 7 January 2016).

¹³² *Ibid* para 11.

¹³³ *Ibid* para 24.

¹³⁴ *Ibid* para 33.

¹³⁵ *Ibid* para 35.

rules are unlikely to change the Court's assessment. Indeed, the Court is likely to take the view that, in contrast to procedural rights included in secondary legislation, EBA's rules are merely internal measures adopted in the interests of the sound administration of the breach of Union law procedure.¹³⁶

The ESAs too have taken note of the decisions in *SV Capital*. In its 2016 Annual Report, EBA for example noted that following *SV Capital* its staff had 'reviewed how to make the enquiries process more effective building on confirmation by the Court of Justice and the General Court that the EBA's conclusion on whether or not an investigation should be opened is not reviewable by the Court or the Board of Appeal'.¹³⁷ How precisely the complaints procedure was reviewed in the wake of *SV Capital* is not clear.

4.4. Meroni?

¹³⁶ By analogy to *Aseprofar* cited supra note 81, paras 55-56. However, even assuming for the sake of argument that EBA's internal rules could in principle be relied on in support of a challenge to an EBA decision that rejects a complaint (say perhaps because they include self-imposed indicative rules on how EBA intends to exercise its discretion to determine priorities for pursuing breaches – e.g. by analogy to Case C-429/11 P *Gosselin Group NV v Commission*, ECLI:EU:C:2013:463, at [64]) – this would not be the end of the matter. Indeed, in such an (unlikely) case, it could be retorted that by assimilating 'ordinary' complainants to those in Article 17(2), EBA's internal rules go beyond the intentions of the EU legislature and the wording of Article 17(2) of the EBA Regulation which, in the absence of any indication to the contrary, lists exhaustively those 'privileged' actors that have a right of their own to lodge a complaint and that, according to the General Court in *SV Capital* benefit from procedural rights that can be enforced before the Court. Hence, relying on EBA's rules for investigating breaches of Union would not bring 'ordinary' complainants closer to achieving their goal of having EBA investigate a breach.

¹³⁷ EBA, Annual Report: 2016, 92, available at <http://www.eba.europa.eu/about-us/annual-reports>.

In none of the decisions that were reviewed above was it suggested that an ESA's discretion to refuse to initiate an investigation was circumscribed by anything else than the language of Article 17. Article 17(2) states that an ESA 'may' initiate an investigation and this discretion to make choices implies that an ESA may decide not to launch an investigation. However, as a general proposition, there is no reason to think that a discretionary power to refuse to initiate an investigation cannot, depending on how this power is used, also contribute to shaping the orientations of an enforcement policy. In competition law, for example, the Commission's power to prioritise cases alleging breaches of competition law (including its power to permanently shelve complaints) is wide because priority-setting is seen as essential for the Commission to perform its task of defining and implementing the orientation of competition policy.¹³⁸ Hence, it is worth considering if and how the ESAs' discretionary power not to act (that is, to refuse to initiate an investigation) can be squared with *Meroni*, as reaffirmed in the short-selling case.¹³⁹ Clearly, there are very few restrictions that constrain the ESAs' discretion to permanently shelve a complaint. Importantly, the decision not to initiate an investigation will produce legal effects on the breach of Union law procedure.¹⁴⁰ Recall that this procedure is based on interlocking stages. Thus, prima facie, an ESA could be said to contribute to shaping a breach of Union law policy if its discretionary decision to refuse to launch an investigation brings the breach of Union law procedure to its end and the Commission thereby foregoes its

¹³⁸ e.g. Case C-119/97/P, *Ufex and others v Commission* [1999] ECR I-1341, para 88.

¹³⁹ *UK v Parliament and Council*, cited *supra* note 9; *Meroni*, cited *supra* note 9.

¹⁴⁰ Discretionary powers that may, depending on their use, make it possible to shape policy are binding and autonomous decision-making powers. In the present cases, it could be argued that the relevant binding effects materialize with respect to the Article-17 procedure since it cannot unfold unless an ESA launches an investigation. Admittedly, by deciding not to launch an investigation, an ESA also foregoes the opportunity to exercise its intervention powers in relation to a market actor. But this power is not an autonomous power. It is dependent on the Commission's intervention and on the content of the Commission's formal opinion.

right to exercise its (binding) powers under Article 17.¹⁴¹ However, it is unlikely that this argument will carry weight with the Court. Indeed, the latter's approach to agency discretion is very much one of ends (i.e., safeguarding the ESAs' role) justifying means. The Court might for example take the view that even if the Commission is prevented from acting under Article 17 because an ESA decided not to initiate an investigation, the Commission will retain the right to direct Article-258 proceedings against a Member State whose competent authority is alleged to have breached Union law. Accordingly, it might take the view that an ESA is not effectively in a position to give competent authorities meaningful policy signals about the type of behavior of competent authorities that will be tolerated at EU level, or that ought to be addressed through other means (e.g. by using non-binding mediation). There is merit to this argument, especially since Article 17 is silent on how a Commission opinion can be enforced against a competent authority. However, the argument also brushes over the very substantial differences between the two procedures. Alternatively, it is conceivable that the Court will simply recast the issue of priority setting as a lawful exercise of 'discretion in application',¹⁴² justified by the technical complexity of assessing different complaints, or simply as a legitimate and 'inherent feature of administrative activity'.¹⁴³ Admittedly, however, in the case of the ESAs, this reasoning also brushes over the considerable discretion that comes with the ESAs' power to decide the fate of the Article 17 procedure when declining to initiate an investigation.

5. Revisiting the breach of Union law procedure: should the procedural position of ordinary complainants be improved?

¹⁴¹ As I pointed out above, there is some uncertainty regarding the nature of the Commission's so-called formal opinion. For the reasons mentioned above, it appears that the nature of this 'opinion' is to produce binding effects.

¹⁴² Galligan, *op. cit. supra* note 33.

¹⁴³ By analogy with Case T-24/90 *Automec Srl v Commission* [1992] ECR II-02223, para 77.

This final section will reflect upon the position of ordinary complainants under the breach of Union law procedure. In particular, it considers whether they should benefit from better procedural safeguards, especially a right of access to the BoA, if an ESA declines to investigate an alleged breach of Union law. This section begins by noting that monitoring – the ability to observe breaches of Union law – is a key issue for an effective breach of Union law procedure. There are two essential ways – two oversight strategies – in which an ESA can become aware of EU law breaches: (i) because of its own – often time consuming – investigations; or (ii) because of information about breaches that it receives from other parties (complainants). Under the first strategy, an ESA might become aware of breaches as a result of, say, ‘peer reviews’ or, more indirectly, because of observations about events or circumstances affecting a regulated entity which allow drawing conclusions about required actions. However, detecting breaches under this first strategy is time and resource intensive and might require *inter alia* legal rights to access information of sufficient quality and consistency. Admittedly, the Commission’s current proposals on the ESFS seek to improve this state of affairs.¹⁴⁴ With respect to access to information, for example, the Commission proposes that the ESAs be given greater powers to request information from national authorities or from a market actor.¹⁴⁵ For the second strategy to be effective, a number of prerequisites must also be met. In particular, complainants must have incentives to bring breaches to the attention of the ESAs. These incentives will be improved if complainants are confident that their complaint will be dealt with and that the decision-maker will not use his or her discretion to make arbitrary decisions. Avoiding such an outcome requires transparency. Incentives and transparency will be improved by granting complainants procedural safeguards, especially a right to appeal if their complaint is rejected. Besides improving incentives, it can also be assumed that such safeguards will contribute to

¹⁴⁴ Commission, *op. cit. supra* note 7.

¹⁴⁵ *Ibid* 20.

improving the credibility of the breach of Union law procedure (and ultimately the ESAs) in the eyes of market actors.

It is noteworthy that the Commission's recent proposals on reforming the ESFS have nothing to say about the role of ordinary complainants under Article 17. Their position remains the same. Yet arguably, the current procedural position of ordinary complainants is unsatisfactory for several reasons. Firstly, the absence of a right to appeal to the BoA will offer little comfort to ordinary complainants who have a genuine and legitimate interest to file a complaint; yet the absence of such safeguards will not stop frivolous complaints. What is more, the ESAs internal procedural rules offer complainants currently fewer safeguards than the measures that the Commission applies in the context of an Article-258 procedure.¹⁴⁶ Secondly, the current situation fails to give sufficient recognition to the fact that ordinary complainants will often, because of their activities or dealings, be best placed to act as informants.¹⁴⁷ Thirdly and perhaps most importantly, the current two-tier system which differentiates between privileged and ordinary complainants is largely ineffective. The reality is that the majority of privileged complainants are not well suited to detect breaches by competent authorities. The Council, the Parliament or the ESA stakeholder groups lack objectives, orientations or resources to exercise these functions. As far as competent authorities are concerned, which are also among the list of privileged complainants, it is questionable whether they have necessarily the right incentives to engage in 'finger pointing'. Yet, Article 17 is a key intervention power in the ESAs' founding regulation. It is part of a wider normative context that seeks to foster convergence of supervisory practices at national level (supervisory convergence). As the BoA

¹⁴⁶ See *supra* section 4.2.

¹⁴⁷ In relation to Article-258 proceedings, see Prete and Smulders, 'The Coming of Age of Infringement Proceedings' 47 *Common Market Law Review* (2010) 9-61, 28 noting that '[m]ost of the proceedings initiated by the Commission stem from a complaint lodged by an individual or a company'.

put it in *Investor Protection Europe*, Article 17 is ‘central to deliver the results that justify the establishment of the European System of Financial Supervision’.¹⁴⁸ As informants, complainants have clearly an important role to play in facilitating the objectives of Article 17.¹⁴⁹

Hence, there is an argument to be made for reconsidering the procedural position of certain types of ordinary complainants, i.e., those that are able to show a legitimate interest. This might be because a complainant can show that she has been directly affected by the failure of a competent authority to uphold Union law through its actions or inactions, or because a complainant is especially well-suited to observe breaches by competent authorities. Think in this context of consumer or investor protection associations. In particular, the competence of the BoA should be revisited in order to give it a firm basis to hear decisions to shelve investigations following a complaint by an ordinary complainant who has shown a legitimate interest. The BoA was a major innovation of the ESFS. It was created to protect the rights of parties who were affected by the ESAs’ decisions.¹⁵⁰ Yet, the BoA has so far only played a limited role. Following *SV Capital* and keeping in mind that most complaints are brought by ordinary complainants, the BoA will play an even lesser role.¹⁵¹

¹⁴⁸ *Investor Protection Europe*, cited *supra* note 110, para 43.

¹⁴⁹ This point was acknowledged, among others, by ESMA’s stakeholder group when offering advice on supervisory convergence: ‘it would be of great importance if ESMA had the possibility to learn from stakeholders whether there is weak enforcement by [national competent authorities]’. See ESMA Securities and Markets Stakeholder Group, Advice to ESMA: Position Paper on Supervisory Convergence (ESMA/2016/SMSG/014, 13 June 2016) 4.

¹⁵⁰ Rec (58) ESA Regulations.

¹⁵¹ The case load of the BoA, which hears appeals from all three ESAs, has been minimal. At the time of writing, there appear to have been only 7 cases. See <http://www.eba.europa.eu/about-us/organisation/joint-board-of->

To be clear, addressing shortcomings in the current two-tier complaint system does not mean that the ESAs ought to investigate each and every complaint or that there should be no differentiation among ordinary complainants. There will always be frivolous complaints that should be weeded out. However, clearly there are categories of complainants who will have a legitimate interest and whose incentives to bring alleged breaches of EU law to the attention of the ESAs will be diminished if they lack confidence in the transparency and integrity of the ESAs' decision-making processes.

To be sure, proposing to reconsider the procedural position of ordinary complainants might face resistance on the grounds that the breach of Union law procedure is akin to the Commission Article-258 infringement procedure which is directed against a Member State and which is said to be bilateral in nature. Recall that under the Article 258-procedure, complainants will not be able to appeal a Commission decision that shelves their complaint. This is not the place to consider arguments for revisiting the position of complainants in the Article-258 procedure. Others have done so.¹⁵² Suffices to say here that instead of over-emphasizing imperfect parallels between the two procedures, it is worth pointing to the considerable differences between them. For one thing, the breach of Union law procedure is not directed at Member States, but primarily at independent competent authorities whose role is to supervise market actors and uphold the law, including EU law.¹⁵³ Besides, the ESAs are not the Commission. They are agencies that operate in the regulatory/supervisory sphere and

appeal/decisions. Admittedly if ESMA is given additional day-to-day supervisory competences, this is likely to change in the future.

¹⁵² Rawlings, 'Engaged Elites, Citizen Action and Institutional Attitudes in Commission Enforcement' 6 *European Law Journal*, (2000), 4-28.

¹⁵³ This of course is not to say that the Commission might not take action under the Article-258 procedure against a Member State whose competent authority persists in breaching EU law.

which have a general objective to protect the public interest.¹⁵⁴ Specifically, under Article 17, their role is to investigate breaches of Union law and to use their (limited) powers to work towards remedying such breaches without entering into some sort of bargaining or negotiation process as the Commission might do in the context of Article-258 proceedings.

To be sure, critics might still point out that complainants can seek redress before national courts in case where a national competent authority fails to uphold Union law. Undoubtedly, the prospect of proceedings at the national level can help to ensure compliance. Indeed, it might very effectively complement public enforcement actions and contribute to the objectives which the ESAs or the Commission are meant to uphold under the Article 17 procedure.¹⁵⁵ However, this is hardly a reason for denying procedural safeguards to ordinary complainants, especially if the decisions of the ESAs to shelve complaints come to inform views about the merit of a case before courts at the national level. Hence, the fact that a complainant is free to bring proceedings at the national level should not stand in the way of attempting to optimize the workings of other (however imperfect) enforcement tools: Article 17 in our context.

Last but not least, it is hard to see any kind of fundamental objection to offering ordinary complainants, who can show a legitimate interest, a better procedural position. The Article-17 procedure already grants a list of complainants a privileged position and they benefit from this position without having to meet additional conditions. They are in this position merely because they are expressly mentioned in Article 17(2) and that being so it is in the interest of the proper administration of justice that they can institute proceedings. Revisiting the procedural position

¹⁵⁴ Art 1(5) ESA Regulations.

¹⁵⁵ See in this context AG Geelhoed in Case C-253/00, Muñoz, ECLI:EU:C:2002:497 (para 55) noting that '[EU] law does not operate on the notion that enforcement by means of private law is precluded where provision is made *expressis verbis* solely for enforcement under public law'.

of ordinary complainants is to recognize that natural or legal persons have a key role to play in monitoring compliance with EU law and that complainants will have better incentives to play this role if they have confidence in the integrity and transparency of the decision-making process which decides the fate of their complaint.

6. Conclusion

There are many reasons to find fault with the breach of Union law procedure under Article 17 of the ESA Regulations. It is open ended with regard to enforcement mechanisms, it is subject to a complex interplay of stages and actors, it includes strict requirements, etc. Yet, Article 17 was also a major innovation of the ESFS. It forms part of a wider normative context aimed at achieving supervisory convergence. The aim of this article was to take stock of the breach of Union law procedure at a time where the Commission has come forward with major legislative proposals on the ESFS. After reviewing the decisions of the BoA and the Court, it was argued that the procedure currently fails to give proper recognition to the importance and role of ordinary complainants as key information providers. This article therefore argued in favour of improving the procedural position of ordinary complainants whilst at the same time recognizing the need to for differentiation between them. A combination of positive and negative factors was highlighted to support a case for reform. Positive factors included improving the incentives of market actors to bring non-compliance to the attention of the ESAs; as well as enhancing the credibility of the Article-17 procedure in the eyes of market participants. When discussing negative factors, it was (inter alia) argued that the current two-tier complaint system was for the most part ineffective.

A question that has so far been left unanswered is how precisely to implement reform. An obvious solution would be to amend the ESAs' founding regulations (e.g. by widening the list of privileged complainants in Article 17(2)). However, given the need for differentiation

among ordinary complainants, it would be advisable to specify by way of secondary legislation the attributes of those new complainants whose procedural position should be improved. It is worth repeating that the ESAs should not be subject to a duty to investigate each and every complaint. They should be entitled to shelve complaints. The underlying dilemma is a familiar one: how best to control wide discretionary powers whilst making sure that discretionary powers are not replaced by a duty to act. The approach that was advocated here is for the ESAs to continue being able to exercise discretion when considering complaints, but to widen the list of complainants who benefit from a privileged position and hence from a right to appeal. Moreover, to remedy any lingering uncertainty about the limits of the ESAs' discretion to decide the fate of Article-17 proceedings when shelving a complaint, it might be sensible for a set of criteria, which sets loose constraints on the ESAs' very wide discretion to reject complaints, to be specified in secondary legislation. This approach would also comply with the usual orthodoxy that the Court has championed in cases such as the short selling judgement where it was ready to validate ESMA's powers to intervene on short selling after considering various conditions, criteria and requirements in statutory and subordinate acts.