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A Technology of Expertise: EU Financial Services Agencies

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Abstract

The collapse of Lehman Brothers in 2008 ushered in a financial crisis whose ramifications are still being felt. Within the EU, collapse not only led to a change in regulatory rhetoric, emphasising the need to secure the stability of EU money markets, but also to a significant widening and deepening of technocratic supervisory structures for European financial services. This paper accordingly investigates the newly established European System for Financial Supervision and, in particular, semi-autonomous EU agencies for banking, insurance and securities, for its ability to provide robust regulation and supervision within Europe. However, it analyses this increase in technocratic governance at supranational level in light of the worrying question of whether it has undermined capacity for political action within Europe. At a time when readily-apparent failings in established technocratic governance in Europe (monetary union) have led only to more technocratisation (proposed fiscal union), perhaps to the point of systemic collapse, the general European trend to expert-led and evidence-based supervision must be doubted; not simply because it has failed on its own terms, but also because it has established a technology of expertise, or dominant rationality, which further encourages abdication of political responsibility for economic crisis.

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I. A technocratic trend in crisis

Financial and sovereign debt crises have ushered in an unprecedented era of technocracy and technocratic governance within the European Union. The most striking examples have been those of the establishment of technocratic or quasi-technocratic 'governments' in Italy and Greece. Vitally, however, a European trend away from democratic government structures is not merely a crisis-driven phenomenon. Instead, it is also a far deeper historical progression, which gives rise to fundamental questions about the governing relationships now being established within Europe between legitimate democratic process, effective exercise of political and administrative power, the deployment of technical expertise and the (autonomous) operation of market forces.[1] The unanticipated establishment in late 2010 of a European System of Financial Supervision (ESFS) was an immediate EU response to financial meltdown, and was greeted as such by the European Parliament, which continues to be generally hostile to the extension of technocratic governance within Europe. At the same time, however, the creation of the ESFS, comprising three European Supervisory Authorities for financial services (ESAs), as well as the European Systemic Risk Board (ESRB) and national regulators, is also only one further chapter in on-going EU efforts to

[1] Debates positing a 'technocratic' character for European integration versus the political union of Europe are as old as the European Economic Communities. For theories of the 'European regulatory state', 'functionally-differentiated European integration' and the 'European Economic Constitution': Joerges (2004).

balance functional demands for effective technocratic governance of intricate European integration processes (output legitimation) against the democratic imperatives of European Union (input legitimation).

The need to balance output against input legitimation is not peculiar to the EU; neither is it a new need. From its inception, the modern nation state has faced a critical conundrum: modernity's state owes its core legitimacy to its ability to govern well but the act of 'good' governing is made up of two contradictory components. On the one hand, the term 'government' simultaneously captures the Enlightenment concept of popular sovereignty and entails establishment of the democratic process, which ensures that government *for* the people is also government *by* the people. On the other, good governing also requires that government is effective, that it may draw on the functional resources that can ensure that the will of the people *is* done and that democratic mandates can in fact be imposed on a social environment beyond political discourse. Democratic government can never be separated from its own functional or 'non-majoritarian' administration; nor, however, can it ever be divorced from the abiding fear that creation of executive power in order to implement political goals might itself undermine democratic process. The traditional spectre is that of the usurping administration; an unchecked executive which, if given too great a margin of discretion, might create policy of its own and wield power against the will and to the detriment of the people. By the same token, however, the conventional response to this danger – or 'transmission-belt model' of administration – is by now so well entrenched within modern states as to be a constitutional truism: a hierarchy of norms (higher legislative and lower administrative) must be established, a ban on delegation of discretionary powers must be imposed and the rule of law must be widened, in order to encompass judicial policing of narrowlydrawn democratic mandates through the proscribing of discretionary exercise of powers by the administration (Stewart 1975; Everson 1995).

The Lisbon Treaty has now reproduced this constitutional truism within primary European Law. Article 290 TFEU establishes a hierarchical distinction between legislative and non-legislative acts, introduces a strict ban on the delegation of 'essential' legislative matters to the expanding administrative arm of the European Commission and subjects all delegations of powers to the Commission to on-going 'democratic' supervision by the Council and Parliament by means of a primary legal norm of recall of powers. Nonetheless, this European re-statement of the transmission-belt model cannot obscure an obvious fact that the EU has suffered the conventional tensions between input and output legitimacy in an altered and heightened form. The EU is not now and never has been a conventionally modern polity. Instead, in-built tensions in the structures of the Union between the joint pursuit of the supranational integration interest and the residual national competences of its severally sovereign member states have not only created a striking democratic deficit, but have also given rise to a series of conceptual and institutional *lacunae* within the governing structures of the Union. These gaps have famously been filled, not with government, but rather with vehicles and concepts of 'governance', which are in no small part legitimated with reference to functionalist effectiveness (Dehousse 2001); and nowhere is this trend more apparent than in the core business of the EU, that of the 'liberalising' convergence of national economies. The demand for economic and scientific expertise to oversee technical regulatory convergence in the internal market has far outstripped the administrative capacities of the Commission, and has consequently witnessed the growth of a vast *ad hoc* European administration – problematically established outside the institutional structures of the treaties – of committees (comitology) and semi-autonomous agencies, which also network horizontally with national administrations.

The predominance of a *narrative* of governance within EU institutional dialogue is also noteworthy on its own terms as a justificatory discourse that privileges mechanisms of expertise, transparency and deliberation above traditional models of democratic legitimacy, such as aggregative representation and political accountability.[2] Similarly, when viewed together with the vast number of quasi-technocratic bodies producing binding norms at EU level,[3] the conceptually-flavoured European governance debate would seem to support commentators who have maintained that the entire European construct must be viewed as a technocratic enterprise, as a 'regulatory state' or as a 'fourth branch of government' (Majone 1996), with its own specific, non-majoritarian legitimacy. The degree of EU reliance on technocratic governance is accordingly revealed and explained: the integration of expertise within EU institutional structures is not only novel and pragmatic answer to the functional imperatives of European (market) integration, but is also a response to normative necessity or to the imperative to identify legitimation for an on-going integration project *outside* the settled contours of government, and *beyond* traditional government's strict division between legislative will and executive action.

In this setting, the emergence of European transmission in Article 290 TFEU is incongruous, but is also representative of continuing mistrust within the EU institutional structure of its own efforts to overcome the legislative-executive divide in a convincing manner. The spectre of unchecked technocratic governance remains an object of suspicion, and must surely continue to be so,

[2] See, only, European Commission, White Paper on Governance COM(2001) 428 final
[3] Falke (1996) details the extent of comitology: approximately 50,000 decisions were taken by agricultural and regulatory committees between 1971 and 1995. Committee activity has no abated: 270 committees delivered 2185 opinions in 2008 (http://ec.europa.eu/transparency/regcomitology/docs/com-2009-0335_en.pdf.)

especially at a time of economic crisis when a particularly striking corollary to the unexpected extension of technocratic governance is loss of political capacity, or the inability of democratic process to impose its sovereign will on financial turmoil. Continuing suspicion and diminished political steering consequently leads this analysis to approach the creation of the ESFS in a broader manner. Above all, the spotlight is focused on a complementary trend to European technocratisation, which has its roots firmly within the member states rather than Union institutions: the permissive consensus, which has, since the early 1980s, lost confidence in the steering capacities of the welfare and social state, and has placed its faith in the wealth-creating powers of market operation instead (Crouch 2011; Everson & Joerges 2012).

In this analysis, traditional transmission administration is placed under strain, not simply because the political constructs of democratic process underlying notions of 'good' governing are themselves mutating as governments – currently in response to globalisation processes – re-invent or seek to expand their now limited functional capacities within supranational institutions which are necessarily divorced from traditional government models. Instead, liberalising processes of European market integration, as well as increased reliance upon regulatory technocratic expertise, are facilitated as the commanding constitutional relationship between polity and market is fundamentally altered such that a protected private sphere of market operation, which was once limited to the safeguarding of individual (contractual) rights, is radically expanded in order to create a realm in which the 'rationalities'[4] of market operation must and will be shielded from majoritarian political influence. The potential consequences of this consensus for discussion of the expert-led trend away from government through democratic process cannot be overstated. Heightened reliance on technocratic

[4] The term is taken from Michel Foucault, from his assertion that the evolution of '*savoir-faire*', or technical knowledge, has fundamentally altered modes of human governing (Foucault 2008).

expertise has a qualitative, as well as quantitative character. To the degree that permissive consensus continues to dominate its institutional and political environment, technocratisation also encompasses radical self-limitation of the sovereign polity that historically mandated all exercise of executive power. Technocratisation, or 'scientification' entails the wholesale transference of steering capacities to rationalities that evolve within the 'independent' market, as well as a normative commitment to establish and protect an autonomous sphere of 'the market' within which such rationalities might continue to unfold themselves free from all political interference.

The most startling and technocratically-obdurate EU institution of expertise formed in the wake of a diffuse notion that market rationalities should be afforded an autonomous realm of self-expression is the European Central Bank (ECB). However, the following analysis investigates the manifestation of scientification at a lower level of European governance; that of the three ESAs established within the ESFS – the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA), and the European Insurance and Occupational Pensions Authority (EIOPA). In so doing, however, the focus of attention is similarly placed on a vital element that has been overlooked within traditional EU governance debate: to what degree has the trend to technocratic expertise also augmented a general crisis of political capacity? Has it nurtured a dominantly unavoidable rationality – or, in the terms of Foucault, 'technology' of expertise (Foucault 2008) – which similarly usurps democratic process and sovereign will, not simply because the executive seeks dominance, but because the polity itself has abdicated all sociological responsibility for the exercise of executive power?

II. Governance versus government in financial services supervision

The ESFS was established by a series of EU regulations in 2010.[5] In full, it comprises:

(1) The European Systemic Risk Board (ESRB), which is chaired by the President of the ECB and includes governors of national central banks (NCBs), a Commission representative and the Chairs of the three ESAs, and which is served by an Advisory Scientific and a Technical Committee. The role of the ESRB is to provide 'macro-prudential' supervision, or to identify and combat 'systemic risks', or hazardous financial activities, which threaten the functioning of the ESFS as a whole.

(2) The three ESAs who administer a complex series of common financial regulations by means of the establishment of the Binding Technical Standards (BTS) and jointly-established practices which inform micro-prudential supervision of individual financial institutions at national level. ESAs are also charged with identification of systemic risks within the system and their notification to the ESRB. A Joint Committee of the ESAs co-ordinates micro-supervision across the three sectors and strengthens macro-supervisory information flows.

(3) National Supervisory Authorities (NSAs), which are formally responsible for micro-prudential supervision at member state level.

(4) A single Board of Appeal responsible for individual challenges to agency decisions.

[5] Regulation (EU) No 1092/2010 (ESRB Regulation); Regulation No 1096/2010 (ECB Regulation); Regulation (EU) No 1095/2010 (ESMA); Regulation (EU) No 1093/2010 (EBA); Regulation (EU) No 1094/2010 (EIOPA).

The ESFS is not the first endeavour to co-ordinate supervisory standards and practices at supranational level. Instead, it builds upon the series of regulatory principles (European Financial Services Action Plan), national regulatory networks, as well as European co-ordinating and standard-setting committees for the financial services, established in the wake of the report of the 'Lamfalussy Committee' of Wise Men on the Regulation of European Securities Markets in early 2001.[6] However, lying between the Commission's establishment of its own comitology system and a far broader Union commitment – sanctioned by Council and Parliament – to the ESFS, we find the collapse of Lehman Brothers in late 2008, a significant change in the rhetorical justification for institutional reform at EU level, a host of new financial regulations, and a significant widening and deepening of supranational regulatory structures founded in independent expertise.

The Lamfalussy group were primarily concerned with the establishment of an integrated and globally competitive European market for financial services. At this stage, unwieldy EU regulations and discrepancies in their national implementation were seen as regulatory failings, not because they accentuated obscurity within financial markets, but rather since they led to differential treatment of financial instruments, thus 'violating the pre-requisite of the neutrality of financial supervision' in the EU market and retarding adaption of European financial services 'to the pace of global financial market change.'[7] By rhetorical contrast, the 'high-level' de Larosière group on EU financial supervision – convened by the Commission in response to financial melt-down – appeared to have returned to a more traditional concept of market failure, concluding that the system of European

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[6] See, in particular, Commission Decisions, 2001/527/EC and 2001/528/EC (EU Securities Committee and Committee of European Securities Regulators); Commission Decision 2004/10/EC (Committee of European Banking Supervisors; Commission Decision 2004/9/EC (Committee of European Insurance and Occupational Pensions Supervisors).

[7] http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf

financial regulation must be strengthened and expanded: first, to improve an 'inadequate mix' of regulatory and supervisory skills, which had not only seen too little information gathered and shared 'on the global magnitude of global leveraging', but which had also witnessed a catastrophic failure to 'fully understand or evaluate the size of the risks'; and secondly, to create a co-ordinated early-warning system to identify macro-systemic risks of a contagion of correlated horizontal shocks.'[8]

In addition to the imposition of enhanced minimum capital and solvency requirements on financial institutions, the regulatory and supervisory structure was significantly enhanced with the establishment of the ESFS and the creation of new, semi-autonomous authorities – or EU agencies – for the regulation and supervision of securities, banking and insurance. This final development is particularly striking. In the face of crisis, the European Parliament dropped its long standing opposition to the further consolidation of EU governance by means of supranational 'agencification'. Despite having contributed to a factual moratorium on the establishment of any further such EU bodies through its lukewarm reception to the Commission's draft Inter-Institutional Agreement (IIA) on the common operating framework for European regulatory agencies, [9] Parliament enthusiastically welcomed the ESFS and the three ESAs (Moloney 2011a).

1. Autonomy and accountability in the EU agency model

The current Commission preference for European governance by means of European agencies or semi-autonomous expert bodies – most forcefully stated

[8] http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf
[9] COM(2005)59 final. A factual moratorium was established as the Commission was required to undertake a further review of the operations of such bodies already operating at EU level, Communication from the Commission to the European Parliament and the Council, 'European Agencies – the Way Forward', COM(2008) 159 final.

in its 2001 White Paper on European Governance – in large part derives from the failings in its own comitology structures exposed by the BSE crisis. BSE still functions as a potent warning to proponents of technocratic governance, especially with regard to the problem of what to do when technical expertise can no longer provide technical answers and of how to respond when diffuse hazard cannot be concretised as risk 'because the science has run out' (see below). In the 1990s, however, the failure of scientific and administrative expertise at national and supranational level – both of quantification of the risks of human evolution of variant Creutzfeldt-Jakob disease and of adequate post-market control of the spread of 'mad cow' products – was primarily viewed within an institutional paradigm that stressed the subsequent need to act in order to improve and to ensure the quality and delivery of scientific and technical expertise. Above all, lack of transparency within the various *ad hoc* scientific committees established by the Commission to assess risks both exacerbated a lack of scientific independence at EU level[10] and foreclosed potential for independent epistemic review of scientific findings. In addition to highlighting the functional 'obscurantism' of the comitology model (Dehousse 2003), the BSE saga also revealed the need for permanently funded EU scientific expertise in order to facilitate long-term research upon the basis of which hazards could be transformed into quantifiable and therefore 'manageable' risks, as well as a demand for permanent oversight of implementation of EU standards at member state level (Vos 2000).

Transparency and permanence are the hallmarks of the operations of expertise within regulatory agencies (Demortain 2010). As a consequence, a radical expansion in the use of this vehicle followed the BSE scandal. The European Food Standards Agency (EFSA) established within its wake, is now one of the most powerful institutions operating within the EU institutional

[10] Most 'European' experts involved were connected with the UK Government (Vos 2000).

architecture (Everson & Vos 2008). Article 290 TFEU's restriction of delegated powers undoubtedly stands as testament to continuing parliamentary reservations towards the executive spectre within Europe.[11] However and particularly so following miscarriage of the idealistic quest to create a self-consciously political European moment within the failed Constitutional Treaty, governance continues to compensate for lacking government within Europe and, in the case of the EU agency model, forcefully asserts its own normative as well as pragmatic claim to legitimacy.

The existence of autonomous regulatory agencies, which operate at arms' length from conventional government has long been justified by the argument that areas requiring complex technical oversight are best governed by 'experts' (Vibert 2007). However, it has recently been further facilitated by alterations in the manner in which the relationship between exercise of political power and market operation is viewed. More particularly, the argument traditionally used in order to justify the operation of independent central banks – one that a polity should guard against the danger that its own government will manipulate exchange rates for short-term political gain (Majone 1996; Vibert 2007) – finds a far more general application within the permissive consensus that market operation should as far as is possible take place within its own autonomous sphere. 'Efficiency' is the leading criterion within a modern regulatory paradigm that seeks to refashion regulation in order to separate out the pursuit of general re-distributive goals from sectoral regulatory aims. Assuming a higher normative commitment to autonomous market operation, efficiency based regulatory models argue that the statist tendency to a political economy of 'corporatism' – distorting conflation of micro-economic market regulation with redistributive macro-economic

[11] Never a comitology fan or concerned that its competences might be surreptitiously siphoned off to the Commission in the fog of committee proceedings (Bradley St Claire 1997), Parliament is similarly wary that its competences may be ceded to powerful agency heads (Geradin & Petit 2004).

policies – can be combatted by means of establishment of governing regulatory expertise within bodies that act independently from government.

Vitally, however, efficiency-based regulatory models also gain in normative legitimacy as postulation of a concept of *pareto*-efficiency itself mediates against concerns that executive power should never be endowed with too broad a mandate. In other words, discretionary powers may be delegated to independent agencies where they have no redistributive consequences – which will always require majoritarian political oversight – and the subject-matter of regulation is value-neutral in terms of welfare losses within the general populace (Majone 1994). Accordingly, and to the degree that pursuit of economic efficiency has become a self-limiting principle within the polity, the independence of regulatory agencies is transformed from constitutional spectre to positive constitutional good; one which must be positively protected from potential perversion within political process.

In this analysis, an 'independent fourth branch of government' is no stranger to the transmission-belt model of administration, but is instead wholly integral to it being no more than its most modern manifestation. The long-term will of the polity for efficient regulation is ensured rather than endangered by the shielding of regulatory expertise from political contingency. At the same time, however, the modernised transmission construct demands that an independent administration of expertise must also be subject to control, in order to ensure that it is capable of fulfilling its regulatory functions and performs them well. The agency must consequently be made accountable to traditional institutions, as well as to the general public, in a manner that does not endanger its own autonomy, and is so through a plural scheme of oversight – drawn from US experience – which ensures that 'no-one controls the agency, yet the agency is under control' (Moe 1990; Everson 1995).

The European mode of ensuring the independence and accountability of EU agency operation primarily owes to the continuing impact of the '*Meroni* doctrine', or establishment by the CJEU of a principle of 'balance of powers' within the Union together with a concomitant ban placed on the delegation of powers to *ad hoc* institutions not named within EU Treaties.[12] Despite the fact that the *fait accompli* of European agency operation has belatedly been recognised within the Lisbon Treaty,[13] the *Meroni* doctrine continues to preclude the full independence of agencies at EU level. Accordingly, EU agencies are only ever 'semi-autonomous', independent in fact rather that law, operating under the umbrella of the European Commission, which retains a final decision-making power. The strict application of *Meroni* is often regarded as an outdated anomaly within EU governance structures: a barrier to pragmatic institutional evolution (Geradin & Petit 2004). However, the sensitivity that attaches to a principle of the balance of powers is explained by the on-going tension between supranational integration interests and national sovereignty. The unforeseen shift to supranational re-regulation of the internal market is also a *de facto* alienation of national competence. To the degree that the primary function of the balance of powers is one of maintaining the *transparency* of the ever shifting constellation of national-supranational competence, it might accordingly at least ensure that this alienation is never a silent one, but subject to explicit instead treaty alteration (Jacqué 1990).

Ever-present national-supranational tension, as well as more conventional fears about alienation of the supranational legislative competence, explains the extreme caution of recent Commission documents detailing and simultaneously justifying its own principles of agency EU operation. The

[12] Case (9/56) *Meroni* v *High Authority* [1957-58] ECR 133.
[13] But only to the degree that Article 263 TFEU expressly establishes a right of review of the CJEU over acts of agencies.

Commission's relations with its own agencies are also often strained; after all, semi-autonomous agency operation also threatens to alienate the competences of a Commission, which will also be held accountable for its impacts (Everson & Vos 2008). Nevertheless, the agency vehicle provides the Commission with a vital increase in its functional capacities, making the Commission an institutionally powerful if sometimes reluctant proponent of an EU-specific model of agency operation. Distilling down the White Paper on Governance, the draft IIA and the 'Way Forward for Agencies', or Communication withdrawing the draft IIA,[14] this justificatory model may be summarised as follows:

(1) *Agency creation and transmission*: Although full independence cannot be accepted within EU structures, agencies are still legitimated with reference to the (economic) principle of utility. They will only be established where the 'added' value of Community regulation can be demonstrated through cost-benefit analysis. Similarly, the balance of powers plays its own rhetorically justificatory role: agencies have a particular role to play in areas where the (executive) powers of the member states must be pooled to avoid over-concentration of powers at Union level; a notion which finds its counterpart in the establishment of 'networked' supranational-national agency operation. Likewise, transmission belt administration is assured by general restriction of the agency role to 'preparatory' decision-making in areas of 'technical expertise' where agencies can be supplied with 'a clear executive mandate'. The executive limitation placed upon agencies – they will never be afforded 'genuine' discretionary powers – is reinforced by 290 TFEU, determining that agencies may only be established by Parliament and Council regulations.

(2) *An agency structure of autonomy and accountability*: Plural theories of agency control, find their application in the stipulation that agencies must be placed

[14] See notes 2 and 9 above.

within 'clear lines of accountability'. A degree of operational independence from the Commission is nonetheless established by virtue of their threefold division into a Director, administrative boards (executive boards) and scientific committees. The Director is typically appointed subject to parliamentary approval. Administrative boards are made up of representative of the Commission, Council and, where necessary, member states, as well as non-voting stakeholders. The members of the scientific committees of agencies are appointed in open public competition on the sole basis of their expertise. Independence is also assured by demands that member state agencies operative within the EU-national network, will be 'autonomous' of their own governments.

(3) *Ex ante and ex post accountability*: The (modern) transmission principle of administration is further secured by imposition of a high degree of transparency upon agencies and the requirement that their proposed activities will always be laid down in an openly accessible annual work programme, which may likewise be subject to subsequent scrutiny in the light of the annual activity report. Agencies are also subject to a further scheme of *ex post* financial, political, administrative and judicial control, whereby significant oversight is furnished by the powers of the Court of Auditors, Council and European Parliament to approve agency budgets, and by review of individual decisions before the CJEU (Article 263 TFEU).

(5) *Scientific transparency and public accountability*: The Commission also seeks to facilitate review of agency operation by broader epistemic communities. Transparent agencies will play a part in 'the validation of the scientific-technical basis for formal regulation' and will be 'held publicly accountable for this role'. Agencies also have an important function in relation to the integration of stakeholder views within public regulation, which occurs within the agency itself. Their role to 'analyse and stimulate public debate at

both European and international level' attempts to reproduce the wider institutional legitimation, which arises as press and public follow the work of, for example, the policies of high-profile US agencies.

2. ESA Governance of European financial markets

Up until financial crisis, the supranational regulatory interest in financial services sought only to create a 'level competitive playing field' between EU and US regulatory structures (Mülbert & Wilhelm 2010) and generally restricted itself to the legislative harmonisation of national prudential regulation: first, establishing the creditworthiness of individual financial institutions (1980s), thus allowing for the creation of 'EU passports', or 'one-seat authorisations' for pan-European market actors (1990s); and secondly, engaging in co-operative national-supranational standard-setting and the sharing of best supervisory practices. Implementation of EU legislation was a matter for national authorities while material supervision, or regulation of the character of financial products, remained within the province of national supervisors. The period since crisis, however, has seen a deluge of financial services regulation.[15] Major initiatives have primarily focused around implementation of the Basel III international regulatory framework for Banks and its de-leveraging, but (still) risk-based regulatory approach: in particular, a strengthening of each of its three pillars encompassing quantitative requirements (regulatory and economic solvency), qualitative requirements (risk management and supervisory oversight, including 'stress tests'), as well as market discipline (disclosure and transparency). They have thus demanded a significant widening and deepening, both of EU legislation (Capital

[15] See, for details as of late 2011, Mülbert & Wilhelm (2011). The deluge of regulation is often characterised as posing a danger of regulatory dissonance (Moloney 2010).

Requirement and Solvency Directives[16]), and vitally, of supranational standard-setting and supervisory oversight. Basel III convergence has also been augmented by proposed EU legislation on deposit guarantee schemes,[17] as well as by important regulatory interventions into credit and securities markets,[18] which similarly increase potential expansion of the EU supervisory function (Moloney 2011b).

The character of the EBA, the EIOPA and the ESMA as rule-making and supervisory authorities mark them out as some of the most powerful autonomous institutions ever established at EU level. Broadly similar to one another, the tasks of the agencies are laid down in Article 1 of each founding regulation. Charged with 'improving the functioning of the internal market', 'sound effective and consistent regulation and supervision', 'ensuring the integrity, efficiency and orderly functioning' of markets, combatting 'regulatory arbitrage', 'consumer protection' and strengthening of 'international supervisory co-ordination', the agencies are afforded one major domain of rule-making powers:[19] the power to make Binding Technical Standards (BTS). These comprise Technical Regulatory Standards for harmonisation of the provisions of EU regulation and Implementing Technical Standards to be applied at national level. Exercised under competences delegated to the Commission by Parliament and Council under Articles 290 and 291 TFEU, BTS are subject to a 'regulatory with scrutiny procedure' – reproducing the traditional procedures of the Comitology

[16] Capital Requirements Directive (CRD III), 2010/76/EU (OJ L329/3 of 12.10.2010) for Banks, and the Solvency Directive for Insurers (Solvency II), 2009/138/EC (OJ L 335/1 of 17.12.2009).
[17] COM(2009)362 final for the banking sector..
[18] Above all, the Securities Regulation on Credit Rating Agencies (Regulation (EC) No 1060/2009), the Directive on Alternative Investment Funds (Directive 2011/61/EU, OJ L174/1, of 01.07.2011), as well as proposed regulation on over-the-counter derivatives and short-selling: COM(2010)484/5 and COM(2011)482.
[19] Article 10 and Article 15 founding Regulations. Similarly, the ESAs may contribute to the making of rules within the relevant 'College of Supervisors' (Moloney 2011a). Colleges of Supervisors exist at supranational and international level and are responsible for global standard-setting.

Decision[20] – which determines that, if opposed to the proposed BTS, the Commission has the power only to delay its full adoption as a regulation or decision, subject to parliamentary and Council scrutiny. The supervisory functions of the agencies are wide-ranging, relating primarily to the co-operative establishment of best practice or joint (risk-based) methodologies for national supervisory authorities through peer reviews and the issuing of recommendations and guidelines (Article 16 founding Regulations). Nevertheless, 'soft' supervision of national supervisory authorities hardens in particular situations, including:

(1) Breach of Union Law (Article 17 founding Regulations): when the relevant agency can make recommendations to national supervisors and private actors and pursue (Commission) enforcement proceedings;

(2) Emergency Situations, or threats to systemic coherence (Article 18 founding Regulations) where the relevant agency acts within the ESRB addressing decisions to competent national authorities and, where necessary, individual financial institutions;

(3) Consumer protection: or action in the case of threats posed to the consumer by financial innovation (Article 9 founding Regulations), where the relevant agency may temporarily prohibit detrimental activities or products by means of powers conferred within the general regulatory framework of the EFSF, or under Article 18 emergency powers.

Established in the midst of crisis, the first agencies to be subject to the new regime of non-delegation established by Article 290 TFEU, yet still established under an *ad hoc* regime of governance, the primary questions to be asked of the new ESAs are: are they functionally effective and to what degree can they

[20] Decision 1999/468/EC, laying down the procedures for decision-making within Comitology.

claim their own degree of non-traditional legitimacy under the EU agency model?

2.1. Utility and autonomy

Predictably, the primary concerns that have to date been raised about ESA structures regard tensions inherent to their partially autonomous status (Moloney 2011a); or the danger that the efficiency of supranational oversight may be undermined by institutional tensions between agencies, Commission, Parliament and Council. The ESAs are established under the *Meroni* doctrine, such that final competence and accountability rests with the European Commission. As a consequence, and to the extent that each agency Chair is enjoined in the exercise of their powers 'neither [to] seek or [to] take instruction from the Union institutions' (Article 49 founding Regulations), potential arises for the self-same form of agency-Commission conflict that has historically marked the EU agency model. Where a major facet of each ESA's functional legitimacy must be its capacity to respond speedily and appropriately to market conditions, the immediate danger is one that disruptive conflict will arise, in particular, during the negotiation of BTS between an expert-led agency seeking to concretise its profile and a Commission that is jealous of its own institutional competence.

Commission-agency conflict is not new, however, and is one which has largely been negotiated without fundamental upheaval within EU institutional relations (Everson & Vos 2008). Nonetheless, an additional institutional strain arises as the post-Lisbon foundation of the ESAs dictates that their sphere of delegated powers is also subject to the transmission strictures of Article 290 TFEU. A 'sunset clause' applies, limiting the Commission's competence to issue BTS within the EFSF for a period of four years (Article 11 founding Regulations), at the end of which time a review must be conducted. Similarly, Parliament and Council may revoke this delegation at any time. Although sunset clauses have proved to be a powerful tool within the US, ensuring that independent agencies are wholly focused upon their executive mandates, their impact may prove to be counter-productive within a specific EU constellation, which establishes semi-autonomous institutions to exercise the mandated competences of a Commission that is held accountable for them, made vulnerable to Council or Parliament whim, and consequently may be prompted to intervene in internal ESA affairs. Further, where BTS are issued by agencies under the regulatory with scrutiny procedure, the breadth of potential inter-institutional conflict is significantly widened: on the one hand, placing regulatory efficiency in doubt as interventionist concerns may inform application of heightened 'political' influence; on the other, casting the Commission as perpetually rancorous looser in an institutional game of competence accrual.

If the purpose of the ESFS is to promote the permissive consensus underlying autonomous, expert-led market regulation, the 'semi-autonomous' status of ESAs could prove to be the worst of all possible worlds. In addition, however, efficiency concerns have been raised about the expansion of ESA activities beyond their supranational regulatory role to one of supervision and implementation at national level. On one level, these worries echo efficiency-informed objections to the widening and deepening of the entire supranational regulatory competence. In this analysis, 'integration by stealth', or veiled neo-functionalist efforts to effect political integration by means of intensified EU market regulation, have not only frustrated efficiency-oriented regulatory programmes at national and European level, but have also undermined *pareto*-efficiency postulates as accentuated spill-over effects inexorably confront the Union with redistributive issues (Majone 2005).

However, given the co-ordination imperative that governs integration of the European financial services market, as well as the prevalence of regulatory arbitrage and contagion within the less intrusive Lamfalussy system, such arguments failed to convince in the run up to establishment of the ESFS (Snowdon & Lovegrove 2010), and are unlikely to convince now. At a less comprehensive level of critique, however, utility doubts may still be raised with regard to the balance struck within the ESAs between standard-setting and supervision, and between supranational and national input into the system.

It is possible that ESAs will promote evolution within the ESFS of a sensitive network of national and supranational regulators, who through sharing of good practice, information and regulatory insights will improve the overall efficiency and stability of the EU regulatory system. Worries about future operation nonetheless coalesce around the question of whether the ESA-NRA relationship will be established in a 'top-up' or 'bottom-down' manner (Black 2010). Potential conflict arises by virtue of the fact that regulatory standard-setting cannot be easily divorced from supervisory implementation and oversight. Instead, the relationship between standards and their on-going application is a necessarily complex one, not simply because understandings about regulatory aims may differ at each level, but rather because their successful achievement is necessarily context dependent (Moloney 2011b). Several factors militate in favour of local flexibility in implementation of BTS. First, the ESAs are new, relatively inexperienced supervisors and are currently understaffed; a factor which gives rise to particular concern about their potential effectiveness with regard to (consumer) product regulation. Secondly, however, regulatory goals will also necessarily require adaptation in view of the varied institutional supervisory structures applying at national level. They may also become contentious as austerity bites and far-ranging political decisions are made about allocation of resources at national administrative level. Above all, however, the risk-based approach to capital requirements and financial innovation proscribed by Basel III regulatory methodologies not only requires an intense degree of local knowledge in order to overcome informational asymmetries, but also demands regulatory-implementing flexibility to allow for experimentation with regard to rapid financial innovation. Equally, experimentalist localism may act as a 'safety-valve' within the system, easing contagion potential through a supervisory plurality that guards against the dangers that over-harmonisation and undue centralisation will themselves facilitate systemic shock (Black 2010; Moloney 2011b).

In other words, the system can only function effectively where the ESA-NRA relationship emerges as a genuinely-responsive and 'heterarchical' network with effective national input into standard-setting and sensitive supranational oversight of implementation and supervision (Black 2010). Nonetheless, the hardened and direct intervention powers afforded ESAs do represent a new hierarchical element within EU oversight, raising potential for inefficient centralisation within day-to-day supervision, as well as the establishment of a 'too distant interlocutor' in cases of potential systemic risk.

2.2. A structure of accountable expertise

An interesting peculiarity of ESA structure, which may militate against inefficiency effects, is the nature of expertise gathered within the authorities. Contrary to conventional EU agency practice, ESA structure does not reproduce the original regulatory/scientific committee divide born of comitology and generally transferred to EU agencies; nor has it experienced the unseemly scramble for parliamentary representation *within* the agency, witnessed during other instances of agency establishment (Everson 2005). Instead, expertise headlines the agency in the character of the Board of Supervisors, which is made up of the heads of each NRA, and is responsible for issuing BST, decisions, recommendations and guidelines, as well as budgetary discipline. One Commission member, single members of each of the two other ESAs, as well as a representative of the ESRB also sit on the Board as 'non-voting' members (Article 40 founding Regulations). The self-contained nature of technocratic expertise within the ESAs is further confirmed by the appointment of the Chairperson of the Authority for a period of 5 years by the Board of Supervisors itself, subject to a parliamentary approval process.[21] A concept of 'technocratic excellence' also plays its role: the Chairperson of EIOPA, for example, is to be appointed 'on the basis of merit, skills, knowledge of financial institutions and markets and of experience relevant to financial supervision and regulation' (Article 48(2) EIOPA Regulation). Similarly, the Board of Supervisors appoints the Management Board, which is responsible for the day-to-day operations of each of the agencies and conduct of its multi-annual work-plans, as well as its Executive Director (on the basis of merit, subject to parliamentary approval).

Possibly as a consequence of heightened influence afforded Parliament and Council under sunset clauses and revocation powers, the desire for political voice within the agencies is dampened. The contained technocratic nature of ESAs is likewise facilitated by a purging of national interest with regard to the establishment of duties of independence from the member states and Union institutions for both Supervisory and Executive boards (Articles 42 and 46 founding Regulations). Political arbitrage is similarly militated against by

[21] Parliament has already taken its approval power seriously, raising significant objections during the process of the appointment of the ESMA head.

simple majority voting in both Supervisory and Management Boards:[22] the sole decisional criteria are technocratic in nature, shorn of political interest and thus – under theories of expert deliberation (Majone 1996) – facilitative of the objectivity and epistemic co-operation that might ensure ESFS efficiency.

Given the technocratic coherence and functional autonomy of the ESAs, the primary legitimating mechanism for their operation is the establishment of an effective scheme of plural accountability, which ensures that the agency is both competent, and acts within its technical mandate. In this case, all the common control mechanisms apply: *ex ante* control of multi-annual work programmes and budgets by Parliament, Council, the Court of Auditors and by the Economic and Social Committee of the EU (Article 62 founding Regulations); on-going control of agency activities by means of parliamentary committee hearings, as well as inter-agency oversight within the joint committee of the ESA (Article 54 founding Regulations); and *ex post* multi-institutional control both of budgets and annual reports. In addition, agency decisions addressed to individual actors may be reviewed by the CJEU (Article 61 founding Regulations). Concerns nevertheless do arise: first, with regard to the budgetary adequacy of the agencies (Moloney 2011b); and secondly, with regard to establishment of a two-stage process of appeals against individual agency decisions, whereby litigants will first be directed to the Joint Board of Appeals, whose members are appointed by Executive Boards, but act independently from them.[23] Nevertheless, and in the absence of in-depth operating studies, it appears fair to state that – in structure at least – no-one controls the ESAs, yet the ESAs are under control.

[22] In the absence of weighted voting, it will prove difficult to forge political alliances amongst 27 voting members.
[23] Members can only be dismissed for 'serious misconduct', Article 58(5) founding Regulations.

2.3. Transparency and the public interest

However, final doubts about the accountability of agencies within the EU must remain, particularly with regard to their transparency and public responsiveness. To a large extent, these worries have accompanied all EU agency operation from its outset (Everson 1995). However, the particular concern that EU agencies are unable to generate their own (critical) epistemic and public communities of review and social responsiveness is necessarily heightened in the case of ESAs.

In contrast to the US (Shapiro 1988), EU institutional literature is strangely devoid of the theme of 'agency capture', which dominated the field in the 1970s (Stiglitz 1989). Instead – in line with the efficiency-based consensus – industry actors are regarded as 'stakeholders' within the regulatory process, representatives of autonomous market process whose views must be taken seriously in the establishment of sensitive schemes of regulation and oversight. The same philosophy applies to ESAs who are mandated to establish 'stakeholder' groups (Article 37 founding Regulations) – comprising market actors, as well as consumers and academics – and to consult them prior to issuing BST. ESAs are also required to establish a measure of modern transparency by means of the maintenance of up-to-date websites, promoting wider industry-led and public debate about their activities (Article 1 founding Regulations). Market actors – including consumers – are no longer conceived of as 'interests' who seek to pervert oversight schemes to their own ends, but are rather viewed as 'partners' in the unfolding of autonomously rational and efficient market regulation.

However, within the financial services sector, it was exactly this close relationship – between regulators and regulated – which contributed to financial collapse. Above all, the joint application of risk-based models of economic solvency fostered particularly co-operative and intense relations between business, regulators and even an academic community, within which the fatal complacency arose, which tolerated and even welcomed unsustainable business models as wealth-creating vehicles of innovation, which were also of benefit to (disadvantaged) consumers. The potential for agency capture was instead replaced with the far more subtle, but no less catastrophic dangers posed by creation of a dominant 'rationality', a shared mode of thinking – or 'cognitive failure' (Black 2010) – which could not recognise, let alone tolerate dissent. Accordingly, in establishing its own epistemic community of review, the ESFS as a whole is surely charged with identifying voices, not of partnership, but of dissent – of 'mavericks' (Black 2010) – of identifying challenges to its own philosophies and methodologies. Nonetheless, a vital question remains: where might these malcontents come from?

Problems primarily arise with regard to fostering of wider public debate. Within the US, a vital element of legitimate agency operation is the broader public that attaches to particular and identifiable institutions, such as the Environmental Protection Agency (Vibert 2007). Nevertheless, in three decades of operation, no such 'agency public' has arisen within the EU. In part, the problem is one of a lack of a European press; the absence of a European public sphere of communication and the tendency to 'renationalise' European decision-making within a fragmented media which focuses on the implementation of EU decisions by national actors. The problem is also institutional: notwithstanding the fact that Supervisory Boards are enjoined to act 'independently and objectively in the sole interests of the Union as a whole' (Article 42 founding regulations), no *general* public right to challenge the actions of European Agencies has been established. The reformulated Article 263 TFEU has considerably widened the parties who might request

CJEU review of ESA implementing acts. Nonetheless, a European Procedures Act has yet to be established, lessening potential for procedurally-based actions before the Court. The publicity and 'post-legislative' control generated by class actions (Stewart 1975), is accordingly still absent from the EU system. Similarly, however, the problem is also specific to financial services. Confidentiality matters: in the case of emergency action to combat systemic risk, in particular, there are powerful reasons that militate against wide-scale provision of information to the public.

III. The rationality of 'risk and normality'

1. Reinstated steering capacity in the responsive regulatory environment?

To the degree that models of agency governance are predicated upon the efficiency of economic autonomy, within the postulate that *pareto*-efficient regulation is best conducted behind a firewall which guards against political contingency, the primary concerns in terms of legitimating institutional design must be those of the establishment of the independence and accountability of a shielded core of expertise. Nevertheless, such starting-assumptions and institutional conclusions may be doubted and, indeed, are strongly questioned by influentially sophisticated sections within (national) regulatory debate who maintain a far more optimistic view of the continuing vitality of political steering mechanisms within the market. In this view, the trend to an autonomous market and independent regulation is wholly overstated: although the grand ideological battle between command interventionism and market autonomy appears to have been comprehensively lost, typological distinctions made between 'responsive', 'smart' or 'performance-based' regulation do matter, or are argued to do so to the extent that they both reflect and impact upon our view and our reality of how steering capacities within the modern economy are exercised and to what end (Vibert 2011). Autonomous regulation is not an act of deregulation, nor a mandated imposition of *pareto*-efficiency, but merely the establishment of a 'regulatory enterprise' (Prosser 2010), within which the sharp divides made between public and private spheres, between efficiency-led regulation and continuing pursuit of social goals necessarily dissolve within a (traditional) *praxis* of discretionary supervision, a melange or network of (radicalised) delegation in which all competing regulatory rationales of efficiency and consumer choice, pursuit of legal rights, social solidarity and consumer protection are still to be fought out – or, more commonly, resolved (Prosser 2010).

On the basis of empirical evidence, the regulatory enterprise, is accordingly argued to represent 'government in miniature' (Prosser 2010), wherein seemingly minor typological regulatory distinctions may be argued to represent different models and rhetorical strategies detailing exactly how social and institutional resources might be utilised, regulatory actors be incentivised and, vitally, macro-economic goals be assured (Vibert 2011). Depending on the regulatory variant chosen, emphasis is accordingly laid upon knowledge and learning within a networked regulatory environment, wherein cognitive capacities of regulator and regulated are expanded and enhanced within a sliding enforcement scale, ranging from more common suasion to rarely-deployed sanction (Baldwin & Black 2010). Or, upon the behaviour or perceptions of private actors, whereby command is replaced with incentive and sanction with the (radical) steering-capacity of 'nudge' or the cognitive re-alignment of private to public interest (Thaler & Sunstein 2008). To such functional efforts to improve the effectiveness and sensitivity of regulation, however, must be added a vital – in necessary response to crisis

(Black 2007; Baldwin & Black 2010) – 'performance-based element', which seeks to re-establish the missing-link, or component of macro-economic control; not, however, through defunct commands, but rather through better enunciation and co-ordination of micro and macro-economic goals (Vibert 2011).

In this view, the creation of the ESFS, or establishment of an institutionalised technocracy of European financial supervision, is accordingly not a particular problem of delegation of oversight capacities, but rather a long overdue recognition that political steering capacities over financial markets can now only be effectively exercised – also at supranational level – within autonomous regulatory structures that are sensitive to learning, incentives and public-private co-ordination. Above all, clear political elaboration of a series of regulatory goals that emphasise the macro-economic goal of 'financial stability',[24] overcomes the existing state of nature within European financial markets. Meanwhile, close co-ordination between macro and micro-economic supervision is similarly assured both by institutional obligations placed upon ESAs to alert the ESRB to operational and product-based malfunctions that might endanger the 'orderly functioning' of financial markets. By the same token, the potential problems of ESA function may – in this view – be re-characterised as habitual characteristics of the regulatory space; commonly manifested features to be managed, rather than viewed with suspicion. Above all, sunset and revocation clauses, enabling re-entry of political power into the system might be argued to be a simple, if messy, manifestation of on-going political steering capacity; a vital means to adjust its on-going operation to regulatory goals. Equally, the apparent tension within the agencies between their market innovation functions – clearly enunciated within the pre-ambles of founding regulations - and their

[24] Article 2, Regulation (EU) No 1092/2010, of the European Council and Parliament, on macro-financial oversight of the system and establishing a European Systemic Risk Board.

precautionary role with regard to product regulation (Moloney 2011a), might suggest a lack of clarity within the regulatory mandate afforded agencies. However, it is also simple reflection of the necessary tensions that arise in any modern regulatory enterprise between notions of consumer choice, consumer protection and macro-steering: is the regulator a representative of (ethically or socially-constructed) consumer interests that defy commodification, a vital co-ordinator between micro and macro-economic policy, or a facilitator for 'marketised' consumer opportunity – a choice that is to be made in the instantiated light of deliberation.

All is well in the world of European financial services regulation. Or is it? On brief reading, this regulatory debate presents a curious mix of blind optimism and equally unsighted rationalism, at least, with regard to steering that might accomplish (social) macro-economic goals. Diffuse feelings of social solidarity within 'government in miniature' are to be welcomed, but are surely no substitute for majoritarian self-dedication to comprehensive social redistribution; meanwhile assertion of social rights within executive process is necessarily piecemeal and subject always to the necessary balancing acts of juridification. Likewise, 'nudge', or the mechanism designed to ensure re-alignment of private with public interest is itself inevitably founded within the market-leaning rationalities of behavioural economics, and would seem singularly ill-designed to implement wholesale challenge to the rationalities in which it is rooted. This final point is vital: within the optimistic regulatory debate itself, emerge conceptual problems of the 'cognition failure' to which 'risk-based regulation' is particularly prone which – although underestimated within that debate itself – highlight a potential for rationality capture within modern regulation, which itself facilitates a fatal sociological abdication of political responsibility.

2. Rationality Capture

Founded within the Basel III accords of the Basel Group of International Banking Supervisors that sought to overcome the deficiencies of the risk-based regulatory scheme introduced by Basel II – a scheme which inexorably contributed to financial meltdown [25] - the underlying philosophy of the ESFS is founded in a process: (1) of debt de-leveraging through enhanced regulatory solvency; (2) of discouragement of systemically inappropriate debt re-securitisation by means of better co-ordinated oversight of economic solvency margins maintained by individual financial institutions, as well as their internal risk management processes; and (3) imposition of stringent market discipline and transparency to discourage further stealthy re-securitisation. Reform specifically entails better oversight of the Value at Risk (VaR) methodology of prudential financial supervision[26] introduced by Basel II: first, in order to minimise its internal 'pro-cyclical' impacts, whereby strong markets encourage hazardous debt-securitisation; and secondly, to improve external supervision with regard to VaR's methodological application and the transmission of systemic shock.[27]

At core, and beyond increased regulatory capital requirements, Basel III and the ESFS vitally do not represent a radical re-evaluation of the founding risk-based regulatory philosophy of Basel II. Instead, they may be characterised as making corrective modification to the existing scheme of risk-based regulation and supervision and, in the case of the insurance sector, might also be argued to be a radical (and dangerous) extension of it.[28] The continuing

[25] The accords were ratified by the G20 in November 2010.
[26] Requiring financial institutions to assess their own liabilities with regard to calculations offsetting debt risks against credit potential within wider financial markets.
[27] With a particular focus on the insurance industry, Beltratti & Corveno (2008).
[28] To the degree that regulatory convergence in the financial services industry would seem to find its limits in its lack of recognition that the insurance *product* is 'different' – not a means of personal financial securitisation, but rather a product, which is bought to offset concrete contingencies (Beltratti & Corveno 2008). To this degree, it appears incongruous that VaR will be

dominance of the rationality of 'risk-based' regulation – or, more cogently, the failure to engage in explicit questioning of it – is nonetheless highly incongruous given the central role that it played in financial melt-down. A risk-based approach to regulation radically increases the risk of cognition failure – particularly with regard to a fragmented and decentralised regime of control - where supervisory or self-regulatory failure to identify and to communicate risks can and did cause systemic shocks of epic proportions.[29] More significantly, however, risk-based models of regulation may also create a lack of political accountability on the part of regulators: '[F]raming regulatory problems as risks allows regulators to argue that certain regulatory failures, are not regulatory failures at all, but normal events, which are to be expected, and for which they are not to blame' (Black 2007:58).

To radicalise and expand upon this statement with regard to a European regulatory space: where permissive consensus at national level has played its own role in the evolution of a European technocracy within the constitutional *lacunae* of the EU, a 'normalisation of inevitability' translates into regularised denial of political accountability. Here it may be argued that ideological battle has been replaced, not by a new political reality – reflecting 'the old' through 'government in miniature' – but by a seductive formula of political abdication instead: the process of wealth-maximisation is a universal good – or normality – to which all conflicting political positions might commit themselves without fear of blame for its collapse. By the same token, the need for the *ex ante* political identification of what constitutes market failure is obviated. No break on autonomous market operation need ever be applied and political responsibility for the lost benefits of potential market innovation need never be assumed. Instead, the potential for collapse of wealth-maximising markets

applied to the insurance sector – by and large not impacted upon, or a player in financial crisis – for the first time.

[29] Recognised as a major cause of financial collapse, 'The whole is only as strong as its weakest link', see, IMF, The Fund's Mandate – An Overview (January 2010), 12.

becomes the norm as it is re-characterised as a 'risk' that might be quantified and assessed within expert-led processes of evidence-gathering; to then be managed within a neutered 'political' process that also lends itself to the (expertly economic) techniques of cost-benefit analysis. Contrasting regulatory goals of consumer choice, consumer protection and macro-steering do not represent opposing political aims, but are, instead, neutral regulatory goods, the quantitative benefits of which might be objectively balanced the one against the other.

Seen in this far more critical light, the vital problem is not one that regulators might deny blame for market failure, but rather that the concept of market failure has itself been expunged, that the famous distinction between uncertainty and risk made by Frank Knight (1921) has been collapsed, such that the question of political accountability for financial collapse need never arise. Rather than being founded upon a differentiation between risk and 'uncertainty' – or, a situation of uncertainty to which politics would once respond by limiting the sphere of free operation of the market – modern economic policy is based upon the distinction between risk and a 'normality' (of market collapse), to which politics need not respond. In this setting, the specific constellation of expert oversight within a European space of governance matters, and gives rise to disturbing conclusions. First, at pragmatic level, the EU has not only already experienced 'normal collapse' within its risk-based schemes of governance. Instead, its 'precautionary' response has also proved inadequate with regard to re-entry of social concerns within EU policy (van Asselt & Vos 2008). The BSE crisis, in particular, still teaches us that risk-based models of regulation, and – above all, their evidence-based core – do not and can never furnish us with universally objective truths. Scientific method is scientific method: risk can only be modelled where evidence has been gathered that demonstrates its existence. Permissively translated into regulatory models of wealth-maximisation, the notion of 'quantifiable risk' accordingly becomes the spectre that promises to deceive; a social construction, which disguises the reality of hazard or uncertainty, for which no one holds themselves accountable. At the same time, however, the ideologically de-neutered response to scientific uncertainty – or principle of 'precaution', secured at EU treaty level (Article 191 TFEU) – has similarly confounded all mechanisms of judicial control: in a world dominated by the rationality of innovation and wealth-maximisation, courts will not re-instate political process, will not overturn expertise with reference to social or ethical concerns, will not substitute their will for that of political process. Instead, courts still demand – in defiance of all logic – an (impossible) evidentiary base for the existence of hazard, or for risk that has yet to be or cannot be quantified, with the consequence that potential for harm remains unchecked (van Asselt & Vos 2008).[30]

Secondly, where a rationality of risk has established itself at the very core of the regulatory regime, it can surely only ever be challenged where political channels of influence are particularly strong. Nonetheless – as ECB actions during the sovereign debt crisis teach us – the autonomous institutions of European governance, discursively legitimated *only* by their expertise and their autonomy, are inevitably resistant, to all 'contingent' political influences that contradict their mandated regulatory objectives, and are so even to the point of systemic collapse. The strength of parliamentary oversight over ESAs might thus be particularly doubted, especially where it urges precautionary approaches to financial innovation: for telling example, all historical

[30] The prime example is that of the slow but inevitable proliferation of genetically-modified organism throughout the EU. Ethical and social concerns about the impacts of GMOs have found it particularly difficult to assert themselves against the 'governing rationality' of the EU Commission and the refusal of the CJEU to afford and normative value to hazard (van Asselt & Vos 2008).

parliamentary efforts to enjoin pursuit of broader economic policy upon the ECB have been comprehensively rebuffed within a cognition dissonance of epic proportions (Atembrink & van Duin 2009). Where the justificatory discourse of independence within European governance has hardened into law, the ESAs may, as a simple result of their own self-justificatory legitimacy, find it hard to accept or even recognise interference with their evidence-based mandates, even where evidence has run out.

The cognition gap identified as a major cause of financial collapse is radical in its extent and perhaps only accentuated by efforts to correct financial dysfunction within regimes of regulatory response, which disguise ideological abdication of responsibility for the political construction of market failure and instead create an appearance of objective truth and evidence-based 'certainty' where none may exist. To this extent, problems of agency capture by economic interests are surely dwarfed by the *self-capture* of the system by a governing rationality of risk – a methodology of regulation that owes its existence, not to sovereign intent, but to political abdication. The hope that cognitive failure, even in relation to initially quite limited instances of financial innovation, can be overcome by 'mavericks' who question both the economic 'science' of VaR, as well as the construction of a 'normality' of market collapse, is a faint one.

IV. The Technology of Expertise

The problems of control of exercise of expert-based executive power are greatly magnified at an EU level where traditional forms of democratic process are in any case weak. They are necessarily accentuated where general trends to abdication of political accountability are naturally heightened within the institutional and process *lacunae* of a governance structure, which must balance supranational integration intent against national interests. They are further radicalised where permissive consensus and a governing rationality of risk substitute for democratic will formation. The core issue, however, is not one of a lack of justification, or absence of attempts to legitimise the sphere of governance beyond traditional government. Instead, the governance enterprise is replete with justificatory discourse: of debate about a sphere of technocratic and market autonomy within which constitutional tradition (transmission) reacts against and is interwoven with expert-led and evidence-based regulatory strategies; a realm of radicalised delegation where social and ethical concerns at least seek influence over, or re-entry within technical regulatory process.

To contemporary regulatory debate, competing justificatory discourses and the contradictions inherent to the endeavour to establish an autonomous sphere of regulation, within which learning, but also continued engineering is the norm, do not recall historical spectres of the usurping administration. Instead, the blurring of the public and the private, the flattening of distinctions between governors and governed is no more than overdue pragmatic recognition that steering capacities cannot be assured through political fiat. Instead, steering is possible only where political capacity is radically extended into the private sphere, where it acts *within* a network of public-private relations. *Pareto*-efficient regulation is revealed as the purely theoretical construct even its supporters concede it to be (Majone, forthcoming); a putative limitation of the regulatory sphere which has no concrete meaning. Meanwhile, even Michel Foucault's famous formulation of 'governmentality' – the spread of a power of rationality across the web of human relations – finds its curious place within sections of contemporary regulatory theory, not simply as a characterising tool, which might be used to describe the modern operations of steering capacity within autonomous market operation, but also as a potential 'regulatory tool' in its own right (Scott 2004).

As much as it confounds, regulatory deployment of the work of Foucault is nonetheless illuminating to this analysis. Certainly, (slightly) more conventional analyses of modern power relations, which continue to posit the existence of sovereign will or a source of power, might provide regulatory debate with useful techniques to enforce steering-capacity within autonomous market logics: means of establishing an 'unobservable' power that impacts upon the minds of its subjects by usurping the environment of debate, 'such that the subject can no recognise that other opportunities for action exist' (Lukes 2005:14-29). However, the 'power' of governmentality and 'political technology' is a very different creature indeed, attaching to rationalities, or *savoir faire*, that are authored by and within human affairs, but of which man is no longer the subject but the object instead (Foucault 1994:416). The scientification of the social is radical in extent and entails negation, not of political steering capacity, but of political subjectivity itself. Rationalities are authored, but the political subject stands in a necessarily 'agonistic' relationship with them; simultaneously their 'scientific object', or a politically-denuded entity forever struggling with and permanently provoked by political technology (Foucault 1994:343). Foucault is not a thinker who might aid to overcome the perennial danger of usurped executive power; instead, he is the thinker who demonstrates just how dark this spectre is.

Seen in this light, the construction or 'fiction' of *pareto*-efficiency and the modern transmission belt-model of administration take on a far more significant constitutional meaning. The core message that autonomous regulatory oversight and the fourth branch of government should only be established where regulation has no redistributive consequences (Majone

1994), may entail a radical extension of the self-limiting of the polity witnessed in the 18th Century creation of constitutionalised property rights. Nonetheless, the sphere of market rationality is itself subject to limits: above all, finance or monetary policy with all of its redistributive consequences can never be viewed as a suitable object for supervision (Majone 1996). Certainly, for example, independent central banks might still be established, but their creation must be understood as political projects with political consequences, for which political accountability must be assumed (Majone 2005). To this degree, the modern transmission-belt model reveals itself as the other side of the coin of renewed post-war or Hayekian commitments to the constitutionally-secured sphere of private autonomy: where Hayek emphasises the importance of establishment of spheres of autonomy *outside* of the political technology of the state and in defence against it, the modern transmission model, by contrast, raises a normative expectation that political technology will also be overcome *within* the state; markets may be made 'free', but, by the same token, political accountability must be explicitly assumed for political projects.

The emergence of permissive compromise and a rationality of risk within the EU, and more particularly, their impacts within the ESFS, might accordingly be characterised, not as a radical extension of the traditional constitutionally-secured sphere of (market) autonomy, but rather as a final perversion of it: following abdication of political accountability, the market becomes subject to the technology of expertise. Where permanent innovation within financial services markets – or substitution of ever more refined debt financing mechanisms for the (politically) defined, if lacklustre, *product* of traditional markets – forms a part of the permissive consensus which has also seen (Keynsian) debt privatised in ever more refined, but ever more illusionary, re-securitisation mechanisms (Crouch 2011), we are all made complicit with a rationality that entails the abdication of political accountability for public welfare. Where a rationality of risk normalises permanent potential for failure of financial markets, Foucault's final and unexpected observations on the slow passage from Hayek's self-limiting philosophies to the expansive rationalities of neo-liberalism – 'anarcho-liberalism' – prove topical, and highly uncomfortable. The rationality of wealth-maximisation, married with the behavioural sciences (economics), heightens permanent agonism between political subject and rationality, and does so to the point of systemic collapse: where expressions of political subjectivity, or attempts to adjust or influence autonomous expertise on the part of Parliament, Council or public may be characterised, to then be dismissed within the 'science' or rationality of regulation, as instances of 'risk aversion' within 'economic objects', political capacity and democratic will have been wholly usurped (Foucault 2008).

The vision is without doubt dark, and hopefully overstated – at least as regards financial services. Nonetheless, darker visions, as well as clear instances of potential collapse within the technology of expertise of the European governance space are now painfully apparent. Where the *only* possible responses to the failings of a technocratic system of monetary supervision are a further technocratisation, the abdication of all political responsibility and accountability within Fiscal Union and establishment of 'technocratic governments', then just as surely as European Union governance has innovated, it has only returned to Max Weber's soulless administration or Carl Schmitt's midnight black spectre of 'technicity' within the '*Großraum'* (Joerges 2011).

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