Accountability of EU agencies: the case of European Banking Authority

Master Thesis

submitted for obtaining the academic degree of

Master of Arts in European Union Studies

at the Paris Lodron University of Salzburg

Submitted by

Dajana Vuletic
Student number: 01321529

Supervisor:

Prof. Dr. Sonja Puntscher-Riekmann

Salzburg, October 2019
Abstract

The European Banking Authority is one of the recently established EU agencies, as part of the European System of Financial Supervision. Established as part of the EU measures to deal with the severe financial crisis, alongside the ESMA and EIOPA, its main task is to strengthen the supervisory arrangements and rebuild the trust in the EU financial system. The ongoing discussions among theorists raised many concerns about the scope of powers delegated to this agency. The EBA has quasi-regulatory powers and therefore it is important that mechanisms to hold the Authority to account are adequate and effective. In this respect, this thesis uses Bovens’ theory in order to answer the question, what are the EBA’s accountability regimes and how do they work in practice? Bovens defines accountability as „a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.“ Here raises the question whether this theory can provide a comprehensive explanation of the EBA’s accountability regimes? In this respect, this thesis involves two case studies, the draft technical standards under the revised Payment Services Directive and the stress-test from 2016, which should give answers about the scope of powers of the EBA and about the instruments of holding this agency accountable.

Keywords: EU agencies, accountability, limits of agencification, European System of Financial Supervision, European Banking Authority, Banking Union
# Table of Contents

### Abstract

**Introduction** ........................................................................................................................................... 6

### 1. Theoretical framework...................................................................................................................... 8

1.1 Concept of accountability .................................................................................................................. 9

1.2 Types of accountability ..................................................................................................................... 10

1.3 Accountability deficits in EU governance ......................................................................................... 12

1.4 Evaluation frameworks for accountability ....................................................................................... 13

### 2. Methodology ..................................................................................................................................... 14

### 3. Agencification .................................................................................................................................... 16

3.1 Brief historical overview of creating the EU agencies .................................................................... 16

3.2 Powers and types of EU agencies ................................................................................................... 18

3.3 Organisation and tasks of EU agencies ............................................................................................ 20

3.4 Debate on accountability of EU agencies ........................................................................................ 21

3.5 Limits of agencification in the EU ................................................................................................... 23

3.5.1 Meroni case .................................................................................................................................. 24

3.5.2 Romano case ................................................................................................................................ 26

3.5.3 ESMA short-selling case .............................................................................................................. 27

3.5.4 Implications of the ESMA judgement on the future of the agencification process ......................... 30

3.6 Agencification of the European Financial Sector ............................................................................ 31

3.6.1 Financial crisis in 2008 and reasons for agencification in the EU Financial Sector ....................... 31

3.6.2 Establishment of the ESFS ........................................................................................................... 33

3.6.3 Agencies in the European Banking Sector .................................................................................... 35

### 4. European Banking Authority .......................................................................................................... 36

4.1 Legislative framework ....................................................................................................................... 36

4.2 EBA’s internal governance ............................................................................................................... 38

4.3 EBA and the Banking Union ............................................................................................................ 40

### 5. Accountability arrangements of EBA ............................................................................................... 41
5.1 Accountability relation to the legislative actors

5.1.1 Accountability of EBA vis-à-vis the European Parliament

5.1.1.1 Regulation (EU) No 1093/2010

5.1.1.2 EBA’s mandate under the Payment Services Directive (PSD2)

5.1.2 Accountability of EBA vis-à-vis the Council

5.1.2.1 Safeguards

5.1.2.2 Annual reports

5.1.2.3 Annual work programme

5.1.2.4 Multi-annual work programme

5.1.3 Accountability of EBA vis-à-vis the Commission

5.1.3.1 Technical standards

5.1.3.2 The Commission’s general report

5.2 Inter-institutional relations and accountability

5.2.1 Joint Committee

5.2.2 Board of Appeal

5.2.3 Actions before the Court of Justice of the EU

5.2.4 Relation to the ECB

5.3 Relation to the National Regulators

5.3.1 Guidelines and recommendations

5.3.2 Breach of Union law

5.3.3 Peer reviews

5.3.4 Colleges of supervisors

5.4 EBA and the market actors

5.4.1 The Banking Stakeholder Group

5.4.2 EU-wide stress test

5.4.3 EBA and the world’s oldest bank

Conclusion

References
### List of abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>BU</td>
<td>Banking Union</td>
</tr>
<tr>
<td>SEA</td>
<td>Single European Act</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>SRM</td>
<td>Single Resolution Mechanism</td>
</tr>
<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
</tr>
<tr>
<td>SSM</td>
<td>Single Supervisory Mechanism</td>
</tr>
<tr>
<td>EBA</td>
<td>European Banking Authority</td>
</tr>
<tr>
<td>EIOPA</td>
<td>European Insurance and Occupational Pensions Authority</td>
</tr>
<tr>
<td>ESMA</td>
<td>European Securities and Markets Authority</td>
</tr>
<tr>
<td>ESFS</td>
<td>European System of Financial Supervision</td>
</tr>
<tr>
<td>OLAF</td>
<td>European Anti-Fraud Office</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
</tr>
<tr>
<td>EP</td>
<td>European Parliament</td>
</tr>
<tr>
<td>ECSC</td>
<td>European Coal and Steal Community</td>
</tr>
<tr>
<td>ESAs</td>
<td>European Supervisory Authorities</td>
</tr>
<tr>
<td>FSAP</td>
<td>Financial Services Action Plan</td>
</tr>
<tr>
<td>CEBS</td>
<td>Committee of European Banking Supervisors</td>
</tr>
<tr>
<td>NCA</td>
<td>National Competent Authority</td>
</tr>
<tr>
<td>MS</td>
<td>Member States</td>
</tr>
<tr>
<td>PSD2</td>
<td>Revised Payment Services Directive</td>
</tr>
<tr>
<td>ECB</td>
<td>European Central Bank</td>
</tr>
<tr>
<td>ECON</td>
<td>Committee on Economic and Monetary Affairs</td>
</tr>
<tr>
<td>MEPs</td>
<td>Members of the European Parliament</td>
</tr>
<tr>
<td>RTS</td>
<td>Regulatory Technical Standards</td>
</tr>
<tr>
<td>BRRD</td>
<td>Bank Recovery and Resolution Directive</td>
</tr>
<tr>
<td>CRD IV</td>
<td>Fourth Capital Requirements Directive</td>
</tr>
<tr>
<td>TS</td>
<td>Technical Standards</td>
</tr>
<tr>
<td>ITS</td>
<td>Implementing Technical Standards</td>
</tr>
<tr>
<td>EEA</td>
<td>European Economic Area</td>
</tr>
<tr>
<td>BSG</td>
<td>Banking Stakeholder Group</td>
</tr>
</tbody>
</table>
Introduction

At every level of governance, calls for more accountability and transparency have increased in the last couple of decades. Accountability is especially expected regarding the organisation and functioning of international organisations, to which Member States delegated powers. Even though the importance of accountability is strongly emphasised in the democratic systems nowadays, there is a lack of clarity about the concept of accountability and the main purpose of it.

This thesis is dealing with the accountability regimes within the EU governance, particularly taking into account an increasing number of EU agencies and their ever-increasing powers. Among some EU politicians, as well as among many political scientists, arose arguments that „the EU suffers from serious accountability deficits“ (Bovens, 2007, p. 447). However, how do we assess the existence of lack of accountability? As the theoretical framework of analysing the accountability regimes of the European Banking Authority (EBA), this thesis will use the Bovens’ concept which defines the accountability as „a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.“

This thesis perceives the process of agencification, as a modern institutional phenomenon, which enhances the credibility of the EU executive. The recently established financial agencies, under the European System of Financial Supervision have quasi-regulatory powers, which can be seen as problematic from the perspective of legal limits of agencification. However, their strong accountability regimes indicate that these powers are well controlled by the EU legislative institutions, as well as by the other important actors at the supranational and at the national level. Moreover, the operation and success of such agencies may bring stability, global cohesion and popular confidence in respect of European regulatory powers (Fahey, 2011).

The EBA was created in 2011 as part of the EU reaction to the financial crisis. The main task of the EBA is to create a single market in the EU banking sector, by developing the common regulatory framework, which is applicable to all EU banking market actors. The concerns about the accountability of the new established EU agencies in the financial sector, were addressed many times in the political, economic and legal theory, given the scope of powers delegated to these agencies. Moreover, their specific structure gathers a number of different supranational and national
actors which makes its accountability regimes very complex. This thesis will give an overview of the EBA’s accountability relations and how they affect its work.

In order to give a background to the main research question, first it will be presented the agencification phenomenon in the context of the EU institutional structure. It will be presented the historical overview of the creation of EU agencies, their powers, tasks and organisational features. The following section will include the explanation of legal limits of agencification, which is significant and strongly connected with a debate about the accountability of the EBA. In this respect there are three main CJEU cases which deal with the issue of delegation of powers to the EU agencies: Meroni, Romano and ESMA case. In the next chapter, it will be presented the reasons and circumstances under which the ESFS was created, as well as the main aim of creation of new generation of EU agencies.

The fourth chapter will present the EBA’s internal governance, its tasks and powers. It will be perceived whether and how these powers changed in the context of creation of the Banking Union. The following part will deal with the main research question: What are the accountability arrangements of the EBA and whether these accountability regimes are effective? In this respect, it will be explained the accountability relations of the EBA to the legislative actors, other European financial regulators, national authorities and to the market actors. When it comes to the legislative actors, it will be explained the EBA’s accountability regimes vis-à-vis the European Parliament, the Council and the Commission. Regarding the horizontal accountability relations, here will be explained the interactions between the EBA and the other two financial agencies (ESMA and EIOPA). Another important accountability relationship is the relation of EBA vis-à-vis the ECB. Following the horizontal accountability relations of the EBA, it will be explained the relation to the national authorities and the complexity of these accountability arrangements. Finally, the accountability relations of the EBA vis-à-vis the market actors is significant from the perspective of real scope of powers of this agency and whether it can really influence the political decisions.

Given the complexity of the EBA’s accountability arrangements, it will be interesting to perceive whether the Bovens’ concept of accountability can give the appropriate explanation of mechanisms to hold the EBA to account.
1. Theoretical framework

In national political systems, administrative actors are in a relationship of delegation of powers and of control and accountability with the political actors (government and parliament) and ultimately with the citizens (Curtin, 2007, p. 524). Political scientists refer to this analysis as „principal-agent“ model. Delegation of powers, in this sense, includes a link between a principal and an actor who should act on a principal’s behalf (Curtin, 2007, p. 525). However, in the context of analysing the EU political system, this model is not completely adequate for analysis of the accountability relations between different actors. Reasoning for this is there is „no unbroken chain“ of delegating powers from the voters to the EU administrative actors. At the EU level there are often multiple chains of delegation of powers with multiple links (Curtin, 2005, p. 90). Furthermore, there is often more than one principal involved in those relations.

In the recent decades, the EU experienced a significant development of its institutional structure, by delegating powers and tasks to the increasing number of non-majoritarian agencies at the EU level of governance. Currently, there is no legal basis in the EU Treaties for the creation of European-level agencies. In the process of agencification of EU administration, the Commission and the Council played a crucial role by delegating its tasks to decentralised agencies. These bodies are established in order to perform defined tasks, using expertise, functioning in an autonomous way and not affected by political changes. The agencies are mostly created as a response to the particular circumstances of the moment. In certain cases the occurrence of a crisis that has aroused public sensitivity is the basis of the decision to create the agency (Curtin, 2007, p. 527).

In the last couple of decades, there were established more than forty agencies, with different types of tasks and powers. Since their accountability relations mostly include more than one principal, due to the importance and complexity of their tasks, it is not adequate to use only a principal-agent model as an analytical framework in order to grasp the accountability relations of EU agencies. This thesis will use Bovens’ concept of accountability (Bovens, 2007) as a theoretical basis of analysing accountability relations of the European Banking Authority (EBA).
1.1 Concept of accountability

In political science, „accountability“ is mostly used as a concept that covers various other concepts such as transparency, equity, democracy, efficiency, responsiveness, responsibility and integrity. „It can mean different things to different people“ (Bovens, 2007, p. 450). One of the reasons for the unclarity about the concept, is the fact that „accountability“ is an Anglo-Norman concept which has no semantic equivalents on the European continent. In other languages like Portuguese, French, German, Spanish, Dutch, there is no exact equivalent and they don’t make distinction between „responsibility“ and „accountability“ (Bovens, 2007b, p. 105). Within American academic and political discourse, the accountability is perceived as a set of standards for the evaluation of the behaviour of public actors. In a broad sense, the accountability is an evaluative concept, which should positively qualify a state of affairs or the performance of an actor (Bovens, Schillemans and Hart, 2008, p. 227). According to Bovens, accountability is a contestable concept, since there is no general consensus about the standards of accountable behaviour.

On the other hand, in European academic discourse, accountability is mostly defined in a more narrow sense. It is perceived as a social mechanism, as an institutional relation or arrangement where an actor can be held to account by a forum. In this sense, the accountability is not concentrated on the behaviour of public agents, rather on how these institutional arrangements work. Bovens defines the concept of accountability in a more sociological sense, referring to concrete practices of account giving. He gives a definition of accountability as „a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences (Bovens, 2007, p. 450).“

According to his definition, an actor can be an individual (an official or civil servant) or an organisation, such as a public institution or an agency. The accountability forum, can be an individual, such as a superior (minister or a journalist) or it can be an agency, like a parliament, a court or an audit office (Bovens, 2007, p. 450). The relationship between an actor and a forum can be based on a principal-agent relation, whereby the forum is a principal (for example, a parliament which delegated authority to a minister) and the agent has an obligation to render account about his performance on a regular basis. According to Bovens, account giving consists of at least three stages. First, there should be an obligation for an actor to inform the forum about his or her
conduct, by providing various data about his performance, procedures and outcomes. Second, there should be a possibility for the forum to pose questions about the adequacy of the information or the legitimacy of the conduct (Bovens, 2007, p. 451). Third, the forum should be able to „pass judgements“ on the behaviour of the actor and to pose sanctions.

1.2 Types of accountability

In order to grasp different kinds of accountability relations in public institutions Bovens poses four main questions:

1. To whom is account to be rendered? This will lead to classification based on the type of forum to which the actor is obliged to render account.
2. Who should render account? Who is the actor who is held to account?
3. What account is to be rendered? This question is about what kind of information should be provided by the actor.
4. Why the actor feels compelled to render account? This is a question about the nature of the obligation of the actor to render account.

1. To whom is account to be rendered? - Public institutions and officials are mostly confronting different types of forums to which they should be held accountable. These forums mostly demand different kinds of information and apply a different set of criteria (Bovens, 2007, p. 455). Bovens defines this as „the problem of many eyes“. In this sense, he differentiates between: political accountability, legal accountability, administrative accountability, professional accountability and social accountability.

Political accountability is one of the most important types of accountability in democratic political systems. This type of accountability is exercised along the chain of the principal-agent relationships and the mechanisms of political accountability operating in the opposite direction to that of delegation (Bovens, 2007, p. 455). In this accountability chain, elected representatives, political parties, voters and media are included.

Legal accountability has an increasing importance in democratic systems nowadays. Legal accountability naturally addresses to accountability relations of various political actors to different types of courts. For EU Institutions and Member States important legal forums are the Court of First
Instance and the European Court of Justice. This is „the most unambiguous type of accountability“ since the legal scrutiny is based on legal standards prescribed by civil, penal or administrative statues or precedent (Bovens, 2007, p. 456).

According to Bovens, administrative accountability includes a wide range of quasi-legal forums, exercising independent and external administrative and financial supervision and control. Professional accountability includes accountability relationships with professional associations and disciplinary tribunals. This type of accountability relation is important for public managers who work in public organisations, as well as for some experts in the EU comitology. Social accountability has an increasing importance in many modern democracies and includes accountability relations of agencies or individual public managers to non-governmental organisations, interest groups and other relevant stakeholders.

2. Who is the actor? - Bovens (2007) also calls this a „problem of many hands“, since it is difficult to clarify who in what way contributed to the implementation of a policy and who should be brought to account for it. „Policies pass through many hands before they are actually put into effect“ (Bovens, 2007, p. 457). Bovens makes here a distinction between: corporate, hierarchical, collective and individual accountability.

3. Which aspect of conduct is present? - Since many aspects of the conduct of an actor could be a subject of justification, Bovens distinguishes here at least three main accountability relationships: financial, legal, administrative accountability and so on.

4. The nature of obligation - Generally speaking there are two possible reasons why an actor renders account to a forum: because he has an obligation to do so, or he does it voluntarily. In this respect, Bovens makes a distinction between vertical, horizontal and diagonal accountability. Vertical accountability is mostly a situation where there is a hierarchical relationship between actor and forum. This type of accountability relationship is mostly found in cases of principal-agent delegation of powers, where the forum formally has powers over the actor. The majority of political accountability arrangements are based on this kind of accountability relation, as well as the legal accountability.
1.3 Accountability deficits in EU governance

Bovens differentiates between traditional and new accountability relationships in the context of the EU multi-level governance. Taking into account his narrow perspective of accountability, he makes a distinction between vertical and horizontal accountability relations. The vertical accountability based on principal-agent relations and horizontal relations doesn’t have such nature. In western democracies, public accountability relations are traditionally vertical and follow principal-agent relationships (Bovens, 2007b, p. 109). However, in the last couple of decades, additional forms of accountability relations are created, which can have a diagonal, even horizontal character and involve accountability to administrative forums, citizens, clients and civil society (Bovens, 2007b, p. 110). As administrative forums Bovens defines ombudsmen, auditors and independent inspectors which stand in a diagonal accountability relationship to the actors, since they are not part of the traditional principal-agent relations. With the rise of the New Public Management, more horizontal forms of accountability relations are established in the public sector. In addition to this, the multi-level character of European governance may be held accountable both, by national and by European forums. These accountability relationships can be perceived as multi-level accountability networks, where information is shared between European and national forums in order to hold European actors to account.

„Public accountability is important to provide a democratic means to monitor and control government conduct, for preventing development of concentrations of power and to enhance the learning capacity and effectiveness of public administration“ (Bovens, 2007, p. 462). First of all, in democratic systems, public accountability is crucial, since it gives citizens the opportunity to control those who hold public office. From this perspective, there is one major accountability deficit: the political accountability of the Council at the European level. Neither the Council itself, nor its individual members are accountable to any political forum at the European level (Bovens, 2007b, p. 113). National parliaments can hold to account their individual representatives, however there is no collective political accountability of the Council as a whole. This is completely different in comparison to the Commission, which is both collectively and individually accountable to the European Parliament. Similarly, there are various agencies, created at the EU level, such as the Europol and the European Defence Agency which are accountable neither to the European Parliament nor to the national parliaments. On the other hand, recent established agencies, such as European Banking Authority (EBA), European Securities and Markets Authority (ESMA),
European Insurance and Occupational Pensions Authority (EIOPA) and many others are directly accountable to the European Parliament.

Second, the accountability relationships provide for „checks and balances“ organisation of institutional powers. This should prevent the corruption, abuse of powers of elected leaders and executive power. From this perspective, the EU is held by an elaborate, multi-level system of legal, financial and administrative checks and balances (Bovens, 2007b, p. 115). There were always incentives to keep the Commission, as European executive under control. Nowadays, some argue that „the European Commission is one of the most controlled executives in the world.“ Situated between the Council and the Parliament, it is subject to the ECJ jurisdiction, overseen by the Ombudsman, the Court of Auditors and a series of ad hoc bodies (Bovens, 2007b, p. 115).

Third, the accountability is seen as a tool to make and keep governments, agencies and individual officials effective in delivering on their promises (Bovens, 2007, p. 463). Since there is a possibility of sanctions, they should make efforts to effectively fulfil their tasks and motivate them to successfully confront challenges. From the learning perspective, the public authorities should learn from their previous errors and shortcomings and it should stimulate them to find new ways and solutions for future conduct.

To conclude, beside the traditional, new forms of accountability should help in order to address the issue of accountability deficits in the EU. The establishment of the new accountability forms should lead to more professional and technocratic types of control. The administrative accountability forums are significant for creating a network of formal and informal, multi-level accountability regimes which should effectively control executive bodies. On the other hand, social forms of accountability are getting more attention at the EU level, since they provide for an informal prevention against the abuse of powers.

1.4 Evaluation frameworks for accountability

The three perspectives defined above provide for systematic frameworks to evaluate the effects of accountability regimes. From the democratic perspective, the main question here is whether the accountability arrangement adds to the possibilities open to voter, parliament or other representative bodies to control the executive power (Bovens, 2007, p. 465). The main issue in assessing
accountability regimes is whether the accountability is effective in overcoming a problem of moral hazard. More precisely, „do the accountability regimes help to provide political principals with sufficient information about the behaviour of their agents and do they offer enough incentives to agents to commit themselves to the agenda’s of their democratically elected principals“ (Bovens, 2007, p. 465). From the constitutional perspective, the main question is „does the accountability forum have enough inquisitive powers to reveal corruption or mismanagement: are the sanctions strong enough to have preventive effects“ (Bovens, 2007, p. 465). From the learning perspective, the key question is whether the accountability regimes indeed enhance the learning capacities and effectiveness of the public authorities.

Sometimes it is not possible to evaluate accountability from these different perspectives at the same time. Accountability regimes could be effective from one perspective, but less from the other. An example of this is the argument that the accountability arrangements which are created around various non-majoritarian European Agencies are more up to standards from a constitutional than from a democratic perspective (Bovens, 2007, p. 466). The agencies are increasingly monitored by the Court of Justice, as well as by the European Ombudsman and the Anti-Fraud Office (OLAF). On the other hand, the links with forums that are democratically legitimised remains very indirect (Bovens, 2007, p. 466). Furthermore, the different perspectives of the evaluation of accountability arrangements does not always point in the same direction. Judicial review of laws and regulations could be perceived from a constitutional perspective as an adequate form of accountability and at the same time as inadequate from the democratic perspective. Furthermore, too severe democratic control can take away the entrepreneurship and creativity from the public managers and turn the agencies into rule-obsessed bureaucracies. At the same time, giving too much attention to administrative integrity and corruption control, which is perceived as beneficial from a constitutional perspective, could lead to a proceduralism that can negatively affect efficiency and effectiveness of public authorities (Bovens, 2007, p. 467).

2. Methodology

This research is based on a qualitative analysis of the accountability regimes of the EBA. The investigation of these accountability regimes is based on evidences from founding acts, official documents and policy papers. The EBA is an agency with a hybrid structure, which can be perceived as a standalone agency, or as a network. The research question is what are the
accountability regimes of the EBA? Can these accountability relations effectively address the concerns about accountability gaps which are raised among many theorists?

In order to answer this question, this thesis will perceive the accountability relations of the EBA vis-à-vis the legislative actors, the EP, the Commission and the Council. In this respect, the EBA will be perceived as standalone agency, which stands in a vertical accountability relationship vis-à-vis the legislative actors. It is crucial from a democratic, as well as from a constitutional perspective that the legislative actors, particularly the EP, have effective instruments to hold the EU agencies to account. The EU agencies are executive creations with ever-increasing powers and they should be accountable to the EP. In this respect, the first hypothesis of this thesis states: „the EBA is in a vertical accountability relationship vis-a-vis the EU’s legislative institutions. European Parliament can pose sanctions in case the EBA fails to fulfil its tasks.“ In order to test this hypothesis, the thesis will include a case study, which will explain how the accountability relations between the EBA and the EP work in practice. This case study is about the EBA’s mandate to draft TS under the PSD2 and its obligation to directly report to the members of the EP.

The next part of this thesis will be concentrated on the horizontal accountability relations of the EBA. In this respect, the EBA will be perceived rather as a network. First of all, the relations with the ESMA and EIOPA will give an overview of the inter-agency cooperation and interactions and how important they are for enhancing the EBA’s accountability. Furthermore, the accountability relation of the EBA vis-à-vis the ECB, will also be presented as a horizontal accountability relation. In this respect, the answers about these accountability regimes will be principally based on evidences from the ESAs founding regulations and its policy papers.

The accountability regime of the EBA via-à-vis the national competent authorities is very complex, since they entail different types of accountability relations. The main question is, how these accountability relations are institutionalised in the EBA's Regulation and official documents? Another significant and interesting accountability relationship of the EBA is vis-à-vis the banks it oversees. In this respect, it will be examined how strong are the EBA's supervisory powers over the market actors. Here will be tested the second hypothesis which states that „the EBA stands in hierarchical relationship to the market actors.“ More precisely, „the EBA has decision-making powers in the case that the banks perform badly by the EU - wide stress test.“ Here will be included
the second case study about the stress-test from 2016, which was conducted by the EBA, where the world’s oldest bank, Monte dei Paschi di Siena, performed poorly.

3. Agencification

3.1 Brief historical overview of creating the EU agencies

European agencies, as decentralised bodies of the European Union, have become an important institutional feature of the EU (Craig, 2015, p. 69). They have an important role in implementing EU legislation and in regulating European policy sectors (Svedin, 2011, p.15). In the last couple of decades, more than forty agencies were established, with different types of tasks and powers, with the main aim to support European institutions in the fields where scientific and technical knowledge are required. The agencies deal with diverse areas such as air safety, medicines, border control, food safety, maritime safety, environment, trade marks, fundamental rights and so on. They help the Commission to focus on core tasks, making it possible to devolve certain operational functions to outside bodies (COM, 2008). They are geographically dispersed throughout the EU, with the aim to bring „Europe“ closer to its citizens (Svedin, 2011, p.15).

The political scientists refer to the phenomenon of an increasing number of agencies at the EU level as „agencification“ of the EU administration. Since the creation of the first two in 1975, European agencies seem to „mushroom“ in succeeding waves and the number of European agencies has doubled since 2000 (Griller, Orator, 2010, p. 4). Many political scientists have written about the importance of the agencies and presented possible explanations for the “mushrooming” phenomenon. In order to make sense of „agencification“ , scholars have pointed to agencies’ ability to resolve collective action problems (Egeberg, Trondal, 2016, p. 4). Others argue that EU agencies represent a „functional decentralisation of tasks“ which could relieve the Commission of specific administrative tasks and leave it with greater room to concentrate on giving political direction (Egeberg, Trondal, 2016, p. 4) . According to Curtin (2007) decisions to create agencies have been raised mostly as an answer to specific circumstances, especially in times of crisis. Furthermore, some authors perceive the creation of agencies as a reflection of trends in administrative policy at the national level.

At least three waves of agency formation at the EU level can be distinguished – the initial one in 1975, the second one from 1990 to 1999, and the third from 2000 to present (Egeberg, Trondal,
The first step towards establishment of agencies on the European level was taken in 1975, when the European Centre for Development of Vocal Training (Cedefop) and the European Foundation for the Improvement of Living and Working Conditions (Eurofound) were established. These agencies were created to fulfil communication and social dialogue tasks (Saurer, 2009, p. 440). Since these institutions had limited powers, they are mostly referred to as „first generation agencies“.

In the late 1980s and early 1990s various circumstances led the Member States to support further European integration and new steps of institutionalisation (Saurer, 2009, p. 441). First of all, the creation of the Single European Act (SEA) in 1986, was a significant step in the process of European integration. Second, Member States were reluctant to delegate more powers to the Commission, which could have probably lead the Commission to advocate the creation of strong, independent agencies. Third, the model of U.S independent agencies was closely studied, and increasingly found supporters among the EU legislators (Saurer, 2009, p. 441). The legal basis for the creation of the second wave of agencies was Article 308 (now Article 352 TFEU) of the Treaty of the European Community.

The second generation of agencies was created in the 1990s with the aim to finalise the internal market project: The European Environment Agency (EEA), the European Training Foundation (ETF), the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), the European Agency for the Evaluation of Medicinal Products (EMEA), the Office for Harmonisation of the Internal Market (OHIM), the European Agency for Health and Safety at Work (EUOSHA), the Community Plant Variety Office (CVPO), the Translation Centre for Bodies of the European Union (CDT), the European Monitoring Centre for Racism and Xenophobia (EUMC) and the European Agency for Reconstruction (EAR). These agencies introduced a new management dimension and were an answer to the desire for geographical devolution and the need to cope with new tasks of a technical and/or scientific nature (Pollak, Puntscher Riekmann, 2008, p. 775). In order to ensure the support of the Member States, the EU established these agencies as part of a „hub and spoke network“ which guaranteed a strong cooperation with the Member States.

The third wave began in the first half of the 2000s with the establishment of the European Food Safety Authority (EFSA), the European Maritime Safety Authority (EMSA), the European Aviation Safety Authority (EASA), the European Railway Agency (ERA) and the Network and Information
Security Agency (NISA). Recently, the European Agency for the Management of Operational Cooperation at the external Borders (FRONTEX), European Centre for Disease Prevention and Control (ECDC), European Institute of Innovation and Technology (EIT), European Union Intellectual Property Office (EU IPO), European GNSS Agency (GSA), European Fisheries Control Agency (EFCA), European Institute for Security Studies (ISS), European Union Satellite Center (EUSC), The European Union Agency for Law Enforcement Training (CEPOL), European Union Agency for Law Enforcement Cooperation (EUROPOL), European Body for the Enhancement of Judicial Cooperation (EUROJUST), Fundamental Rights Agency (FRA), Body of European Regulators of Electronic Communications (BEREC), European Systemic Risk Board (ESRB), Agency for the Cooperation of Energy Regulators (ACER), European Banking Authority (EBA), European Securities and Markets Authority (ESMA), European Insurance and Occupational Pensions Authority (EIOPA), European Asylum Support Office (EASO), European Agency for the Operational Management of large-scale IT Systems in the Area of Freedom, Security and Justice (EU-LISA).

The institutional design of the third agency generation was stronger. Many of them were given formal licensing power and competences to investigate the enforcement of national laws (Saurer, 2009, p. 443). The rationale for creation of these agencies was pointed out in the Commission’s White Paper from 2001 which stated: „The creation of further autonomous EU regulatory agencies in clearly defined areas will improve the way rules are applied and enforced across the Union. Such agencies should be granted the power to take individual decisions in application of regulatory measures. They should operate with a degree of independence and within a clear framework established by the legislature. The regulation creating each agency should set out the limits of their activities and powers, their responsibilities and requirements for openness.“ So, the creation of agencies was perceived as a tool to improve regulation, as well as strengthen the credibility of EU institutions, especially European administration.

3.2 Powers and types of EU agencies

When it comes to the powers, some agencies have informational and coordinating functions, a few can make individualised decisions and some have quasi-regulatory powers (Craig, 2015, p. 69). However, none of them has a power to make rules and adjudicate in the manner that is common for
agencies in the United States. Although, one could claim that the EU financial regulatory agencies which are established after the financial crisis come close in this respect (Craig, 2015, p. 69).

The Commission defined two main types of agencies: executive and regulatory agencies. Executive agencies are responsible for purely managerial tasks, i.e. assisting the Commission in implementing the Community’s financial support programmes and are subject to strict supervision by it (COM, 2002, p. 3). Their tasks must relate to the management of Community programmes; they are set up for a limited period, and they are always located close to Commission headquarters (COM, 2008, p. 3).

On the other hand, regulatory agencies are mostly actively involved in the executive function by enacting instruments which help to regulate a specific sector. The Commission defined regulatory agencies as “any autonomous legal entity set up by the legislative authority in order to help regulate a particular sector at European level and help implement a Community policy” (COM, 2005, p. 11). The agencies’ tasks may vary. Some of them can adopt individual decisions with direct effect, applying agreed EU standards; some provide additional technical expertise based on which the Commission can make a decision. The majority of them are intended to make regulation more consistent and effective by combining and networking at community level activities which are initially a matter for the Member States (COM, 2002, p. 4). They are especially significant in the field of shared competences, where the effective implementation of Union policies depends on close cooperation between the EU and the Member States. Regulatory agencies are independent bodies with legal personality. Since these bodies are instrumental for implementing a particular Union policy, the legal basis for establishing regulatory agencies should be the provision of the EU Treaty which forms the specific legal basis of the policy in question (COM, 2005, p. 3). They are mostly funded by the EU budget, as well as by the direct receipt of fees or payments (COM, 2008, p. 4).

The Commission was always in favour of creating agencies, in order to ensure the efficiency of the executive function, but also has political reasons to limit their powers. The executive power should undoubtedly stay in the hands of the Commission.
3.3 Organisation and tasks of EU agencies

We can say that agencies are operating between pure administration and politics. Their tasks and powers significantly expanded over the last couple of decades. Many scientists argue that the EU agencies have become more than non-regulatory facilitators of transnational regulatory networks and arenas for the exchange of information (Egeberg, Trondal, 2016, p. 3). Nowadays, many agencies have regulatory functions whereby making (or preparing for the Commission) individual decisions, issuing guidelines on the application of EU law at the national level, engaging in national agencies’ handling of single cases and developing new EU legislation (Egeberg, Trondal, 2016, p. 3). The responsibilities and powers of the EU agencies differ. However, there are some basic criteria in governing the agencies which should be common to all regulatory agencies. According to the Commission’s Operating Framework for the European Regulatory Agencies, the creation of these bodies would make the executive more effective at European level in highly specialised technical areas requiring expertise and continuity, credibility and visibility of public action (COM, 2002, p. 5). They were created by the secondary law (regulation), in order to perform the tasks clearly specified in those acts. They all have legal personality and a certain degree of organisational and financial autonomy.

According to the Commission, there are three types of tasks which could be delegated to the regulatory agencies. First of all, some EU agencies can adopt individual decisions which are legally binding on third parties (Griller, Orator, 2010, p. 10). Second, they should provide technical and scientific advice or inspection reports, as a way of direct assistance to the Commission and if necessary to the Member States. Thirdly, they create and manage networks of national competent authorities, co-operating between them and gathering, exchanging, and comparing information and good administrative practice (Griller, Orator, 2010, p. 10).

Agencies are led by a director and a management board. Usually an agency official is employed in a temporary or quasi-temporary position (Egeberg, Trondal, 2016, p. 3). The Management Board’s main function is to ensure that the agency fulfils the tasks set out in its establishing act, and a Director is responsible for operational working of the agency (COM, 2008, p. 5). The Director is in charge of adopting individual decisions in the case of decision-making agencies, preparing opinions, studies and other tasks. He is also responsible for preparing discussions within the Management Board and representing the agency.
The main tasks of the Management Board is to decide on the agency’s budget, the work programme and the appointment of its executive director. Management Boards are mostly composed of a large majority of member state representatives. Commission representatives are also part of the Management Board, occasionally accompanied by European Parliament and interest group representatives. Most Management Boards of EU agencies number between 20 and 50 delegates (Egeberg, Trondal, 2016, p. 3). Even though the agencies are strongly dominated by member states’ representatives, they are mostly not affected by the national political guidelines. Instead, professional concerns and considerations tend to have the highest priority (Egeberg, Trondal, 2010, p. 4).

However, the EU agencies are not always dealing with pure non-politicised issues. In fact, in many cases their decisions attract political attention and public debate. When it comes to the more politicised issues, the EU agencies are to great extent influenced by the political institutions such as the Commission, the European Parliament and the Council. The Commission, as well as the EP are particularly influential at the policy formulation stage (Egeberg, Trondal, 2010, p. 13). On the other hand, when it comes to implementation and daily interaction, EU agencies cooperate predominantly with the Commission and national agencies (Egeberg, Trondal, 2010, p. 16). Such organisational features of the EU agencies illustrate the importance of the role of these bodies in building multilevel EU administration.

3.4 Debate on accountability of EU agencies

An increased number of European agencies have brought many concerns about their accountability regimes. These bodies are set up to deal with highly relevant and delicate issues such as food safety, medicines, environment, border control, police co-operation, energy, disease prevention and so on. There is considerable variety in the kind of tasks with which they are entrusted, where some agencies’ main tasks is to collect information, others can adopt decisions that are binding on third parties and in some of them can even adopt soft law provisions which have wide application (Busuioc, 2010, p. 25). As already mentioned, the process of agencification started when the Commission, as the European executive power, decided to delegate some powers to the independent agencies, in order to focus on its „core tasks“. This process of delegation of powers motivated the Council as well, which transferred some powers to the so called „second and third pillar agencies“. In the recent years, also member states decided to delegate some powers directly to the European
agencies. Overall, we could say that the creation of European agencies is an instance of simultaneous processes of delegation, decentralisation and „Europeanisation“ of executive powers (Busuioc, 2010, p. 3).

According to their founding acts, the European agencies should be independent, meaning that they should operate free of political influences, emphasising their expert-based tasks and functions. In fact, the large degree of independence, as well as the institutional complexity of these bodies raised many concerns regarding their accountability (Busuioc, 2010, p. 3). For many people, current accountability regimes of the European agencies are not sufficient to properly address these concerns. Furthermore, some argue that accountability and independence are conflicting concepts and finding the right balance between independence on the one hand and control and accountability on the other, is one of the main challenges regarding non-majoritarian agencies (Busuioc, 2010, p. 4). Moreover, according to Busuioc (2009), there are two problematic assumptions in the discussion about accountability. The first one is about the extent to which the agencies are controlled, in relation to the degree of independence. Another assumption important for this debate is related to independence and accountability as contradictory concepts and therefore „the needed degree of control could not be achieved without jeopardising their very raison d’être“ (Busuioc, 2009, pp. 602).

The concerns about the accountability of the European agencies is to great extent based on the fact, that there is no explicit legal basis for the process of agencification in the Treaties. Such disparities between legal texts and the reality of legal and institutional practices creates a potential for accountability gaps (Busuioc, 2010, p. 4).

The call for more accountability of EU agencies, also came from the EU institutions itself. The European Parliament and the Commission addressed this issue several times. The Commission in its White Paper on European Governance, defines the accountability as one of the main principles of a good governance beside openness, participation, effectiveness and coherence (COM, 2001, p. 32). In the Draft of the Inter-institutional Agreement on the operating framework for the European regulatory agencies, the third part named „Evaluations and controls“ addresses the main accountability regimes of the regulatory agencies. This Agreement creates a very complex network of accountability relationships of the agencies, involving institutions such as the Commission, the European Parliament and the Council as the main actors of political control over the agencies.
Furthermore, it involves the Court of Auditors and the European Anti-Fraud Office (OLAF) as the key principals in the financial control and evaluation of the agencies. It is well defined, that the agency should be subject to the administrative control of the European Ombudsman (COM, 2005, p. 24). Furthermore, the Agreement sets out the judicial accountability relationship of agencies to the European Court of Justice. Even though, this Draft Agreement failed to obtain support from the Council, the issues which the inter-institutional agreement sought to address remain (COM, 2008, p. 6). After two years, the Commission issued a new document the Communication to the EP and the Council „European Agencies - The way forward“ in which it, once more, pointed out the importance of accountability of agencies. Furthermore, the Commission called for creation of more defined lines of responsibility (COM, 2008, p. 6). According to the Commission’ Communication, the mechanisms to ensure the accountability should be clear to both the agencies and the Institutions. This should include reporting and auditing requirements, relations with stakeholders and responses to parliamentary questions (COM, 2008, p. 7). Furthermore, the Commission points out that there should be coherent rules for evaluation of agencies.

The European Parliament as well addressed the issue of accountability of the agencies at several occasions and similarly to the Commission’s approach, it pointed out the importance of increased accountability of agencies. In the „Report on a strategy for the future settlement of the institutional aspects of Regulatory agencies“ the EP stated „given that the European regulatory agencies are in large measure decentralised or independent services, there must be particular emphasis on transparency and democratic control of their formation and operation. Otherwise, the proliferation of regulatory or executive formations which have or claim exclusive competence to regulate crucial areas of social activities is at risk of reducing the importance of and supplanting the representative institutions of the EU and hugely inflating bureaucracy“ (EP, 2008, p. 13).

3.5 Limits of agencification in the EU

The increased number and extended powers of the EU agencies raise another important question: whether and to which extent is the process of agencification limited? The absence of legal basis for agencification in the Treaties and unclear scope of powers that could be delegated to the EU agencies, could be perceived as a risk of spreading the democratic deficits in the EU Governance as well as lack of accountability. The question of democratic legitimacy of EU agencies, seems to be very problematic since they are created without an explicit, constitution-based authorisation by the
people (Scholten, van Rijsbergen, 2014, p. 1224). The number of agencies and scope of their powers have grown rapidly over the last couple of decades. They have a strong impact on policy shaping and its implementation, even though they don’t have the power to make legally binding decisions. However, the three most recently created EU financial regulators, European Banking Authority (EBA), European Securities and Markets Authority (ESMA) and European Insurance and Occupational Pensions Authority (EIOPA), enjoy powers to issue legally binding measures and to enforce EU law by surpassing, in certain cases, relevant national authorities (Scholten, van Rijsbergen, 2014, p. 1225). The legal basis in the early days of agency foundations, more specific bases can be found in the areas of transport, environment, health, agriculture, as well as policies relating to the free movement of goods (Griller, Orator, 2010, p. 11). On the other hand, for the creation of EU agencies dealing with the relevant policies in the area of internal market, the EU legislator made use of Art. 95 EC (now 114 TFEU) (Griller, Orator, 2010, p. 11). The agencies created in the field of the Common Foreign and Security policy found legal basis in the Art. 28 TEU.

The Court of Justice addressed several times in its cases, the issue of delegation of powers to the European agencies. The most important cases in this respect are Case C-9/56 Meroni vs High Authority, Case C-98/80 Romano v. Institut National D’assurance Maladie-Invalidité and Case C-270/12 ESMA.

3.5.1 Meroni case

In 1958 the CJEU ruled for the first time over the delegation of powers to the agencies in the case Meroni vs High Authority. In this case, the Court established the so called „non-delegation standard“ within the framework of the European Coal and Steal Community (ECSC). Under the Art. 53 of the Treaty establishing the European Coal and Steel Community (TECSC), the High Authority authorised the ferrous-scrap equalisation bodies to keep ferrous scrap prices low. These bodies were administered by the „Office commun des Consommateurs de Ferraille” and the “Caisse de Peréquation des Ferrailles importees” (called the “Brussels agencies”), which were founded under the Belgian private law (Griller, Orator, 2010, p. 16). So, the High Authority created a special obligatory ferrous-scrap equalisation system for all concerned companies, which was administered by the two Brussels agencies „under the responsibility of the High Authority“ (Griller, Orator, 2010, p. 16). Meroni & Co. was an Italian steel company affected by this system and claimed that the
decision of the High Authority requiring from this company to pay a specific amount of money to the Fund, should be annulled.

The Court questioned the possibility for the High Authority to delegate powers, since the Treaty didn’t explicitly envisaged such delegation. It is stated in the judgement of the Court that „article 8 of the Treaty requires the High Authority „to ensure that the objectives set out in this Treaty are attained in accordance with the provisions thereof“ and does not provide any power to delegate“ (ECJ, 1958, p. 151). Even though, the Court further stated that „the possibility of entrusting to bodies established under private law, having a distinct legal personality and possessing powers of their own… cannot be excluded. Hence the power of the High Authority to authorise or itself to make the financial arrangements mentioned in Article 53 of the Treaty gives it the right to entrust certain powers to such bodies subject to conditions to be determined by it and subject to its supervision.“ (ECJ, 1958, p. 151). However, such delegation was allowed only if it was “necessary for the performance of the tasks set out in” respective articles and “compatible with” the Treaty (Scholten, van Rijsbergen, 2014, p. 1237).

However, the Court concluded that the delegation at stake was illegal and explained it as follows: „Decision No 14/55 did not make the exercise of the powers which it conferred upon the Brussels agencies subject to any of the conditions to which it would have been subject if the High Authority had exercised them directly. Even if the delegation resulting from Decision No 14/55 appeared as legal from the point of view of the Treaty, it could not confer upon the authority receiving the delegation powers different from those which the delegating authority itself received under the Treaty. The fact that it is possible for the Brussels agencies to take decisions which are exempt from the conditions to which they would have been subject if they had been adopted directly by the High Authority in reality gives the Brussels agencies more extensive powers than those which the High Authority holds from the Treaty.“ It is clear that such delegation of powers is incompatible with the Treaty provisions.

However, coming back to the Court’s statement that the delegation of powers is basically possible, the Court further made a distinction between the delegation of executive powers „which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority“ and on the other hand, the powers that involve discretion which „makes possible the execution of actual… policy“ (ECJ, 1958, p. 152). The Court basically accepted the delegation of
the first kind of power, however it concluded that the delegation of the second kind of power would negatively affect the balance of powers (Scholten, van Rijsbergen, 2014, p. 1238).

3.5.2 Romano case

Romano is another important case related to the delegation of powers. Some authors claim that it is even more relevant to the EU agencies than Meroni (Chamon, 2011). In this case the delegator is the Council, entrusting an agency with implementing the enacted measures (Griller, Orator, 2010, p. 19). Mr Romano was an Italian national living in Belgium and was entitled to pensions in both states. According to the Belgian Institution invalidity pension paid in Belgium had to be reduced by the amount of the Italian invalidity pension (ECJ, 1981, p. 1243). This decision was based, among others, on the pension calculation issued by the Administrative Commission of the European Communities on Social Security for Migrant Workers (Scholten, van Rijsbergen, 2014, p. 1239). This body dealt with questions of social security schemes for employed persons moving within the EU. The plaintiff in the main action disputed the validity of the calculation carried out by the Belgian Institution (ECJ, 1981, para 9).

The Court answered that „it follows both from Article 155 of the Treaty and the judicial system created by the Treaty (…) that a body such as the Administrative Commission may not be empowered by the Council to adopt acts having the force of law. Whilst a decision of the Administrative Commission may provide an aid to social security institutions responsible for applying Community law in this field, it is not of such a nature as to require those institutions to use certain methods or adopt certain interpretations when they come to apply the Community rules“ (ECJ, 1981, para 20).

Overall, the Meroni and Romano judgements impose strict limits to delegation of powers within the EU. According to these judgements, the delegation of powers to the EU agencies was only limited to executive tasks which do not involve discretionary powers. The later jurisprudence of the European courts provides clear evidence that the Meroni principle continues to be applied not only in substance, but also by directly referring to the 1958 case (Griller, Orator, 2010, p. 20). In practice, in the last couple of decades the EU agencies have become the recipients of discretionary powers along with the power to issue legally binding decisions (Scholten, van Rijsbergen, 2014, p. 1239). The most extensive delegation of powers to the agencies, happened in the time of financial
crisis in 2008, when the three European financial authorities were created: EBA, ESMA and EIOPA. These agencies have regulatory and supervisory powers, which is, according to many scientists, in collision with the Court’s non-delegation standard.

3.5.3 ESMA short-selling case

In this case the Court dealt with the question of delegation of powers to the one of the recently created European financial authorities, the European Securities and Markets Authorities. In 2012 the United Kingdom brought an action for annulment to the CJEU under Article 263 TFEU. It sought the annulment of Article 28 of Regulation No 236/2012 that confers powers to ESMA to control short selling. According to the UK, such delegation of powers contravened the Meroni doctrine. The Regulation No 236/2012 was adopted on the basis of the Article 114 TFEU for approximation of laws necessary for the functioning of the internal market. Under Article 28 of Regulation No 236/2012 ESMA may 1) require natural or legal persons who have short positions in relation to a specific financial instrument to notify a competent authority or disclose details of any such position; or 2) prohibit a short sale which relates to a different financial instrument where a financial advantage is obtained in the event of a decrease in the price of another financial instrument (Nicolaides, Preziosi, 2014, p. 17). However, the ESMA can act only when there is a threat for a regular functioning of the financial markets and the stability of the financial system, as well as in the case that no competent authority has taken measures to address the threat (Nicolaides, Preziosi, 2014, p. 17). Article 28 para 4 of the Regulation 236/2012 states that „before deciding to impose or renew any measure referred to in paragraph 1, ESMA shall consult the ESRB and, where appropriate, other relevant authorities.“ Furthermore, same Article para 5 envisaged that „ESMA shall notify the competent authorities concerned of the measure it proposes to take.“ However, the ESMA has wide discretionary power to issue such bans, and it is the only adjudicator of whether such a threat exists (Dr Costa, 2014).

The UK raised four main arguments in this case. First of all, the powers delegated to the ESMA under this Regulation especially the Article 28 entails a wide range of choices as to which measure or measures to impose and those choices have very significant economic and financial policy implications (Scholten, van Rijsbergen, 2014, p. 1244). These powers are in collision with the principles laid down in the Meroni case.
Second, the UK is of the view that Article 28 of Regulation No 236/2012 authorises the ESMA to adopt quasi-legislative measures of general application and that such power is contrary to the principle established in Case 98/90 Romano (ECJ, 2014, para 56). The UK further argued that since Articles 290 TFEU and 291 TFEU circumscribe the circumstances in which certain powers may be given to the Commission, the Council has no authority under the Treaties to delegate powers such as those provided for in Article 28 of Regulation No 236/2012 to an EU agency (ECJ, 2014, para 69). The prohibition on short sales under Article 28 is a measure of general application, which could not be entrusted to an agency. In the fourth argument the UK challenged the legal basis for the Article 28 of Regulation No 236/2012. According to the UK the article is not intended to authorise the ESMA to take individual measures directed at natural or legal persons, on the contrary the measures that may be adopted under that provision are of general application (ECJ, 2014, para 88). Furthermore, decisions directed at financial institutions overriding those made by competent national authorities cannot be regarded as Article 114 TFEU harmonisation measures (ECJ, 2014, para 90).

Overall, the Court concluded that the fears of the United Kingdom in relation to the powers of the European Securities and Market Authority (‘ESMA’) to intervene in the financial assets and securities markets were unfounded (Ankersmit, 2014). The Court dismissed all arguments raised by the UK.

When it comes to the first UK argument which referred to the Meroni case, the Court answered that article 28 „does not confer any autonomous power on that entity that goes beyond the bounds of the regulatory framework established by the ESMA Regulation“ and that the exercise of those powers „is circumscribed by various conditions and criteria which limit the ESMA’s discretion“(Ankersmit, 2014). The Court emphasised the various procedural and substantial limitations such as the above mentioned Article 28 para 4 and 5. These provisions established also the possibility for judicial review of ESMA decisions and the Court concluded that such system is compatible with the Meroni principle.

When it comes to the UK’s reference to the Romano judgement, the Court answered that the delegated powers don’t have a quasi-legislative nature, but there are clearly defined executive powers, which is in line with the Romano judgement. Furthermore, the Court noted that article 263 and 277 TFEU expressly permit EU bodies, offices and agencies to adopt acts of general application (Ankersmit, 2014).
Regarding the UK’s reference to the Articles 290 and 291 TFEU which permit the delegation of powers only to the Commission, the Court answered as follows, „while the treaties do not contain any provision to the effect that powers may be conferred on a Union body, office or agency, a number of provisions in the FEU Treaty none the less presuppose that such a possibility exists“ (ECJ, 2014, para 79).

The Court rejected also the last UK’s argument about the legal basis of Art. 28 of the disputed Regulation. The Court referred in this respect to the recital 2 in the preamble to Regulation No 236/2012, which states that the purpose of the regulation is to ensure the proper functioning of the internal market and to improve the conditions of its functioning, in particular with regard to the financial markets. A common regulatory framework regarding requirements and powers relating to short selling and credit default swaps is intended to prevent the creation of obstacles to the proper functioning of the internal market and the continuing application of divergent measures by Member States (ECJ, 2014, para 114). The Court further stated in the para 115 of the judgement that ESMA should have the power to take measures where short selling and other related activities threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union, where there may be cross-border implications and competent national authorities have not taken sufficient measures to address the threat. So the Court concluded that the disputed Regulation fulfils the requirements set up in the Article 114 TFEU, therefore this article is an appropriate legal basis for the adoption of Article 28.

It could be argued that the Court established a new delegation doctrine in the EU in the ESMA judgement. The Court relies on the Treaties, which for the first time envisage the possibility to establish the agency and delegate specific powers to them and concludes the review-ability of the agencies’ decisions. The (Article 263 and 277 TFEU) implies the possibility to create agencies with powers to issue acts of general application (Scholten, van Rijsbergen, 2014, p. 1249). This judgement overturns the previous Meroni and Romano non-delegation principles at least to some extent. We could say that it establishes a new delegation standard: „The delegation of powers to issue legally binding measures, which are (1) precisely delineated, (2) subject to sufficiently (delineating) conditions and criteria limiting discretion, which may include a notification requirement and the temporary character of a measure; and (3) amenable to judicial review in the
light of the objectives established by the delegating authority, is allowed“ (Scholten, van Rijsbergen, 2014, p. 1249).

3.5.4 Implications of the ESMA judgement on the future of the agencification process

The implications of the ESMA judgement on the further agencification process could include the issues of democratic legitimacy and accountability of the EU agencies. Primarily, there is no provision in the EU Treaties that explicitly authorise the creation of EU agencies, as well as the nature and scope of powers that could be delegated to them. Furthermore, many concerns are raised about the fact that the process of agencification takes place without explicit authorisation or consent from the Member States. The process of delegation of powers occurs far away from the EU citizens, at the same time leaving unclarities about the scope of delegable powers. Many argue that the Meroni doctrine about delegating executive powers without involvement of discretionery powers, wasn’t respected in practice.

The ESMA case allows the Union Legislator to cherry-pick legal bases for creating agencies, which includes the possiblility of creating agencies without the agreement of all EU Member States (Scholten, van Rijsbergen, 2014, p. 1252). It seems like, the Court in the ESMA case didn’t clarify the issues of democratic legitimacy of EU agencies, but rather left many questions open. There are many arguments in favour of a Treaty change which should take place in order to preserve the balance of powers among the EU institutions.

Another issue that still remains unclear after the ESMA judgement, is the accountability of the EU agencies. An increased number of more than forty agencies are involved in the policy-shaping and implementation process, however, there are no clear accountability roles of the EU main institutions in relation to the agencies, nor is there any Treaty or case law obligation to clarify such roles (Scholten, van Rijsbergen, 2014, p. 1253). Given the many concerns that rise about these bodies, it was expected that the Court would call for establishment of a more clearer system and promote democratic legitimacy. It seems like, the Court rather left many questions unanswered, which raises further concerns among the politic and economic scientists.

This thesis will examine the accountability regimes of one of the newly created agencies, the EBA, which is created as part of the European System of Financial Supervision (ESFS). It will try to give
the answers to the question whether the accountability relations of the EBA can effectively address
the issue of accountability gaps. Before that, this thesis will present the main reasons and causes of
creation of this body, as well as its organisation and main tasks.

3.6 Agencification of the European Financial Sector

3.6.1 Financial crisis in 2008 and reasons for agencification in the EU Financial Sector

Despite the concerns about the creation and powers which are delegated to them, the EU agencies
are always perceived as a successful project of the EU institutional structure. As already elaborated,
these bodies are created in order to unburden the Commission as the core executive, so that it could
improve its performance. On the other hand, the fact that agencies primarily rely on expertise in
their work, without possibility of political influence, stimulates the credibility of policy making at
the EU level. The process of agencification affected the European Financial Sector as well. The
agencies in this sector were established in the last agencification wave, which was triggered by the
2008 financial crisis.

In 2008, the EU was affected by the worst financial crisis since its existence. The banking system
suffered substantial losses, the unemployment rate raised and the whole world trade fell at an annual
rate of 42% in the first three months of crisis, according to the IMF estimates (Quaglia, Eastwood,
Holmes, 2009, p. 2). This crisis was initially a liquidity crisis and it began to have effects in the EU
in the summer of 2007. It was triggered by the increasing scale of losses on sub-prime mortgage
lending in the US. Even though it had relatively limited direct impact on the value of European
bank assets, it created a vicious circle whereby European banks attempted to rebuild liquidity by
selling illiquid assets, notably residential mortgage-backed securities (Quaglia, Eastwood, Holmes,
2009, p. 3). Consequently, the asset prices fell which led to weakening and reducing the bank
capital and this created the solvency crisis in the European financial system. The following loss of
confidence in the credit ratings assessed by the rating agencies, further deepened the crisis. The
individually rational acts of illiquid banks served to erode their collective solvency, while fears of
counterparty default intensified the unwillingness of any private agents other than fully-insured
depositors to lend to the banks (Quaglia, Eastwood, Holmes, 2009, p. 4). Such situation obviously
had consequences for the real economy as well, since illiquid banks without certain financial
sources cut drastically their lending to the non-bank private sector (Quaglia, Eastwood, Holmes,
2009, p. 4). So, the national policy makers faced three main problems: bank illiquidity, bank undercapitalisation and recession.

As an answer to the financial difficulties, the central banks and governments concentrated on the financial rescue policies aiming at restoring liquidity and capital of banks. Deposit guarantees were raised, central banks cut policy interest rates to unprecedented lows and governments provided liquidity facilities to financial institutions in distress (COM, 2009, p. 2). The Stability and Growth Pact was applied in a flexible manner, in order to allow for implementation of fiscal stabilisers in the Member States. The EU provided for guidelines as how to state aid policies - including to the financial sector - could be shaped as to pay respect to competition rules (COM, 2009, p. 2). Furthermore, the EU jointly with the IMF and World Bank provided financial assistance to the Member States which faced enormous financial difficulties. A direct EU financial support occurred through the European Investment Bank loans and other available funds.

The EU made strong efforts in coordination of policies at all three stages of facing the financial crisis: control and mitigation, resolution and prevention (see COM, 2009). Even though the EU provided support to the Member States which were strongly affected by the financial crisis, the Union lacked supranational mechanisms in order to efficiently and effectively address the financial difficulties.

The importance of centralised and uniform approach to regulatory and prudential policies, which could be implemented by a single supranational authority, was raised even before the crisis took place. Scholars argued that the increased cross-border activity in the European banking sector required centralisation of regulatory and supervisory mechanisms. However, the Member States were reluctant to transfer national sovereignty to supranational institutions within the framework of financial integration. The Member States rather favoured an intergovernmental approach to policy-making in the financial sector and advocated for different modes of „soft governance“ in regulatory and supervisory matters (Božina Beroš, 2018, p. 19). These concerns revived in times of crisis, when it was clear that loose coordination of national authorities within different committees and networks was not sufficient, in order to ensure the stability of the EMU (Božina Beroš, 2018, p. 19).

In this respect, the establishment of EU agencies which should deal with the regulatory convergence among national authorities and base their work on the expertise, was perceived as a compromised
solution. This led to the establishment of new European financial agencies in 2010: EBA, ESMA and EIOPA, which together form the European Supervisory Authorities (ESAs).

3.6.2 Establishment of the ESFS

In the time of crisis, many concerns were raised at the EU level regarding the supervision in the financial sector. These concerns were raised in the context of enhanced market integration, especially in the post crisis period. The EU traditionally relied upon the competent authority of the home Member State of a market actor, whereby one rule has dominated: „the home country control rule“ (Schammo, 2012, pp. 774). Under the home country control principle, the home competent authority has prime competence to supervise a market actor or regulated activities (Schammo, 2012, pp. 774). Difficult financial circumstances had manifested the weaknesses of a supervision in a cross-border framework, whereby the concerns of the host Member States weren’t taken into consideration by the home state authorities and which consequences their decisions could have for the host state. The EU traditionally addressed these concerns of the host states by calling for greater harmonisation, cooperation and coordination, as well as insisting on mutual trust between authorities, however it never demanded a transfer of supervisory powers to a single European financial markets agency (Schammo, 2012, pp. 775). So the financial markets were getting more unified within the European Union, but the supervisors were not (Alford, 2006, pp. 396).

One of the first attempts of the EU to improve the cooperation and convergence in the implementation of EU rules in this field, is the European Commission’s „Financial Services Action Plan“ (FSAP). One of the main goals of the EU was the creation of an internal market for financial services. In this respect, the FSAP serves as a strategic outline of the way in which the integration of all financial services markets within the EU will be achieved, whilst identifying the required legislative action (Vitkova, 2008, pp. 159).

The Council of Ministers asked the Committee of Wise Men (Lamfalussy Committee), which was a group of prominent policymakers involved in monetary and economic affairs, to report on the prospects of improving the regulation of securities markets, banking and insurance in the EU (Alford, 2006, pp. 397). This Committee was led by the Baron Alexandre Lamfalussy, central banker and former president of the European Monetary Institute (predecessor to the European Central Bank). The report of the Committee of Wise Men stated that, the fact that necessary EU-
wide regulations of the securities markets were not present, it hindered the growth of the EU capital markets (Alford, 2006, pp. 398). They presented, in 2001, a specific regulatory process in financial services in order to make it more efficient and more effective. This process was generally based on a decentralised model of supervision and involved a four-level legislative process which could effectively respond to the market developments.

According to the Lamfalussy report, at the level 1, the basic laws and principles should be adopted in the usual co-decision procedure by the European Parliament and the Council, on the proposals by the Commission. At the level 2, this report recommended that the Commission should be able to adopt, adapt and update technical implementing measures with the help of consultative bodies, which should be composed by the Member States representatives. Such system would allow the EP and the Council to focus on the key political questions. At the level 3, the report endorsed the establishment of committees of national supervisors, which should support the Commission by the adoption of acts and for issuing guidelines on the implementation of these laws. Finally, the level 4 suggested that the Commission should have a stronger role in safeguarding the proper implementation of rules by the national governments.

Following the recommendations of the Lamfalussy report, the so called „Level 3“ committee was established: the Committee of European Securities Regulators (CESR). Subsequently, another two committees were created: the Committee of European Banking Supervisors (CEBS) and the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS). These bodies were networks of competent national authorities, which adopted guidelines and recommendations. However, their decisions didn’t have a legally binding nature, meaning that compliance with these decisions largely depended on the preferences of the national authorities.

Difficult financial circumstances during 2007 and 2008 revealed that the informal cooperation methods exercised by the Level 3 committees had reached their limits. In 2008 a group of experts was set up, the so called „de Larosière group“, in order to make proposals on improving supervisory arrangements across the financial sector (Schammo, 2012, pp. 776). Following the recommendations of the de Larosière group, a new ESFS was set up. For monitoring macro-prudential risks, European Systemic Risk Board (ESRB) was established. According to the founding regulations of ESAs, the ESFS comprises of three European Supervisory Authorities: European Banking Authority (EBA), European Securities and Markets Authority (ESMA) and
European Insurance and Occupational Pensions Authority (EIOPA), as well as European Systemic Risk Board (ESRB), the Joint Committee of the European Supervisory Authorities and the competent authorities in the Member States.

3.6.3 Agencies in European Banking Sector

Legal basis of the founding regulations of ESAs (Regulation No 1093/2010; Regulation No 1094/2010; Regulation No 1095/2010) is the Article 114 TFEU. The so called „harmonisation clause“ gives a general legal basis for the approximation of laws in the area of internal market.

ESAs are independent European agencies, with legal personality. According to ESAs founding Regulations, these bodies should have administrative and financial autonomy. Their main task is to promote stability and effectiveness of the financial system in the EU. Moreover, within regulatory framework they should contribute to the creation of a „single rulebook“ and carry out supervisory tasks, as well as tasks related to consumer protection policy (Baran, Eckhardt, Schmidt, Van Roosebeke, 2016, p. 5).

The agencies in the European financial sector have a „hybrid structure“, established as a supranational actors at the same time with strong network characteristics. Their everyday regulatory workload involves a strong potential for centralisation and the capacity to transform them into true regulatory entities (Božina Beroš, 2018, p. 26). The agencification in the European financial sector advanced this phenomena in terms of scope of powers that can be delegated to these bodies. However, it seems they are the preferred instrument of deepening financial integration nowadays, at the same time becoming significant components of the European multi-level governance. As non-majoritarian, independent agencies, with regulatory powers, it raises many concerns about their accountability regimes. According to Simoncini (2015, pp. 320), „they have been allocated a range of responsibilities and tasks which exceed the traditional nature of the powers of EU agencies and open up significant legal issues about the limits of EU agencies’ remit.“ The issue of limits of powers delegated to these agencies was addressed also in the ESMA case in 2012.

In this multi-level governance in the EU, the role of national actors remains important, since the financial agencies rely to great extent on the national authorities and their capacities to implement policies. It means that, the agencies’ main task is the effective coordination of national preferences,
in order to ensure a proper implementation of policies. Since the Member States have divergent economic, legal and institutional features, the convergence of their national preferences depends fundamentally upon effective coordination by the agencies. Furthermore, in the context of policy making, there are multiple and sometimes even conflicting interests that have to be observed, confronted and reconciled through agency governance, which makes effective coordination challenging and crucial at the same time (Božina Beroš, 2018, p. 27).

4. European Banking Authority

4.1 Legislative framework

The EBA is one of the key components of EFSF, established in 2010 alongside the other two European Supervisory Authorities. In the context of UK’s withdrawal from the EU, the EBA was relocated from London to Paris (the Council, 2017). Legal basis for establishment of this body is Article 114 TFEU (Regulation No 1093/2010, Recital 17).

It is created with the aim to replace the Committee of European Banking Supervisors (CEBS). Main task of CEBS was coordination of National Competent Authorities (NCAs) „in the field of banking supervision and provide expert advice to the European Commission on prudential matters“ (Božina Beroš, 2018, p. 47). CEBS was an important actor in the previous comitology approach emphasised by the Lamfalussy Report in 2001. According to Božina Beroš (2018), the CEBS presented a „discussion forum where national banking supervisors exchanged practices and policy views“ and thereby „the convergence of supervisory standards among MS.“ The recommendations, guidelines and standards which were agreed on the meetings were „soft law“ instruments with non-binding nature. The financial difficulties which emerged across the EU, about 10 years ago, revealed the flaws in the CEBS’ coordination of NCAs in the cross-border banking matters. The EU’s response to the weaknesses of such banking supervisory system, was agencification of this sector, hence replacing the CEBS with an EU agency - the EBA. From the national governments’ perspective, an agency governance was politically acceptable, since the day-to-day supervision is still in hands of national authorities.

According to the EBA’s founding Regulation (No 1093/2010, Recital 11), this body is responsible for „improving the functioning of the internal market“ by providing an effective regulation and supervision on the financial markets.“ Furthermore, the Recital 11 of the EBA’s Regulation states
that „the Authority should protect public values such as stability of the financial system, the transparency of markets and financial products and the protection of depositors and investors“. Another important task of the EBA is promoting „supervisory convergence and providing advice to the Union institutions in the areas of banking, payments, e-money regulation and supervision“ (Regulation No 1093/2010, Recital 11).

In order to fulfil its main tasks and that is to reach maximum harmonisation in the banking supervision, the EBA relies on the specific regulatory tools and „soft law“ instruments. More precisely „the EBA has the power to draft quasi-rule-making instruments: regulatory and implementing technical standards, through which it ensures greater supervisory convergence among MS“ (Božina Beroš, 2018, p. 48). However, the technical standards become legally binding only after the Commission’s affirmation. Under the „soft law“ measures which are at the EBA’s disposal, guidelines and recommendations are addressed to NCAs or even to the particular financial institution.

The tasks of the EBA are defined in a number of various EU regulations and directives in the area of financial and banking regulation. These include the Capital Requirements Directive (CRD IV), the Capital Requirements Regulation (CRR), the Bank Recovery and Resolution directive (BRRD), the Deposit Guarantee Schemes Directive (DGSD), the revised Directive on Payment Services (PSD2), the Mortgage Credit Directive (MCD), the Payment Accounts Directive (PAD), the Regulation on key information documents for packaged retail and insurance-based investment products (PRIIPs), the fourth Anti-money Laundering Directive (AMLD), the Electronic Money Directive (EMD), the EU Market Infrastructure Regulation (EMIR), the Financial Conglomerates Directive (FICOD), the Directive on central securities depositories (CSD), the Markets in Financial Instruments Directive (MiFID II) and the Interchange Fee Regulation (IFR) (EBA, 2016).

The main task of the EBA is to create a single market in the EU banking sector, by developing the common regulatory framework, which is applicable to all EU banking market actors: The Single Rulebook. „The single rulebook arises out of the legislative framework proposed by the European Commission and the EBA builds on it by developing technical standards (TSs), guidelines and recommendations addressed to banking institutions and EU supervisors“ (EBA, 2016). Furthermore, the EBA has established the so called „Q&A tool“ which should provide the clarification in the implementation of these rules to the stakeholders and other concerned market
actors. Relaying on its expertise, the EBA should „identify, at an early stage, trends, potential risks and vulnerabilities stemming from the micro-prudential level, across borders and across sector“ (Regulation No 1093/2010, Recital 43). In this respect, the EBA initiates and coordinates an EU wide stress test, in cooperation with the ESRB, the ECB and the Commission. The stress test is a „risk assessment tool that examines the resilience of financial institutions with regards to adverse market developments, as well as any systemic risks in the EU financial system overall“ (EBA, 2016).

The EBA has also a competence to investigate „alleged breaches or non-application of EU law“ (EBA, 2016). It should act „upon a request from one or more competent authorities (…) or on its own initiative“ (Regulation No 1093/2010, Article 17 (2)). „The outcome of the EBA investigations into alleged breaches usually consists of recommendations addressed to the competent authority concerned, setting out the actions that must be followed to comply with EU law“ (EBA, 2016).

4.2 EBA's internal governance

Internal governance framework of the EBA is defined by the Article 6 of the Regulation No 1093/2010. It is regulated that the EBA is composed of four organs: the Chairperson, the Executive Director, the Board of Supervisors and the Management Board.

According to the Article 5 of the EBA Regulation, this body has a legal personality and as such it „shall be represented by its Chairperson.“ The Chairperson should act „objectively and independently, in the sole interest of the EU“ (Božina Beroš, 2018, p. 50). The independence of this body is elaborated in the Article 49 of the Regulation No 1093/10 which states that „the Chairperson shall neither seek nor take instructions from the Union institutions or bodies, from any government of a Member State or from any other public or private body.“ Beside representing the EBA externally, the Chairperson „shall be responsible for preparing the work of the Board of Supervisors and shall chair the meetings of the Board of Supervisors and the Management Board“ (Regulation No 1093/10, article 48 (1)). The Chairperson is a professional appointed by the Supervisory Board, with the office term of 5 years, which can be extended once.
According to Article 53 of the EBA Regulation, the Executive Director is responsible for management of the EBA and prepares the work of the Management Board. He is also responsible for implementing the annual work programme, preparation of a multi-annual work programme and other tasks significant for everyday work activities of the EBA. The Executive Director shall be appointed by the Board of Supervisors, with 5 years office term, which can be extended once.

The Board of Supervisors is the main decision-making body of the EBA, which brings together the NCAs „in creating commonly agreed policies“ (Božina Beroš, 2018, p. 51). According to the Article 43 of the EBA Regulation, the Board of Supervisors gives guidance to the work of the Authority, adopts the opinions, recommendations, and decisions, appoints the Chairperson, adopts the annual report and the multi-annual work programme, as well as the budget of the EBA. The Board of Supervisors is composed of the Chairperson, the head of the national public authority competent for the supervision of credit institutions in each Member State, representative of the Commission, representative of the European Central Bank, representative of the ESRB, one representative of each of the other two European Supervisory Authorities (Regulation No 1093/20, Article 40). According to the Article 44 of the EBA Regulation, „decisions of the Board of Supervisors shall be taken by a simple majority of its members.“

The Management Board fulfils administrative tasks of the EBA. More precisely, the tasks of the EBA are „executing various preparatory assignments, such as proposing the adoption of (multi) annual work programmes and annual activities, reporting to the Board of Supervisors, exercising specific budgetary powers (such as delivering opinions on final accounts), considering and safeguarding access to EBA documents, managing specific staff policy tasks and, finally, appointing and removing members of the Board of Appeal (Božina Beroš, 2018, p. 52). According to the Article 45 of the EBA Regulation „The Management Board shall be composed of the Chairperson and six other members of the Board of Supervisors.“

The Supervisory and Management Board are kind of forums where different interests of the NCAs „can be confronted, coordinated, compromised and finally, harmonised in the policy creation process“ (Božina Beroš, 2018, p. 52). The interplay and dynamics of the NCAs interests can be brought to light by investigating the functioning of these two Boards. The features of the EBA’s governance structure, with the Board of Supervisors which members are the representatives of the national competent authorities, mirrors its intergovernmental nature. According to Ferran (2016, pp.
it is thus the national supervisors, acting collectively, that determine the EBA’s policies and practices and make the key formal decisions.” Since the financial regulation and supervision within the EBA is principally decentralised, the governance arrangements of the national supervisors is an important factor in supervisors’ motivation to cooperate across national borders (Masciandaro et al, 2011, pp. 205). In this respect, some theorists consider the EBA’s „dependency on national supervisors“ as a weakness of this body and „it has been called upon to assert its own authority and be more than just a „club“ of supervisors“ (Ferran, 2016, pp. 290).

4.3 EBA and the Banking Union

The second wave of crisis which started in 2011, demonstrated that „maximum harmonisation and coordination of supervision were necessary but not sufficient to overcome the heavy inheritance of the previous stage of the crisis (Cappiello, 2015, pp. 425). According to Cappiello (2015) there was a „lack of a common response“, which means a lack of „common resolution procedures, a shared safety net and effective coordination among Member States“ and such constellation of powers inevitably led to „fragmentation of the single market through ring-fencing measures along national borders; the creation of the vicious circle between banks and the national budgets on which banks rely in case of failure; and serious obstacles to the conducting of a single monetary policy.“ These were the reasons to integrate the national supervisory and resolution systems, which led to the establishment of the Banking Union (BU) in a time period between 2012 and 2014. The institutional structure of the Banking Union relies on two main components: the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM).

Source: Single Resolution Board [online]
Here raises the question: what effects has the creation of the Banking Union on the tasks of the EBA? According to Cappiello (2012) the EBA and the BU „operate in complementary levels“, whereby the EBA is „working on the rule-making ground“ and the BU is „acting as an integration mechanism.“ More precisely, „the EBA has a horizontal function, which is to provide the common regulatory ground on the basis of which the BU provides a vertical integration mechanism of the previously national supervisory and resolution arrangements and mechanisms“ (Cappiello, 2015, pp. 426).

An important task of the EBA is to avoid polarisation between BU and non-BU states. Under the SSM, the ECB is responsible for the overall effective functioning of the SSM and has direct oversight of the euro area banks, i.e the SSM applies only to the euro area and to the non–euro area member states that decide to join the banking union (Quaglia, 2019, p. 6). Given the Governance Structure of the EBA and the fact that in its Board of Supervisors sit NCAs representatives of all EU Member States, we could say that in the system of EU financial supervision, the EBA is kind of a bridge between the euro area and non-euro area Member States.

The EBA’s main tool in this respect is the Single Rulebook and achievement of convergent and consistent practices throughout Member States which are inside as well as outside the BU. This is especially important because of the fact that the „largest cross-border groups operate and intermediate capital in and out of the BU area“ (Cappiello, 2015, pp. 426). The specifics of relationship between the ECB as a central EU banking supervisory authority and the EBA will be explained in the following section.

5. Accountability arrangements of EBA

The concerns about accountability of the new established EU agencies in the financial sector, were addressed many times in the political, economic and legal theory. The CJEU gave answers in the ESMA case, about the scope of powers which were delegated to these bodies and stated that the agencification in the EU financial sector was consistent with the Meroni doctrine.

Nevertheless, given the scope of powers delegated to the EBA and its quasi-regulatory tasks, it poses many questions about its accountability relationships. Moreover, this body has a „hybrid“
structure „combining the institutional forms of the “pure” standalone agency and of the looser, more open network“ (Salter, 2017, p. 2). This implies that the accountability mechanisms around the EBA are quite complex, combining various EU actors and institutions and to some extent the actors at the national level. This thesis will explain the main accountability relationships of the EBA, and based on the theoretical framework by Bovens, will try to give an answer to the questions whether these accountability regimes are appropriate or effective. In this respect, the following part elaborates the accountability relations of the EBA to the legislative actors, other European financial regulators, national authorities and to the market actors.

5.1 Accountability relation to the legislative actors

This part will present the accountability relations of EBA to the European Parliament, the Council and the Commission. The political accountability to the European Parliament and the Council is explicitly defined in the Recital 10 and in the Article 3 of the EBA founding Regulation (No 1093/2010). These institutions have, to great extent, parallel roles as political supervisors, with the EP having a dominant role. So, this vertical accountability relationship can be perceived at the most simple way of a connection between the principal and the agent, whereby the principal or the forum are engaged in monitoring the agency to ensure that it fulfils its mandate (Salter, 2017, p. 4). This accountability relationship contributes significantly to democratic legitimacy of the EBA. In order to give a comprehensive explanation of the accountability regimes of EBA vis-à-vis the legislative actors, it will be presented the legal basis of these relations, as well as the examples of how these accountability relations works in practice.

5.1.1 Accountability of EBA vis-à-vis the European Parliament

5.1.1.1 Regulation (EU) No 1093/2010

The accountability of EU agencies vis-à-vis the European Parliament have become crucial, given the increasing scope of powers delegated to the agencies. This accountability relation is significant from a democratic, as well as from a constitutional perspective „as a check on the exercise of executive power“ (Busuioc, 2010, p. 97). Overall, the Recital 45 of the EBA Regulation specifies the advisory functions of the EBA in relation to the EP, the Council and the Commission. According to this law, the EBA „should serve as an independent advisory body to the European Parliament, the
Council and the Commission in the area of its competence“ (Regulation No 1093/2010, recital 45). In this respect, the EBA should provide assessments to the European Parliament, the Council, the Commission and the ESRB of trends, potential risks and vulnerabilities in its area of competence (EBA, 2011, p. 13).

However the legal basis for accountability relation of EBA vis-à-vis the EP is provided in the EBA Regulation (No 1093/2010) in the Recital 10, as well as in the Article 3 stating that „the ESAs should be accountable to the European Parliament and to the Council.“ The relations between the EP/the Council and the EBA are several times addressed by the EBA Regulation.

According to the Article 50 of the respective Regulation, the Authority has an obligation to directly report to the EP and the Council stating that „the European Parliament and the Council may invite the Chairperson or his alternate to make a statement, while fully respecting his independence. The Chairperson shall make a statement before the European Parliament and answer any questions put by its members, whenever so requested“ (Regulation No 1093/2010, Article 50 para 1). Furthermore, „the Chairperson shall report in writing on the main activities of the Authority to the European Parliament when requested and at least 15 days before making the statement referred to in paragraph 1“ (Regulation No 1093/2010, Article 50 para 2). How the direct reporting of EBA’s Chairperson to the EP works in practice, will be explained in the following part.

Another important instrument of reporting to the legislative actors are the annual reports and the multi-annual work programmes of the Authority. According to the Article 43 para 5, the annual report on the activities of the EBA shall be submitted to the EP, the Council, the Commission, the Court of Auditors and the European Economic and Social Committee by 15 June each year and it should be also made public. Furthermore, the multi-annual work programme of the Authority should be submitted to the European Parliament, the Council and the Commission, according to the Article 43 para 6 of the respective Regulation.

5.1.1.2 EBA’s mandate under the Payment Services Directive (PSD2)

According to the EBA’s founding Regulation the Chairman can be anytime invited to report directly to the EP and the Council and to answer the questions on the conduct in particular cases. An example for that are the Chairman’s appearances before the Committee on Economic and Monetary
Affairs (ECON) of the European Parliament to report on the progress made on the revised Payment Services Directive (PSD2) and to explain why this progress was slow (Salter, 2017).

The rapid development in the payments markets, the introduction of new technologies, as well as newly established business models in the context of digitalisation have caused the need for adjustments in this field. The revised Payment Services Directive updated the EU rules adopted by the initial PSD from January 2007 (ECB, 2018). The PSD2 entered into force in January 2016 with the deadline 13th of January 2018 for the Member States to transpose it into their national law. The main objective of the PSD2 is to support innovation and competition in retail payments and to enhance the security of payment transactions and the protection of consumer data (ECB, 2018). The PSD2 conferred to the EBA eleven mandates. More precisely, the EBA should develop six technical standards, five sets of Guidelines, and a register under the PSD2. Part of them relate to the development of draft Regulatory Technical Standards and Guidelines on establishment of adequate security measures for electronic payments in cooperation with the ECB. Furthermore, the EBA should develop draft Regulatory Technical Standards addressed to payment service providers, as well in cooperation with the ECB (EBA, 2016b).

The Chairman of EBA was invited to the scrutiny slot which was set up by the ECON Committee for the 29th of November 2016. It should focus on PSD2, particularly on draft Regulatory Technical Standards (RTS) specifying the requirements on strong customer authentication and common and secure communication under the Article 98 PSD2 (ECON, 2016). Beside the representatives of the EBA, the Commission as well as the ECB representatives, participated in the meeting. The Chairman of EBA presented the progress this agency had made on development of RTS under the PSD2. Moreover, about a month before the scheduled scrutiny slot in the ECON Committee, the former Chairman of EBA Mr Andrea Enria had received a letter from two MEPs Markus Ferber and Antonio Tajani, which were also members of the negotiating team for the EP for PSD2. They raised couple of technical questions concerning the mentioned RTS under the Article 98 PSD2. They addressed couple of potentially problematic solutions that EBA previously proposed and raised a concern that it could affect „fair competition among all payment service providers“ (ECON, 2016b). After couple of weeks, the EBA Chairman, Mr Enria answered to their letter stating that they will carefully consider the concerns raised in their letter and that he will provide for more comprehensive response at the ECON scrutiny slot on November 29th 2016 (EBA, 2016c).
On the ECON scrutiny slot in November 2016, the Chairman of EBA reported about the progress that EBA made on the RTS specifying the requirements on strong customer authentication and common and secure communication and explained why the work on these RTS was time-consuming. In his introductory statement, the Chairman explained that the timeframe for development of the concerning RTS is quite challenging since „the different objectives of the PSD2 give rise to competing demands“ which requires the EBA and the ECB „to make difficult trade-offs between these competing demands“ (EBA, 2016d). Furthermore, he addressed the questions raised in the mentioned letter from MEPs Ferber and Tajani. He proceeded with the report about the way EBA had developed these RTS. According to his speech, the EBA involved interested parties into the discussion, whereby the first step was a Discussion Paper. The EBA received 118 responses to the Discussion Paper, from incumbents, market challengers and other interested parties (EBA, 2016d). Moreover, they invited selected third party providers and banks to participate in the meetings. This intense consultation period resulted in 226 responses which the EBA was obligated to take into account (EBA, 2016d).

This example indicates two main points. First of all, the EBA has an obligation which is set up in the founding Regulation, to give account to the EP, by reporting to the EP’s respective Committee about its performance on tasks which are falling into the EBA’s competence. The appearances of EBA Chairman before the EP and his obligation to respond to the questions from MEPs, is consistent with the Bovens’ definition of accountability. Second, this example indicates another accountability relation of EBA, namely the accountability relationship to the market actors, especially in the context of development of draft RTS. According to the EBA Regulation, the Authority has an obligation to involve interested parties into the discussion. The relationship between the EBA and NCAs/market actors, will be explained in one of the following parts of the thesis.

5.1.2 Accountability of EBA vis-à-vis the Council

As already mentioned in the previous chapter, the EBA Regulation explicitly defines the obligation of EBA to give account to the EP and the Council in the Recital 10 and Article 3. Beside the Article 50 of the respective Regulation which sets up the obligation for EBA to directly report to the EP and the Council, there is another important instrument of holding this body to account. Namely, the
EBA has an obligation under its founding Regulation to issue annual reports, annual work programme and multi-annual work programme.

5.1.2.1 Safeguards

Important aspect of the EBA’s accountability relation vis-à-vis the Council is the safeguard clause from the Article 38 of the EBA Regulation. In this Article para 1 is stated that the Authority should ensure that the decisions adopted pursuant to Article 18 (Action in emergency situations) and Article 19 (Settlement of disagreements between competent authorities in cross-border situations) don’t influence the fiscal responsibilities of Member States. In the case that Member State considers that the mentioned EBA’s decision impinges on its fiscal responsibilities, it may notify the Authority and the Commission within two weeks to the competent authority that the decision will not be implemented by the competent authority. „In the case of such notification, the decision of the Authority shall be suspended“ (Regulation 1093/2010, Article 38, para 2). In the case that the Authority maintains its decision, the Council have a competence to decide whether the Authority’s decision is maintained or not. If the Council decides not to maintain the EBA’s decision, it should be terminated.

5.1.2.2 Annual reports

The Article 43 para 4 of the EBA Regulation states that „The Board of Supervisors shall, on the basis of a proposal by the Management Board, adopt the annual report on the activities of the Authority, including on the performance of the Chairperson’s duties, on the basis of the draft report referred to in Article 53(7) and shall transmit that report to the European Parliament, the Council, the Commission, the Court of Auditors and the European Economic and Social Committee by 15 June each year. The report shall be made public.“ So the annual report, as well as the annual work programme and multi-annual work programme should be proposed by the EBA’s Management Board.

Annual reports of EBA offer a comprehensive oversight of activities for each year. These documents summarise the main activities of EBA which fall under its competence. Additionally, it sets up the key plans and priorities for the following year. The first annual reports from 2011, 2012 and 2013, witnessed difficult financial times in the EU and outlined the first reaction of EBA in
such circumstances. Over the first three years, the EBA faced many challenges, since it „had to achieve all the operational targets in the context of an ongoing crisis in Europe and in times of serious economic uncertainty“ while at the same time the discussions on major legislative proposals were taking place (EBA, 2013, p. 8). The EBA made preparations for a new crisis management regime under the Bank Recovery and Resolution Directive (BRRD), which was adopted in 2014. From the regulatory side, the first years of EBA's activity were also challenging, in terms of workload and deadlines (EBA, 2014). In 2013 the EBA submitted 57 technical standards to the European Commission for endorsement, covering banks’ own funds, supervisory reporting, credit risk, market risk, liquidity and remuneration, which were significant for the implementation of reforms under the Fourth Capital Requirements Directive (CRD IV) and the Capital Requirements Regulation (CRR) (EBA, 2014). This regulatory activity involved the Banking Stakeholder Group, as well as external stakeholders.

In the next two years the EBA made a significant progress by completing the single rulebook. The EBA’s financial standards were applied for the first time in all Member States. This was especially significant in the context of the Banking Union, since the rulebook foster convergence in financial supervision. Another important task of EBA during 2015 and 2016 was to fulfil the mandates received by the BRRD and revised PSD. Beside its regular tasks, during 2017 and 2018 the EBA was concentrated on the Brexit preparations with the main aim to protect the public interest. The Brexit brought political uncertainty and potential risks for the financial institutions, which EBA addressed in an opinion from 2018 (EBA, 2019). On the other hand, the Brexit also had operational impacts on EBA, i.e. the relocation of the Authority from London to Paris.

5.1.2.3 Annual work programme

According to the Article 43 para 4 of the EBA Regulation the „The Board of Supervisors shall adopt, before 30 September of each year, on the basis of a proposal by the Management Board, the work programme of the Authority for the coming year, and shall transmit it for information to the European Parliament, the Council and the Commission.“ Similar to the annual reports, the annual work programmes of EBA should be made public.

The annual work programme describes and summarises the main objectives and deliverables of the EBA in the forthcoming year derived from the tasks specified in the Regulation and from the
relevant EU banking sector legislation (EBA, 2011). The annual work programmes of EBA define Regulation, Oversight, and Consumer Protection as the core functions of the EBA that are laid down in the EBA regulation (EBA, 2013b).

5.1.2.4 Multi-annual work programme

When it comes to the EBA’s multi-annual work programmes, the EBA Regulation stipulates that „The Board of Supervisors shall adopt the multi-annual work programme of the Authority, and shall transmit it for information to the European Parliament, the Council and the Commission.“ This document should be also made public.

Multi-annual work programme describes the context in which the EBA operates, the EBA’s mission, objectives and the evolution of EBA’s activities over the years within the main strategic areas derived from the tasks specified in the Regulation and from the relevant EU banking sector legislation (EBA, 2015). The multi annual work programme has mostly a three-year planning horizon and are mostly accompanied by the annual work programme. While the multi annual work programmes set the main objectives and strategic areas within the planning period, the annual work programme provides for more detailed informations about the EBA’s activities for the upcoming year (EBA, 2015).

5.1.3 Accountability of EBA vis-à-vis the Commission

The EBA Regulation indicates strong accountability relations of EBA vis-à-vis the Commission. The draft TS developed by the EBA become a law only when the Commission adopts it. The following part will explain how the process of drafting TS looks like and how strong are the accountability relations of EBA vis-à-vis the Commission in this respect. The Commission is mandated under the ESAs Regulation to publish general reports, which are assessments of the performance of ESAs for the specific time period. Furthermore, the Commission has supervisory powers regarding the establishment and implementation of the EBA’s budget.
5.1.3.1 Technical standards

Under the CRD IV package and the BRRD, the EBA has a mandate to produce draft Technical Standards (TS). "TS are legal acts which specify particular aspects of an EU legislative text (directive or regulation) and aim at ensuring consistent harmonisation in specific areas" (EBA, 2016). The EBA Regulation differentiates between regulatory technical standards (RTS) and the implementing technical standards (ITS).

Article 10 para 1 of the respective Regulation states that "where the European Parliament and the Council delegate power to the Commission to adopt regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU in order to ensure consistent harmonisation in the areas specifically set out in the legislative acts referred to in Article 1(2), the Authority may develop draft regulatory technical standards. The Authority shall submit its draft standards to the Commission for endorsement." Furthermore, according to the same Article, RTS should not imply strategic decisions or policy choices.

The EBA should conduct public consultations on draft RTS and also request an opinion from the Banking Stakeholder Group. After the submission of draft RTS from the EBA, the Commission should forward it to the EP and the Council. Within three months the Commission should decide, whether to adopt these RTS. The Commission can also adopt it in part only, or with amendments. So basically, the Commission can not change the content of the draft RTS without prior coordination with the EBA (Regulation 1093/2010, Article 10, para 1). Only in the case that the EBA doesn’t submit a draft RTS to the Commission within the given timeframe, the Commission can adopt it as a delegated act.

The Article 10 para 4 of the EBA Regulation specifies that "the regulatory technical standards shall be adopted by means of regulations or decisions. They shall be published in the Official Journal of the European Union and shall enter into force on the date stated therein."

Article 15 of the EBA Regulation empowers the EBA to develop draft ITS. The procedure to develop the draft ITS is the same as for the RTS. Basically, the EBA should submit it to the Commission and the Commission decides whether to endorse it or not. The ITS should be also adopted by means of regulations or decisions and should be published in the Official Journal of the European Union.
To sum up, the EBA is mandated with the power to develop RTS and ITS in the area of its competences. However, this procedure involves other actors as well, such as the Commission, the EP and the Council, as well as public consultations and the Banking Stakeholder Group. The Commission is in this respect the key decision-maker, which indicates a clear hierarchical relationship of EBA to the Commission. Furthermore, in the context of developing draft TS, the EBA lacks the enforcement powers, which instead takes place through the Commission. The reason for this is the Meroni non-delegation standard, which argues that powers cannot be delegated to agencies where the powers are conferred by the Treaties on the EU institutions (Fahey, 2011, pp. 585).

5.1.3.2 The Commission’s general report

Article 81 of the EBA Regulation defines that every three years „the Commission shall publish a general report on the experience acquired as a result of the operation of the Authority and the procedures laid down in this Regulation.“ According to this law, the Commission’s report should basically evaluate: the convergence in supervisory practices reached by competent authorities, the functioning of the colleges of supervisors, the progress achieved towards convergence in the fields of crisis prevention, management and resolution, the role of the Authority as regards systemic risk and others. Furthermore, the Article 81, para 3 of the respective Regulation stipulates that the Commission should develop „an annual report on the appropriateness of entrusting the Authority with further supervisory responsibilities in this area.“ These reports should be also forwarded to the EP and the Council.

As envisaged in the EBA founding Regulation, the Commission published a general report on the operation of ESAs and the ESFS. Basically, the Commission assessed the functioning of the ESAs in the period between their establishment till the December 2013 and thereby involved a wide range of stakeholders. The Commission organised a public hearing on the ESFS review in May 2013, as well as a public and a targeted stakeholder consultation (COM, 2014). Furthermore, a self-assessment provided by the ESAs, review of the EP Resolution on the EFSF, as well as the studies undertaken by the IMF and the EP are taken into account (COM, 2014). The Commission stated that overall, the ESAs performed well during that period, even though there are also areas for improvement. In this report the Commission assessed overall effectiveness and efficiency,
regulatory role of ESAs, their supervisory role, activities as regards international matters, monitoring and coordination role within the financial stability framework, consumer protection role, the internal governance and financing of ESAs.

When it comes to the regulatory role, the Commission stated in its report that „the work undertaken by the ESAs on the development of the single rulebook has contributed significantly towards enhanced regulatory harmonisation and coherence and has improved mutual understanding between supervisors“ (COM, 2014). The Commission further pointed out that their role in the regulatory process is very important, however significantly different from the EU institutions and that their role in the regulatory process need to be assessed within the limits posed by the Treaty (COM, 2014). In this respect, the Commission recommended ESAs to enhance transparency of the regulatory process, to establish adequate time frames for the public consultations and to provide for more detailed feedback on the input received from these discussions. From the annual reports of the EBA, it is obvious that the Authority paid a lot of attention to the recommendations of the Commission in this respect. The EBA makes strong efforts to make the process of drafting TS transparent and to involve a wide range of stakeholders.

When it comes to the supervisory role, the Commission states in its general report that the ESAs made strong efforts in promoting convergent supervisory practices. They are strongly involved in the work of colleges of supervisors and improved their functioning by adopting guidelines and controlling their agendas and annual action plans (COM, 2014). The Commission however suggested that the ESAs should be able to make more effective use from rights of access to data from competent authorities and financial institutions and to pay more attention to the peer reviews (COM, 2014).

Regarding the monitoring and coordination role in terms of financial stability, the Commission stated that the ESAs „contributed to monitoring developments in financial markets and to test the resilience of financial institutions as well as of the EU financial system as a whole“(COM, 2014). Furthermore, it is pointed out that the stakeholders are to great extent satisfied with the ESAs coordination role. The Commission stated that the ESAs should pay more attention to the issue of consumer protection, especially through the Joint Committee.
5.2 Inter-institutional relations and accountability

In the previous sector, the EBA was perceived as a standalone agency, which stands in vertical accountability relationship vis-à-vis the legislative bodies. In the following part, the Authority will be perceived rather as a form of network, where the relationships are getting more complicated. The EBA operates alongside with the two other sectoral bodies, the ESMA and EIOPA, which work collectively to produce „regulatory standards supporting the legislation which governs the single market in financial services“ (Salter, 2017, p. 10). Main bodies which bring together the heads of the three agencies are the Joint Committee and the Board of Appeal. In this respect the following part will present the inter-agency relations in the context of work of these two bodies. The main argument here is that the inter-agency coordination creates a floor for increased learning, transparency and development of the technocratic expert-led behaviour of these bodies, which further enhances the accountability. Another important component of EBA’s accountability arrangements is the relation to the ECB.

5.2.1 Joint Committee

According to the Article 55 of the EBA, ESMA and EIOPA founding Regulations, the Joint Committee should comprise of Chairpersons, as well as Executive Directors of each agency and representatives of the Commission and the ESRB should also be invited to the meetings. In the respective Regulations is also set up that Joint Committee should meet at least once every two months. The Joint Committee is established to ensure close and regular cooperation among the agencies particularly regarding financial conglomerates, accounting and auditing, micro-prudential analyses of cross-sectoral developments, risks and vulnerabilities for financial stability, retail investment products, measures combating money laundering (EBA, ESMA, EIOPA Regulations, Article 54, para 2). Beside being a forum for cooperation the Joint Committee also plays an important role in the exchange of information with the European Systemic Risk Board (ESRB) and in developing the relationship between the ESRB and the ESAs (EBA, 2012).

The main argument is that inter-agency interactions promote transparency between the agencies (Chiu, 2015, p. 17). Such cooperation which is based on transparency can also enhance accountability and promote its expert based performance. In order to improve inter-agency interaction and cooperation the Joint Committee established couple of effective functional elements.
First of all, the Joint Committee established a procedure of decision-making that involves consensus of the three Chairpersons (Chiu, 2015, p. 17). In this respect, the case of disagreements lead to reconsideration of issues. According to Chiu (2015), this fosters inter-agency transparency, sharing, learning and negotiation and can contribute towards enhancing the technocratic development in each agency. In other words, the coordination among agencies in the Joint Committee leads to cross-sectoral interaction and this could positively affect the agencies expert-based performances.

Another important instrument of enhancing the inter-agency cooperation is the establishment of Sub-Committees under the Article 57 of the agencies’ founding Regulations. This Article defines that the Joint Committee should establish Sub-Committee on Financial Conglomerates and authorises this body to create further Sub-Committees. In this respect, beside the Financial Conglomerates Sub-Committee, the Joint Committee established the Sub-Committee on Cross-Sectoral Developments, Risks and Vulnerabilities, the Sub-Committee on Anti Money Laundering, the Sub Committee on Consumer Protection and Financial Innovation (EBA, 2012). The Sub-Committee on Financial Conglomerates exercises wider supervisory role over groups of financial institutions that may pose cross-sectoral and systemic risks and has also established standards for supervisory convergence in the oversight of financial conglomerates (Chiu, 2015, p. 18). The Sub-Committee on Cross-Sectoral Developments, Risks and Vulnerabilities is responsible for delivering the bi-annual report on cross-sectoral market developments, risks and vulnerabilities in the EU which the three agencies are tasked to prepare for the Commission, Parliament and Council (Chiu, 2015, p. 18).

The Joint Committee makes significant efforts in the area of consumer protection. Primarily, it was perceived that the EBA was relatively weaker in the area of consumer protection than the ESA and the inter-agency interaction through the Joint Committee had resulted with progress in this respect. The three agencies have also took technocratic leadership on additional cross-sectoral issues such as reviewing mechanistic reliance on credit ratings and the review of benchmark setting and regulation of the relevant processes (Chiu, 2015, p. 19).

It can be concluded, that the inter-agency coordination which is based on transparency as well as sharing of experiences and knowledge, can enhance accountability which further fosters technocratic effectiveness of the agencies. So, it seems like that inter-agency accountability can
increase the effectiveness of the agencies in terms of making adequate, expert-based, politically unbiased decisions.

5.2.2 Board of Appeal

The Board of Appeal is as well a forum where the interaction and cooperation between the ESAs agencies takes place. Inter-agency coordination within the Board provides opportunities for scrutiny into agency processes and practices (Chiu, 2015, p. 19). Sir Blair (2017) defined three main reasons why the right to appeal is important: „one reason is that some of the ESAs’ decisions could have a direct effect on the rights of businesses and consumers; second, an independent appeal process is part of the accountability of the supervisory authorities; and finally, it is an aspect of good governance.“

According to the Article 58 para 2 of the ESAs Regulations „the Board of Appeal shall be composed of six members and six alternates, who shall be individuals of a high repute with a proven record of relevant knowledge and professional experience… the Board of Appeal shall have sufficient legal expertise to provide expert legal advice on the legality of the Authority’s exercise of its powers.“ The member should be appointed by the ESAs from a short-list proposed by the Commission, with the office term of five years. The strength of this body depends on expertise of the members in highly technical issues. Furthermore, it is enshrined in the Article 59 of the ESAs Regulations that the members of the Board should be independent in making their decisions and that they should not be bound by any kind of instructions. Further guarantee of independence of the Board is a right to contest its decisions before the Court of Justice of the EU.

So the Board of Appeal is not a supervisory or a policy making body. It has an adjudicative function and should be guided by the principles in the case law of the Court of Justice (Blair, 2013, pp. 169). In the Article 60 of the ESAs Regulations it is defined that any natural or legal person, including competent authorities, may appeal against a decision of the ESAs. Furthermore, it is stated in the same Article that an appeal should be filed two months of the date of notification of the decision to the person concerned. „If the appeal is admissible, the Board of Appeal shall examine whether it is well-founded. It shall invite the parties to the appeal proceedings to file observations on its own notifications or on communications from the other parties to the appeal proceedings, within
specified time limits“ (EBA Regulation, Article 60, para 4). The Board decision should be made public.

In order to make its arbitration effective, the Board established its procedure by drawing from the experiences of other EU bodies and from the best practices in international dispute resolution (Blair, 2013, pp. 170). It is quite challenging to provide a procedure which is competent to deal with different kinds of appeals. In practice, there are appeals which require relatively simple procedure, on the other hand, there are very complex appeals which deal, for example, with the questions of financial regulation.

The decisions of the Board are adopted by the majority of at least four of the six members and this majority has to include at least one of the two members appointed by the Authority whose decision is being appealed (Blair, 2013, pp. 170). Article 60 para 5 of the ESAs Regulations, defines that „the Board of Appeal may confirm the decision taken by the competent body of the Authority, or remit the case to the competent body of the Authority. That body shall be bound by the decision of the Board of Appeal and that body shall adopt an amended decision regarding the case concerned.“

5.2.3 Actions before the Court of Justice of the EU

As already mentioned the ESAs Regulations provide for the opportunity to bring an action before the Court. More precisely the Article 61 of the respective Regulations defines that „proceedings may be brought before the Court of Justice of the European Union, in accordance with Article 263 TFEU, contesting a decision taken by the Board of Appeal or, in cases where there is no right of appeal before the Board of Appeal, by the Authority.“

The same Article para 2 states that the Member States and the Union institutions, as well as any natural or legal person can appeal the against the decision of the Authorities before the Court of Justice, in accordance with the Article 265 TFEU. In the case that the Authorities fail to take a decision, there is a possibility to bring an action for failure to act before the Court in accordance with Article 265 TFEU.

An interesting example how the right to appeal is exercised by the market actors is the case SV Capital OÜ v EBA (C-577/15 P). In this case, SV Capital raised a matter to the EBA regarding the
suitability of persons directing the Estonian branches of Finnish Bank Nordea in Estonia (Chiu, 2015, p. 20). The claimant raised a concern to the Estonian financial regulator about the credibility of the two governors of the Nordea branch. The Estonian authority directed the SV Capital to the Finish authority, which rejected the SV Capital’s complaint. The SV Capital decided to bring the matter to the EBA with a claim that the Finnish authority had breached the Union law. However, the EBA responded that there is a lack of competence of EBA to intervene in matters of corporate governance. Couple of weeks later, the applicant brought an appeal to the Board of Appeal against the EBA’s decision. The Board analysed that the „EBA had interpreted its remit too narrowly and that the EBA could intervene in matters regarding the corporate governance of key branches such as the Estonian branch of Nordea, in relation to key function holders that could include persons directing the branches“ (Chiu, 2015, p. 20). So the Board remitted the case to the EBA. In its decision from February 2014, the EBA rejected the complaint on the basis that there were insufficient grounds for initiating an investigation under Article 17 of Regulation No 1093/2010 (CJEU, 2016). The claimant brought another appeal against this EBA’s decision before the Board of Appeal. Basically, the Board of Appeal first, declared the appeal against the EBA decision from February 2014 admissible and, then, dismissed it in its entirety as unfounded (CJEU, 2016). The SV Capital decided to bring the action before the Court in accordance with the Article 263 TFEU. SV Capital sought annulment, of the EBA decision of 21 February 2014 and of the Board of Appeal decision of 14 July 2014. SV Capital also sought to have the case remitted to the competent body of the EBA for the purposes of examining the merits of its complaint (CJEU, 2016). The General Court noted that, in an action for annulment, the EU Courts do not have jurisdiction to issue directions to the EBA. Consequently, the General Court declared that head of claim inadmissible (CJEU, 2016, para 20). The General Court raised of its own motion, under Article 60(1) and (2) of Regulation No 1093/2010, the question of the Board of Appeal’s competence to decide on the appeal brought before it against the EBA decision of 21 February 2014, and it held that the Board of Appeal did not have the competence to do so (CJEU, 2016, para 21). Basically, the General Court without examining the merits of the pleas raised by SV Capital, the General Court upheld the action, in so far as it sought annulment of the Board of Appeal decision of 14 July 2014, on the ground that the Board of Appeal did not have competence (CJEU, 2016, para 22). The SV Capital appealed this judgement of the General Court, where it dismissed, as inadmissible, the SV Capital action seeking annulment of the EBA’s decision from February 2014. The Court dismissed the appeal of the SV Capital.
So to sum up, the right to appeal before the Board of Appeal and to bring the action against the Authorities’ decisions and the decisions of the Board before the Court, is an evidence of legal accountability of Authorities. Such accountability relation gives a significant component for the credibility of the Authorities’ actions.

5.2.4 Relation to the ECB

In order to provide for a comprehensive overview of the inter-institutional relations of EBA, it is of the great importance to perceive the relation of this agency with the ECB in terms of cooperation and possible accountability relations.

The EBA which was established in 2011 mainly had coordinating and rule-making powers, whereby its supervisory powers were limited. In times of the debt crisis in the Eurozone, there was a need to shift the mechanisms of micro-prudential supervisory powers from the national to the EU level. At that time, the expected candidate to receive new banking supervisory powers was EBA, however the legislator decided to make the ECB the central EU banking supervisory authority (Weismann, 2016, p. 92). Weismann (2016) emphasises couple of reasons for this decision. First, the SSM was supposed to be a Eurozone project, whereby other Member States have the opportunity to join, „if they submit to the supervisory powers of the ECB.“ Second, during the Eurozone crisis, the ECB took rescue measures to provide liquidity for the Eurozone banks. Third, the supervisory powers under the SSM were „deemed to be too far-reaching for a European agency.“ Additionally, the main aim of the supervisory powers under the SSM is the Europeanisation of banking supervision and not necessarily the approximation of laws.

The ECB with its newly established Supervisory Board is a part of the network of regulatory and supervisory bodies at the EU and the national level and should strongly cooperate with ESAs. The participants of this network should „cooperate with trust and full mutual respect“ in accordance with Article 4 para 3 TEU (Weismann, 2017, p. 5). Even though some could argue that the EBA rather stays in a vertical accountability relationship vis-à-vis the ECB, since the latter is one of the EU institutions, the relation between the EBA and ECB is based on cooperation which can be defined as horizontal, inter-institutional accountability relation.
The creation of banking union had significant effects on the functioning of ESAs, especially on the EBA. As already mentioned before, the EBA now has an important task to coordinate between the SSM and the non-SSM Member States. In this respect, the EBA has supervisory powers which are especially effective in the cross-border cases. The ECB, as a micro-prudential supervisor under the SSM Regulation also acts as a macro-prudential supervisor in the ESRB. Within the SSM the ECB is without doubt more powerful that the EBA, however, there are instances where the ECB has to submit to the Authority of the EBA (Weismann, 2016, p. 231). This is particularly the case with EBA’s draft TS, its guidelines and recommendations and the decisions under the Articles 17-19 of the EBA Regulation. Moreover, under Article 18 of the ESAs Regulations (action in emergency situations) even though it is defined as an individual decision, may in fact be addressed to all competent authorities and constitute general instructions. Beside the competent authorities of the Member States, these general instructions can be addressed also to the ECB (see Weismann, 2017, p. 7). Some argue that this can be problematic from the perspective of institutional balance. On the other hand, conflicts may arise due to the fact that both actors have comprehensive soft regulatory power that may conflict with each other (Weismann, 2016, p. 231). Furthermore, the cooperation between the EBA and the ECB is highly important in coordinating the EU wide stress test.

5.3 Relation to the National Regulators

The EBA as a network form is strongly connected with the national regulators which operate in the Member States. Inter-institutional ties are formalised in the Board of Supervisors, which, as EBA’s main decision body, comprising the heads of the national competent authorities (Salter, 2017, p. 11). According to Salter (2017), we can perceive here a „horizontal, inter-institutional accountability, with the community of national authorities constituting the EBA’s accountability forum.“ The EBA makes strong efforts to make this relationship and cooperation with national authorities effective. Salter (2017) argues that accountability relationships in this network are not so clear as the accountability structure in the supranational regulatory network which are established in formal arrangements like the Joint Committee and the Board of Appeal. In this network, beside the Board of Supervisors there are no formal structures and no equivalent mechanism for answerability or sanctioning behaviour (Salter, 2017, p. 12). In this respect, the national authorities rather rely on making the discussions public and on this way to exercise pressures on EBA. An example for that are public critics of BaFin (Federal Financial Supervisory Authority in Germany) for the methodology the EBA used in the early period of EU wide stress-testing.
Another, important aspect of the relations between the national authorities and the EBA is cooperation in areas of regulatory policy, where the EBA can, to great extent, rely on the national authorities and their expertise. Furthermore, the EBA has supervisory powers enshrined in its founding regulation with the aim to preserve the stability of the financial markets. In the following section, it will be presented the main aspects of cooperation and accountability relations between the EBA and the national authorities.

5.3.1 Guidelines and recommendations

Regarding the EBA's oversight responsibilities, there are couple of instruments at the Authorities disposal to ensure the consistent and uniform application of Union law. According to the Article 16 para 1 of the EBA Regulation, this agency can „issue guidelines and recommendations addressed to competent authorities or financial institutions“ with the aim to establish consistent, efficient and effective supervisory practices within the ESFS. Where appropriate, the EBA should conduct open public consultations regarding the guidelines and recommendation and it could also request opinions or advice from the Banking Stakeholder Group. According to the same Article para 3 „the competent authorities and financial institutions shall make every effort to comply with those guidelines and recommendations.“ Furthermore, the financial institutions should report whether they comply the particular guideline or recommendation. If the competent authority doesn’t comply with the EBA’s guidelines and recommendation, it should inform the EBA and state the reasons for such a behaviour. On the other hand, the Authority has an obligation under the Article 16 para 4 to inform the EP, the Council and the Commission about the issued guidelines and recommendations and to report „which competent authority has not complied with them and outlining how the Authority intends to ensure that the competent authority concerned follow its recommendations and guidelines in the future.“

This example clearly suggests the complexity of accountability regimes of the EBA and how these relations can intersect in particular cases. In this respect, the EBA has significant powers to establish the effective supervisory practices in the EU banking sector, on the other hand it is also accountable to the market actors by conducting the public consultations and requesting the opinion from the Banking Stakeholder Group. Furthermore, the EBA has to report about this process to the legislative actors.
5.3.2 Breach of Union law

The Article 17 para 1 of the EBA Regulation states that in case that a competent authority has not applied the acts referred to in Article 1(2), or has applied them in a way which appears to be a breach of Union law, including the regulatory technical standards and implementing technical standards… the Authority shall act in accordance with the powers set out in paragraphs 2, 3 and 6 of this Article. So the EBA can investigate the alleged breach or non-application of EU law „upon a request from one or more competent authorities, the European Parliament, the Council, the Commission or the Banking Stakeholder Group, or on its own initiative“ (Regulation No 1093/2010, Article 17, para 2). It is set up in the same Article that the EBA should, within the two months period, issue a recommendation to the concerned competent authority as how to comply with the EU law. In the case that the competent authority does not comply with the recommendation within the specific time period, the EBA can „adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Union law including the cessation of any practice“ (Regulation 1093/2010, Article 17, para 6) and this decision should prevail over all previous decisions adopted by the competent financial authority.

5.3.3 Peer reviews

In to ensure the supervisory consistency in the EU banking supervision, the EBA has a competence under the Article 30 of its founding Regulation to conduct peer reviews of some or all the activities of the competent authorities. The EBA should develop specific methods allowing for an objective assessment and the „comparability of these assessments“ (Weismann, 2016, p. 186). The Peer review is an assessment of the competent authority adequacy of resources and governance arrangements of the competent authority, regarding the application of the RTS and ITS and its capacities to respond to market developments. It should also include the assessment of degree of convergence reached in the application of EU law and in supervisory practice, set in the RTS, ITS and also guidelines and recommendations, as well as the extent to which the supervisory practice reaches the objectives set out in the EU law. Furthermore, the peer review should also recognise best practices developed by some competent authorities which might be of benefit for other competent authorities to adopt. Finally, it should assess „the effectiveness and the degree of convergence reached with regard to the enforcement of the provisions adopted in the implementation of Union law, including the administrative measures and sanctions imposed against
persons responsible where those provisions have not been complied with“ (Regulation 1093/2010, Article 30, para 2 (d)). The EBA can develop, based on the peer review, the guidelines and recommendations to the competent authorities and should also take into account the results of this assessment in the process of drafting RTS and ITS. The best practices identified by the peer reviews should be made public.

The ESAs established review panels composed of representatives of the competent authorities which conduct peer reviews in number of fields (Weismann, 2016, p. 186). The legislative actors, especially the Commission supports the ESAs progress on conduct of peer reviews.

5.3.4 Colleges of supervisors

An important aspect of cooperation between the EBA and the national competent authorities are the colleges of supervisors. They can be defined as „permanent, although flexible, coordination structures that bring together competent authorities involved in the supervision of a banking group“ (EBA, 2012). They are forums for the exchange of information between home and host authorities. The intensive cooperation between the supervisory authorities can foster the effective supervision of cross-border banking groups. The cooperation between the national supervisory authorities within the colleges stimulate sharing of knowledge, skills and resources more effectively and efficiently. Under EU law, colleges of supervisors have to be established for EEA banks with subsidiaries or significant branches in other EEA countries and they may include supervisors of non-EEA countries, where relevant (EBA, 2012).

According to the Article 21 of the EBA Regulation the Authority should contribute to promoting and monitoring the efficient, effective and consistent functioning of the colleges of supervisors and foster the coherence of the application of Union law among the colleges of supervisors. In this respect, the EBA should also be able to participate in the work of colleges. The colleges of supervisors had important role in times of crisis, where the effective crisis management was very complex in the cases of cross-border banking groups. In this respect, the EBA was also mandated to contribute to the development of effective and consistent recovery and resolution plans in the EU (EBA, 2012).
Within the respective college of supervisors, the EBA should collect and share all the relevant informations, initiate and coordinate Union-wide stress tests in accordance with the Article 32 of the EBA Regulation, promote effective and efficient supervisory activities, oversee the actions of the competent authorities and request further deliberations of a college in cases where it considers that the decision would result in an incorrect application of EU law. Furthermore, it is set up in the EBA Regulation, Article 21, para 3 that „the Authority may develop draft regulatory and implementing technical standards to ensure uniform conditions of application with respect to the provisions regarding the operational functioning of colleges of supervisors.“ With the foundation of the SSM, colleges of supervisors are competent only for banking groups which are present in non-SSM countries (Weismann, 2016, p. 187).

5.4 EBA and the market actors

The EBA has an obligation to cooperate with the market actors in making important decisions which fall under its competence. This is a very important accountability regime, which is in the theory defined as social accountability. This accountability relation is important in terms of commitment to credible policy-making. In this respect, the EBA has an obligation under its founding Regulation to cooperate with the market actors through the Banking Stakeholder Group. Moreover, in the process of drafting TS, the EBA should organise public consultations and take into account the inputs from the market actors. Such relations of EBA to the market actors enhance the credibility of its role at the supranational level.

On the other hand, in the relationship of the EBA and it banks it oversee, we perceive the EBA again as a standalone agency. The EBA is in a vertical (or hierarchical) relationship vis-à-vis the community of market actors in terms of EBA’s supervisory powers. The EBA Regulation mandates the Authority to conduct the EU-wide stress test with the aim to assess the resilience of financial institutions to adverse market developments. The following part will give

5.4.1 The Banking Stakeholder Group

The EBA’s Banking Stakeholder Group was established in March 2011 to help facilitate consultation with stakeholders in areas relevant to the tasks of the EBA. The EBA has an obligation enshrined in its founding Regulation to consult the Banking Stakeholder Group regarding drafting
RTS and ITS and also concerning the adoption of guidelines and recommendations. The Banking Stakeholder Group should be composed of thirty members representing in balanced proportions credit and investment institutions operating in the Union, their employees’ representatives as well as consumers, users of banking services and representatives of small and medium-sized enterprises. At least five of its members shall be independent top-ranking academics and ten of its members shall represent financial institutions, three of whom shall represent cooperative and savings banks (Regulation 1093/2010, Article 37, para 2). The members of the BSG should meet at least four times a year. According to the Article 37, para 3 of respective Regulation, the members of the Banking Stakeholder Group shall be appointed by the Board of Supervisors, following proposals from the relevant stakeholders. The Banking Stakeholder Group should give opinions and advice to the Authority on any issue related to the tasks. The EBA should make the opinions and advices of the BSG public.

5.4.2 EU-wide stress test

One of the main tasks of the EBA is to ensure the orderly functioning and integrity of financial markets and the stability of the financial system in the EU. In this respect, the Articles 21 and 32 of the EBA Regulation authorise the EBA to initiate and coordinate the EU-wide stress test. EU-wide stress test is an assessment of resilience of financial institutions to adverse market developments. In this respect, the EBA should develop common methodologies for assessing the effect of economic scenarios on an institution’s financial position; common approaches to communication on the outcomes of these assessments of the resilience of financial institutions; common methodologies for assessing the effect of particular products or distribution processes on an institution’s financial position and on depositors, investors and customer information (Regulation No 1093/2010, Article 32, para 2). The EBA should conduct the stress-test in cooperation with the ESRB, the ECB and the Commission. The EBA constantly makes strong efforts to improve the methodology of the stress-testing, which should be adequate for the EU financial market structure.

5.4.3 EBA and the world’s oldest bank

Already in July of 2015, the EBA released the key features and a calendar of the 2016 EU-wide stress test (EBA, 2015b). Couple of months later, the EBA published its 2016 EU-wide stress test draft methodology and announced the timeline, methodology and the process of the stress test. The
EBA stated that the stress test will be launched at the end of February 2016 with a publication of the final methodology and templates as well as the scenarios (EBA, 2015c). This stress test involved 39 euro area banks, which is 70% of banking sector assets in euro area. However, the overall exercise involved 53 banks across the EU.

When it comes to the methodology of this stress test, the EBA stated that the 2016 EU-wide stress test was primarily focused on the assessment of the impact of risk drivers on the solvency of banks. Banks are required to stress test a common set of risks, such as credit risk, including securitisation, market risk and counterparty credit risk and operational risk including conduct risk (EBA, 2015c). According to the EBA (2015c) the EU-wide stress test involved the close cooperation between the competent authorities, the ECB, the ESRB and the Commission. Scenarios, methodology, minimum quality assurance guidance and templates were agreed by the EBA's Board of Supervisors in close collaboration with competent authorities (EBA, 2015c). The ECB and the ESRB in cooperation with the competent authorities developed the macroeconomic adverse scenario and any risk type specific shocks linked to the scenarios. The EBA coordinated the process and acted as a data hub in line with its transparency commitments. The important steps and progress of the stress test, the EBA made public on its website. Finally, in July 2016, the EBA published the results of the stress test.

According to these results, the bank Monte dei Paschi di Siena (MPS) obtained a negative result in the adverse scenario. More precisely, its key capital ratio turned to be negative by the end of the three year adverse scenario. This Italian bank is the world’s oldest bank still in operation. It is one of the major Italian banking groups with significant market shares in all areas of business in which it operates. Immediately, many concerns were raised about the future of this bank and how it should be rescued from the crisis. Under the BRRD the concerns about the bail-out and use of taxpayers’ money to save the banks, is replaced with the opportunity of bail-in. A bail-in is exactly the opposite of bailout and means the cancellation of debts owed to creditors and depositors, which practically means that in the case of bail-in, the creditors take losses.

The power of decision-making in such cases has the central EU banking supervisory authority, the ECB. The ECB’s supervisory board set up a deadline by the end of 2016 for the Italian bank to find the capital it needs and complete the sale of €28bn of bad loans. Since the MPS failed to find private funds for recapitalisation, it asked the ECB to give them time until end of January. However,
the ECB’s supervisory board decided to stick with the deadline. As an answer to this, the MPS requested for precautionary recapitalisation.

The BRRD permits the injection of state funds in a distressed bank on grounds of systemic safety, with the strict preconditions and such intervention can be allowed only under specific circumstances. So, the public intervention can only be allowed at late stage, after substantial bail-in. However, there is also one exception „precautionary recapitalisation“ which involves the injection of state funds in institutions which are still solvent, in the sense that they still meet their basic regulatory capital requirements (Hadjiemmanuil, 2017). Important is that it can not be used to absorb past losses, which must be covered out of private resources prior to the state’s intervention (Hadjiemmanuil, 2017).

In the case of Monte dei Paschi, the Commission announced the approval of the precautionary recapitalisation for total amount of EUR 8.1 billion in July 2017. The State aid amounts to EUR 5.4 billion, and was approved as precautionary recapitalisation (EP, 2017). For many commentators such decision by the Commission has compromised the credibility of the European resolution regime, since it permitted the Italian state to recapitalise MPS without applying bail-in (Hadjiemmanuil, 2017).

Based on this case, we can conclude that the EBA doesn’t have decision-making powers in the case of banks which are in financial trouble. The decision-making power is rather in hands of the ECB and also the Commission. This can be due to the fact that such decision are to great extent political decisions, where the EBA as an agency, which decisions are based on the expertise, shouldn’t be able to influence.
Conclusion

This thesis elaborated the accountability regimes of EBA at three different levels. First, the accountability regime vis-à-vis the legislative actors: the EP, the Council and the Commission. It is clear that their roles, in holding the EBA to account, are parallel and even cross cut in many situations. This relation can be defined, based on the Bovens theory of accountability, as vertical and/or political accountability regime. The EBA Regulation explicitly states that the Authority is accountable to the EP and the Council. In this sense, we can conclude that the EP, as a democratic elected body has a dominant role in holding the EBA to account. The EBA, as an agent, has an obligation to directly report to the EP and the Council, which present an accountability forum. Furthermore, based on a presented case of EBA’s mandates under the PSD2 to draft TS, the EBA had an obligation to report to the EP about the progress it made and to explain why this process was slow. In this respect, we can say, that this finding is in line with the Bovens definition of accountability which defines it as „a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.“

Furthermore, it can be concluded that the first hypothesis is partly confirmed. The EBA indeed stands in vertical accountability relationship vis-à-vis the legislative actors. However, the second part of the hypothesis which states that „European Parliament can pose sanctions in case that EBA fails to fulfil its tasks“ is not confirmed in this case. The EP didn’t pose any sanctions on EBA, probably because the EBA didn’t completely failed to fulfil its tasks, it only took more time than it was planned, from the reason of time consuming public consultations, which EBA is obliged to conduct in cases of drafting TS.

Second level of accountability is more complicated to grasp. The EBA stands in so called horizontal accountability relation with the other two financial agencies, the ESMA and the EIOPA. This accountability relation is based on cooperation and it is institutionalised in the Joint Committee and the Board of Appeal. The Joint Committee is a forum for interaction, exchanging knowledge and learning. This fosters the effectiveness and credibility of agencies’ decisions. However, there is a lack of formal mechanisms and indicators of holding each other to account. The interactions within the Board of Appeal reveal another important accountability regime: legal accountability vis-à-vis the CJEU. ESAs Regulations state that there is a possibility to appeal against the decisions of these agencies and also, under specific circumstances, proceedings can be brought before the CJEU. The
relations to the ECB are also based on the cooperation, due to the fact that they have few similar
tasks. Their accountability relation is very complicated to define, since there is lack of formal
mechanisms of holding each other to account.

The relation to the national authorities is very complex. Generally, this relationship is based on
cooperation. On the other hand, the national authorities contend to hold the EBA to account and at
the same time, the EBA has formal mechanisms to oversee the behaviour of the national authorities.
The cooperation between the EBA and the national authorities is institutionalised in the Authority’s
main decision making body, the Board of Supervisors. In this respect, the national authorities and
their preferences significantly influence the decision-making process. On the other hand, the EBA
has specific instruments at its disposal, in order to supervise the behaviour of the national
authorities such as the EBA’s guidelines and recommendations, peer reviews and the EBA’s
competences in case of breach of EU law.

Another important level of accountability is relation of EBA vis-à-vis the banks it oversees. In this
respect the EBA is perceived as standalone agency, which stands in hierarchical relationship vis-à-
vis the market actors. There are mechanisms of cooperation between the EBA and the market
actors, institutionalised in the Banking Stakeholder Group. Furthermore, the EBA has a power to
oversee the behaviour of the banks. Important mechanism in this respect is the EU-wide stress test,
which EBA initiates and conducts in cooperation with the ECB, the ESRB and the Commission.
The stress-test from 2016 was a case study, where the second hypothesis was tested. It can be
concluded, that the EBA doesn’t have decision-making powers in case that a bank performs badly
on the stress-test. Decision-making power is in the hands of Supervisory Board of the ECB and the
Commission. It seems like, the EBA provides for the comprehensive overview of the banks’
performances in the financial markets using its expertise knowledge. However, the decisions about
the future of these banks, rescue packages and other issues is in the hands of political institutions.

This overview of accountability relations of EBA indicates a great complexity of its accountability
regimes. The Bovens’ accountability theory can be to some extent helpful to grasp and explain the
main accountability relationships of EBA. However, these accountability relations include a wide
range of institutions, bodies and other actors, at the supranational as well as at the national level,
which makes the EBA’s accountability regimes more complex than the main assumptions of
Bovens’ theoretical framework.
In sum, the EBA appears to be an institutional set up, which is very powerful and autonomous. Many argue that the scope of its powers is not in line with the Meroni principle. However, it can be derived from the main findings, that the work of EBA is underpinned by strong intergovernmentalism and at the same time there are very clear mechanisms of control by the EU political actors. There are areas such as consumer protection, where the EBA may act relatively more independent and in that sense, develop credibility as autonomous agency.
References


Baran A. K, Eckhardt P., Schmidt C. and Dr Van Roosebeke B. (2014) *European Supervisory Authorities, Room for improvement at Level 2 and Level 3*, Study of the Centre for European Policy Freiburg


Božina Beroš, M. (2018), *Agencies in European Banking, A Critical Perspective*, Macmillan Studies in Banking and Financial Institutions, (eBook), [https://doi.org/10.1007/978-3-319-78689-6](https://doi.org/10.1007/978-3-319-78689-6)


Commission of the European Communities (2002), Communication from the Commission, *The operating Framework for the European Regulatory Agencies* [online]. Available at: [https://](https://)


Judgement of the Court (First Chamber) of 14 December 2016, *SV Capital OÜ v European Banking Authority (EBA)*, Case C-577/15 P, ECLI:EU:C:2016:947


