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## COMMON MARKET LAW REVIEW

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Marco **Lamandini**, 'Book review: *The Age of ESMA. Governing EU Financial Markets*, by Niamh Moloney.(Oxford: Hart Publishing, 2018)' (2019) 56 *Common Market Law Review*, Issue 5, pp. 1431–1433

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Niamh Moloney, *The Age of ESMA. Governing EU Financial Markets*. Oxford: Hart Publishing, 2018. 392 pages. ISBN: 9781509921775. GBP 85.

To my eyes, there has always been something remarkable in the legal writings of Professor Moloney on the European law of finance, her books in particular: a relentless pursuit of perfection. To the extent that this word can be used for human endeavours in legal writing, this is exactly what her works distil, for their comprehensiveness and accuracy, which translates into an amazing ability not only to clearly show all founding blocks of such a system in light of the forces which shape its underlying policies, but also to engage almost obsessively (and rightly so) with all relevant details. This happens in a way and with a method which are not just robust but exhaustive in detecting all shades and in casting beneficial light on all shadows of an extremely complex, yet fascinating web of (hard, soft and hardening) rules, principles and values, supervisory arrangements and institutional structures which compose the European law of finance. A field which, as we all know, is currently testing the European project to its limits. I wonder, sometimes, whether under the clothes of her angelic appearance, Moloney hides a superhero with legal writing's superpowers. She seems to offer indeed the best example of a writer who can parallel artificial intelligence in collecting and mastering such an incredible amount of data which has risen beyond human capacity, but obviously does so with the essential creativity which takes humans to develop values, weigh competing interests, look for justice. This book is no exception.

In Moloney's words, *The Age of ESMA* is intended to ask how ESMA has come to occupy a central position in EU financial market governance and the ramifications of its expanding influence. With some understatement, she acknowledges that this book "does so by providing an in-depth examination of ESMA's role and whether ESMA's burgeoning technocratic influence – and the related 'agencification' of EU financial market governance – raises challenges for ESMA's effectiveness in delivering its mandates and for its legitimacy as a technocratic EU agency" (p. 1). This ambitious target is fully met and this book, to my mind, works as the much needed and most comprehensive review of the first years of operation of ESMA, up to its recently adopted reform in Spring 2019.

The book clearly depicts the distinct character of this quite unique European body, which, in the author's words, is "part EU agency, part traditional financial market regulator, part international standard-setter, part EU network actor, part horizontal/peer coordinator of national regulators, part vertical/hierarchical supervisor of national regulators" (p. 2). In so doing, the book considers in all details ESMA's institutional design and its governance and funding arrangements (Ch. 2), ESMA's role as architect in shaping regulatory governance in the European law of finance and as powerful contributor to the administrative component and the soft law component of the Single Rule-book (Ch. 3), ESMA's vertical role as system supervisor and facilitator, coordinator, coach and policeman of supervisory convergence among national supervisors (Ch. 4), ESMA's direct supervision over credit rating agencies and trade repositories and, exceptionally, its merit review remits in temporarily prohibiting or restricting financial products or services (Ch. 5), and ESMA's horizontal role as network actor in the European System of Financial Supervision and in the international context (Ch. 6).

All these themes are tackled in a way that illuminates how legal design has translated into practice, drawing lessons (with a very meticulous review also of internal documents) from the rich material offered by ESMA's (almost) first decade of activity, during which its institutional focus moved from supporting rule-making towards supporting convergence of NCAs' supervisory practices and also partially morphed into that of a SupTech of first generation, with ability to gather and interrogate data and build new data infrastructures (p. 23). Moloney's optimistic conclusion that ESMA emerges as a technical expert, responsive actor often deploying "state of the art" tools and approaches (p. 4) is reassuring. This is even more so, if one considers that the "creation story" of financial authorities in Europe is one still in its making and one of incremental development, where strong adaptive qualities are needed to fit into the (progressively more elusive, to my mind at least) constraints of the Treaty limits to delegation of regulatory and executive powers. On this, Moloney is purposefully ambivalent. On the one hand, she recalls the *Meroni* principle (Case 9/56, *Meroni v. High Authority*) which prohibits agencies from engaging in discretionary action without appropriate conditionality imposed by the delegating EU institutions and which can support review (p. 38) and she acknowledges that as its influence expands, ESMA is pressing on the *Meroni* boundary and this may endanger its overall legitimacy. On the other hand, however, she also notes that (p. 55) a more liberal reading of *Meroni* after the *Short Selling* ruling (Case 270/12, *UK v. Parliament and Council*) would in principle be possible and rightly signals the legitimizing virtues of concerted efforts of a plurality of complementary institutional checks and balances.

The merits of this book are thus self-evident. The reader is taken, hand in hand, on an extremely insightful journey into the intricacies of ESMA legal design and is offered in plain language, in the first place, a thorough illustration of all aspects (from the most fundamental to the slightest of details) of this distinct institutional creature of EU law. In the words of the author, the book is concerned with "ESMA's current suite of powers, how they are deployed, and what this suggests as to ESMA's influence, effectiveness and legitimacy" (p. 31). But through this journey, the reader is also made part – and this is even more remarkable – of a rich fact-finding exercise that illustrates with facts and examples how legal design was turned into administrative practice, how each component of this multi-faceted architecture delivered, to what extent the regulatory and supervisory different tasks and tools conferred upon ESMA met their foundational and functional expectations, raised difficulties and (sometimes) even vivid disagreements, also within the circle of ESMA's overarching institutions. The resulting picture

is not black-and-white, but colourful. Yet, with a note of brightness, because despite all complexities and the clearly unfinished character of this fascinating example of European experimentalism, the provisional balance, in Moloney's view, is positive and there is ground for (some) optimism.

One could perhaps be tempted to consider that, no matter the perfection of the *opus*, its significance may now rapidly lose attraction because just months after the book's publication a quite eye-catching reform of ESMA was approved in Spring 2019. This would be a fatal mistake, though. Not only does the book offer a comprehensive presentation of the reform proposal (in anticipation of its approval) and of its founding principles, but, more importantly, this book – being (to me) the *definitive* legal review of the first decade (or so) of ESMA's history – will also nicely work in the future as the necessary base-line to weigh ESMA's new era after reform against its first era. Thus, if the best way to understand the present is by learning the lessons of the past, this book is bound to remain essential reading also after the reform.

What is then missing in this work? Simply what the author deliberately decided not to include. As she explains, this book is not concerned “with the optimal design of institutional governance for the EU financial market, nor with how ESMA might be reconfigured” in the future (p. 31). As already noted, therefore, the reader, will not find any final answer by Moloney on the future emergence of a CMU single supervisor (as she notes, speculation on this is perilous at present, due to Brexit, the CMU agenda, and the expanding reach of the Banking Union; p. 352) and on the intertwined legal question on the *Meroni* constraints on ESMA's further expansion of powers and on its (manifest and/or hidden) discretion, despite *Meroni*, in the current design and in any evolution thereof. Yet, this is so for good reasons. First, despite the clarifications in the *Short Selling* ruling we are still waiting for further, and perhaps this time more explicit guidance by the ECJ, which is likely to come in the *Banco Popular* saga. It is simply right for this book to defer to the Court on this. The direction of travel of the *Short Selling* ruling seems, however, promising and there is also reassuring increasing official consensus that, despite *Meroni*, European agencies established under Article 114 TFEU can not only be delegated powers precisely delineated and amenable to judicial review in the light of the objectives established by the delegating authority (as the ECJ noted in the *Short Selling* ruling, paras. 44 to 50), but also the power to apply rules to specific factual situations, which often requires an interpretation of open-textured provisions and translates into the exercise of assessing facts and circumstances and their correspondence with the relevant rules to adopt individual decisions. Otherwise, how could agencies contribute meaningfully to the achievement of their role within the Union? In principle, this could give leeway to further expansion of ESMA's role and powers in the future. Second, Moloney's approach to the subject matter is clearly meant to state the law as neutrally and objectively as possible at the time of writing (1 July 2018, with a postscript briefly reporting on some later developments). It is not for a book which illuminates the present by masterfully presenting the past to also divine the future. And only time will tell if the necessary reshuffling of the CMU initiative by the next Commission will be able to take ESMA another step closer to its final destination, keeping meanwhile the right direction of travel.

Marco Lamandini  
Bologna/Munich