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Evolution Under Control: The Conditional Transition Towards Multi-Level Governance

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Citation

Tsirakis, C. (2022). *Evolution Under Control: The Conditional Transition Towards Multi-Level Governance*.

Version: Not Applicable (or Unknown)

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Evolution Under Control

The Conditional Transition Towards Multi-Level Governance

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Submission Date: June 7th 2022

Word Count: 14284

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Abbreviations

CARD – Coordinated Annual Review on Defense
CDM – Capability Development Mechanism
CESR – Committee of European Securities Regulators
CSDP – Common Security and Defense Policy
DDP – Directly Deliberative Polyarchy
DG DEFIS – Directorate General of Defense Industry and Space
EBA – European Banking Authority
ECB – European Central Bank
EDA – European Defense Agency
EDF – European Defense Fund
EDP – Equipment Development Programme
EEAS – European External Action Service
EIOPA – European Insurance and Occupational Pensions Authority
ESA – European Supervisory Authorities
ESC – European Securities Committee
ESFS – European System of Financial Supervision
ESMA – European Securities and Markets Authority
ESRB – European Systemic Risk Board
EU – European Union
EUMC – Military Committee of the European Union
EUMS – European Union Military Staff
FAC – Foreign Affairs Council
IIMG – Inter-Institutional Monitoring Group
JC-ESA – Joint Committee of European Supervisory Authorities
MS – Member State
NIP – National Implementation Plan
PESCO – Permanent Structured Cooperation
QMV – Qualified Majority Voting
TEU – Treaty of the European Union
TFEU – Treaty for the Functioning of the European Union

Declaration of originality

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Introduction

“Who do I call if I want to call Europe?”—a quite popular anecdote that was allegedly uttered by Henry Kissinger, ex-Secretary of State for the United States, has been slightly overused to highlight the lack of an all-encompassing position—a spokesperson on EU foreign policy—representing the Union rather than just one state. The official answer to that question has been the High Representative of the Union for Foreign Affairs and Security Policy, but what if Kissinger was searching for the Head of the Union instead—the person or the institution at the very top? In a geopolitical setting that knows monarchs and kings better than any other, governance has been traditionally intertwined with absolute hierarchy; however, judging from the EU’s unique architecture, a trajectory shift in that regard is on full effect.

Governance in the context of transnational institutions has been a constant topic of ambivalence, conflicting interests, and interdisciplinary debates. In the wake of several crises of a global scale, actors taking part in international cooperative structures have been troubled by the question of efficient and effective decision-making. In that process of evolution through consideration of alternatives the topic of hierarchy has remained one of the least flexible parameters in governance. Building upon the somewhat obsolete hegemonical archetype, established institutional actors and member states appear to be fixated on the two-dimensional ‘rule or be ruled’ dilemma.¹ History, in turn, has shown that there is an undoubted reluctance by states to concede aspects of their sovereignty to an international structure, even if that would entail more benefits for them. On the flipside, an institution of that caliber without clear powers over state players has rarely proven adequate enough to address the mandate for which it was created. As a result, weak institutional structures tend to succumb to the pressure created by dominant actors within their premises.

Focusing on the European space, governance within the European Union (EU) is characterized by a multi-level approach that tries to encompass goals set by both Member States (MS) and the EU institutions. In order to effectively promote this hybrid model, the latter are primarily responsible for the definition of objectives, as well as their formulation into policy, which is to be implemented

¹ Jonathan Zeitlin, *Extending Experimentalist Governance?*, ed. Jonathan Zeitlin, Oxford University Press, 1st edition (October 2015), pp. 20–25, <https://doi.org/10.1093/acprof:oso/9780198724506.001.0001>.

accordingly by the MS. In turn, regulatory authorities on the national level are expected to execute the given policy plan, enjoying scaling levels of flexibility in terms of both regulatory interpretation and the means through which the goal is to be achieved. A side-effect of this process is the creation of new supplementary institutions, which are to maintain a consultative and potentially decision-making—albeit limited—mandate. To guarantee that this decentralized network operates seamlessly, there is a particular focus on communication between actors, through joint committees and additional feedback channels that enable closer monitoring and—relatively—faster action. In that manner, lower levels of governance have the necessary means at their disposal to report back potential unwanted effects and, thus, incite revision.

According to Sabel and Zeitlin, the aforementioned concept of multi-level decision-making and governance is described as Directly Deliberative Polyarchy (DDP), falling within the broader term of experimentalist governance.² This architecture, in spite of the fact that it is not explicitly described in the Treaties, has characterized the Community-method in decision-making; not only it has been adopted by the EU over several policy areas, but it has marked a significant rise in popularity over the last two decades. It has been argued that, thanks to its more technocratic composition, the EU was able to navigate through the storm and out—of some—of its existential crises by focusing on a successful policy-making framework that would not meddle with the ‘ship’s course’. However, on both levels conditions are present, setting obstacles and other limitations before such undertakings.

The present paper examines the evolution of experimentalist governance within the EU by examining two institutional amendments over two policy areas of contrasting levels of integration: financial services and defense cooperation. Along the analysis from an experimentalist perspective, the argument to be supported is that DDP—albeit successful and widespread—is also conditional, which prevents it from being implemented in certain policy areas. Starting from the policy domain of financial services, the Lamfalussy Process—the successful case study acknowledged by Sabel and Zeitlin—will be compared with the most recent establishment of the European Securities and Markets Authorities (ESMA), in an attempt to gauge the extent of continuous commitment to the architecture

² Charles Sabel and Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, *European Law Journal* 14 No. 3 (May 2008), pp. 271–327, <https://doi.org/10.1111/j.1468-0386.2008.00415.x>.

under examination. Along the same lines, the focus shall be laid on defense cooperation, under the Common Defense and Security Policy (CSDP). In lack of a respective chapter or relative analysis on that policy area by the aforementioned academics, the chapter will be devoted on the eventful formulation and eventual establishment of the Permanent Structured Cooperation (PESCO); from what it was envisioned to what was adopted, and, most importantly, to the key takeaways that can be extracted in terms of the trajectory of multi-level governance the Union. In the second half of the paper, a set of three conditions will be presented, based on which experimentalist architecture is rendered possible and potentially optimal.

Literature Review

The purpose of this paper is not to gauge whether experimentalist governance has led towards a negative shift in terms of EU policymaking. On the contrary, there is an abundance of examples showcasing the benefits it has introduced, even in times of crises. Instead, the motive behind this analysis is to supplement the theory by tackling what is deemed its weak point, which is the perception of its broad and unconditional effectiveness. As a result, by underlining its conditionality and inability to penetrate specific policy areas, the goal is to provide a minor contribution towards the mass of empirical analysis on the EU's policy-making framework.

The foundational typology for this paper can be traced back to the very definition of experimentalist governance. On that basis, research, conducted by Sabel and Zeitlin, sets the foundations of this concept on four prominent characteristics. The first element is that of a joint agenda setting process, in which formal socialization between the deliberators—within the premises of 'epistemic communities'—allows for the avoidance of critical blockages.³ The second and arguably most critical element of this framework is the lack of clear hierarchy. Following a multi-level approach that blurs the lines between centralized and decentralized decision-making, experimentalist governance frees traditionally 'lower' levels from their systemic restraints. In this way, these entities are in a position

³ Sabel and Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, pp. 320

to interact with, influence or even challenge ‘superior’ levels of decision-making.⁴ From that perspective, experimentalist governance is safeguarding heterogeneity of power and counters the issue of democratic declension.⁵ Third, there is the prerequisite of report back mechanisms. By establishing feedback channels connecting all actors with one another, the decision-making network allows for more instances of peer review. Fourth, in absence of a rigid hierarchical structure and the abundance of feedback, corrective revisions are viewed as an integral part of this framework—hence the definition as experimentalist. As a result, the primary objective of experimentalist governance is to introduce innovative methods that utilize the unstable nature of circumstances and variants to its advantage, by remaining agile and adaptable.⁶

In continuation of that work, academics welcome the reconfiguration of the governance mix in the EU, that aims to differentiate the traditional debate between supranational and intergovernmental cooperation. In deeper analysis of experimentalist governance, however, they underline the potential threat it poses towards transparency and further aggravation of democratic deficit. Börzel acknowledges that the groundbreaking effects of experimentalist governance can distance policy making from the ‘shadow of supranational hierarchy’, but also questions whether that obscurity in EU policymaking is simply diffused rather than extinguished.⁷ In turn, de Burca et al recognize that despite its several advantages, experimentalist governance may entail ‘unexpected and negative consequences’ on the backdrop of two key parameters: conflicting interests and human fallibility.⁸ On the topic of conflicting interests, Morgan admits that experimentalism may be the gateway towards a new era in international institutions that legitimizes asymmetries of power behind the façade of deliberation.⁹

⁴ Ibid., pp. 323

⁵ Oliver Gerstenberg and Charles Sabel, *Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?*, Good Governance in Europe’s Integrated Market (April 2002), pp. 288–341, <https://doi.org/10.1093/acprof:oso/9780199246083.003.0010>.

⁶ Charles Sabel and Jonathan Zeitlin, *Experimentalism in the EU: Common Ground and Persistent Differences*, Regulation & Governance 6 No. 3 (September 2012), pp. 410–26, <https://doi.org/10.1111/j.1748-5991.2012.01157.x>.

⁷ Tanja Börzel, *Governance Approaches to European Integration*, KFG Working Paper Series no. 84 (May 2018), pp. 16–18

⁸ Gráinne de Burca, Robert Keohane, and Charles Sabel, *New Modes of Pluralist Global Governance*, N.Y.U. Journal of International Law & Politics 45 (January 2013), pp. 723, https://scholarship.law.columbia.edu/faculty_scholarship/2465/.

⁹ Kevin Morgan, *Experimental Governance and Territorial Development*, OECD (December 2018), [https://www.oecd.org/cfe/regionaldevelopment/Morgan\(2018\)ExperimentalGovernanceAndTerritorialDevelopment_OECD_FINAL.pdf](https://www.oecd.org/cfe/regionaldevelopment/Morgan(2018)ExperimentalGovernanceAndTerritorialDevelopment_OECD_FINAL.pdf)

Focusing more on experimentalist governance during times of crises, Chalmers notes that the EU architecture gravitates towards centralized decision-making, at the expense of the Community method.¹⁰ Following a more extreme line, Crum would argue that this experimentalist concept is malleable enough to be turned into executive federalism in times of turbulence, with democratic procedures being sacrificed on the altar of monetary stability and integration.¹¹ In terms of broader criticism towards the concept, it has been suggested that unless there is a new paradigm introduced through content of policy, experimentalist governance will be just a 'new' conceptualization of 'old' tools already used in EU governance.¹² Focusing on the aspect of regulatory autonomy, Eriksen highlights the rather limited regulatory authority conceded to nascent institutions that occur through DDP,¹³ which feeds into the concept of incremental empowerment of non-state actors.¹⁴ On that note, Curtin would refer to 'quasi-autonomous' administrative actors with limited accountability as well as executive power.¹⁵ Last but not least, it has been supported that experimentalist governance is still a theory under development and not 'the end product of a research project', which creates a window of opportunity to examine its conditionality.¹⁶

An additional concept with particular importance for the case studies is that of the agencification of the EU, which focuses on the creation of supplementary institutional structures of significant expertise over a certain policy domain within the EU architecture. A critical juncture of this, however, is the reconfiguration of balance of power in the Union, as well as the motives to push this process forward. In principle, it is acknowledged that new institutions emerge, but they are limited in power. From another point of view, the agencification process of the EU is operated as a depressurizing

¹⁰ Damian Chalmers, *The European Redistributive State and a European Law of Struggle*, European Law Journal 18 (August 2012), pp. 667–93, <https://doi.org/10.1111/j.1468-0386.2012.00623.x>.

¹¹ Ben Crum, *Saving the Euro at the Cost of Democracy?*, JCMS: Journal of Common Market Studies 51 No. 4 (April 2013), pp. 614–30, <https://doi.org/10.1111/jcms.12019>.

¹² Bettina Lange and Nafsika Alexiadou, *New Forms of European Union Governance in the Education Sector? A Preliminary Analysis of the Open Method of Coordination*, European Educational Research Journal 6 (December 2007), pp. 321–35, <https://doi.org/10.2304/eeerj.2007.6.4.321>.

¹³ Erik Eriksen, *The Unfinished Democratization of Europe*, Oxford University Press 1st Edition (September 2009), pp.180–212.

¹⁴ David Benson and Duncan Russel, *Patterns of EU Energy Policy Outputs: Incrementalism or Punctuated Equilibrium?*, West European Politics 38 No. 1 (2015), pp. 185–205, <https://doi.org/10.1080/01402382.2014.936707>.

¹⁵ Deirdre Curtin, *Holding (Quasi)Autonomous EU Administrative Actors to Public Account*, European Law Journal 13 No. 4 (2007), pp. 523–541, <https://doi.org/10.1111/j.14680386.2007.00382.x>.

¹⁶ Tapio Raunio et al., *The Changing World of EU Governance*, International Studies Review 13 (2011), pp. 314–317, <http://www.jstor.org.ezproxy.leidenuniv.nl:2048/stable/23017162>.

mechanism around the incremental redistribution of power.¹⁷ In that discussion, there are two main sides to be accentuated: the Commission, representing the supranational authority, and the Council, representing the intergovernmental authorities, alongside the MS. For the Commission, the agencification process may entail conferral of powers to new institutions, but it can also be perceived as creation of 'satellite actors' that promote integration on a supranational basis. For the Council and the MS, the process has the potential of containing the power of the Commission and distributing it to smaller institutions, within which national interest representation can be more effective. On that note, it can be argued that the aforementioned process is a recent iteration of the debate of supranationalism versus intergovernmentalism in the EU, manifesting more as an institutional *bras de fer* rather than an intentional shift towards multi-polar governance.¹⁸

Methodology

To support the hypothesis that there are practical limitations preventing an EU-wide implementation of a multi-level decision-making framework, two sets of case studies will be introduced. Subsequently, the comparative analysis will take place on two levels, one intradisciplinary and one interdisciplinary. On the first level (Chapter 4), a comparison will be drawn between institutional structures of the same policy domain, going from the Lamfalussy process to ESMA in terms of financial services and from inactive to active PESCO in terms of defense cooperation. After highlighting the experimentalist trajectory of the two examined policy domains, on the second level (Chapter 5), there will be an attempt to underline the catalytical factors that caused the disparity between them. In essence, by accentuating the parameters for which experimentalist governance emerges as policy domain-dependent, there will be an opportunity to shape three conditions that in the absence thereof, decision-making procedures may fall within the DDP framework, posing as successful case studies. Inversely, these conditions can also describe the reasons for which some

¹⁷ Giandomenico Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, Journal of Public Policy 17 No. 2 (May 1997), pp. 139–167, <https://doi.org/10.1017/s0143814x00003524>.

¹⁸ Yannis Papadopoulos, *Democracy in Crisis? : Politics, Governance and Policy*, Palgrave Macmillan (2013), pp. 192–198

policy domains are not—at least for the time being—able to support that level of multi-level governance, despite the fact that circumstances allow them to do so.

Case Study Selection

This paper is heavily dependent on comparison of case studies; thus, case study selection represents a major checkpoint preceding its realization. In the selection process, there were three parameters that were taken into consideration. First, the two policy domains had to be able to be examined over the same period of time, so that parameters such as level of EU integration overtime or expansion in terms of MS could be treated as non-critical variables during the examination. As such, on both occasions the regulatory activity takes place from 2001 onwards. The importance of timeframe was even more heightened due to the second criterion of selection, which was the experience of exogenous shocks for each sector. In other words, the two selected policy domains would have to come against crucial externalities that introduced variable dynamics for the EU and incited regulatory adjustments. In both cases, these externalities highlighted the need for adaptation, which, in turn, verified that the form of the latter depends on the policy domain at hand. The third criterion was the level of institutionalized integration. It was necessary for both policy domains to not only be incorporated in the EU legal body, but also in the form of institutionalized bodies, which would facilitate their examination as potential actors within a polyarchic setting.

The two policy domains that were chosen were financial services and defense cooperation. In order to facilitate the connection to the original work of Sabel and Zeitlin, the financial services sector provided the case study of the Lamfalussy process, a procedural framework with strong experimental elements, that were most prevalent via CESR. By particularly focusing on its evolution over time as a successful iteration of the framework, it would allow for the exploration of an additional aspect of experimentalist governance in the EU, which is survivability by adaptation, especially in times of crisis. Consequently, the second branch of the financial services domain highlighted the ESFS, the succeeding framework in that regard. Unlike the Lamfalussy process, ESFS encompasses several other institutions, which made selection rather complex. In the end, ESMA was selected over EBA or EIOPA for two reasons: First, it was deemed necessary to maintain a narrow scope within the broad

domain of financial services. With the Lamfalussy process starting on securities and then being implemented in banking sector, it was logical to follow the original route of implementation of this concept within the sub-domain of securities, rather than the subsequent ones. Second, ESMA is the direct successor of CESR, arguably the experimentalist core of the Lamfalussy process, which allowed for the direct comparison between the two in terms of mandate regulatory independence. For the aforementioned reasons, ESRB and JC-ESA were ruled out on the first round of selection, whereas EBA and EIOPA were ruled out on the second, leaving ESMA being the second case study, allowing the most specific and linear examination of progress overtime.

The selection of CSDP as the second policy domain over defense cooperation was equally challenging, primarily due to the fact that there is scarcity of institutions, instead of strategies or common practices, with some level of—or even potential for—regulatory initiative. Obviously, defense policy remains superficially integrated in comparison with financial services, which underlines the importance of prior integration for experimentalist governance. In addition, this case study enabled the revisiting of the debate on intergovernmentalism versus supranationalism within that context, by highlighting the evident reluctance towards further integration over that policy area. Based on the aforementioned, PESCO was selected, slightly changing the continuum of case studies, as it was not effectively enabled prior to 2017. However, it was selected for two additional reasons: first, it can be traced back in the unratified Constitutional Treaty of 2004, which adds to the discussion of reluctant integration over issues meddling with MS sovereignty. Second, PESCO resulted in being implemented as a process, even though it was not originally that limited; the adaptation and limitation of the provision so that it becomes establishable feeds into the complexity of promoting non-hierarchical decision-making in a policy domain like common defense. These two main case studies and their respective sub-cases were deemed adequate to underline the conditionality of experimentalist governance in the EU.

A Experimentalist Governance in Financial Services

I. The Lamfalussy Process

Introduced in 2002, the Lamfalussy Process was a procedural framework of coordination between competent authorities regarding the regulation and supervision of the financial services sector.¹⁹ The primary purpose of its introduction was the overall strengthening of EU's regulatory capabilities in financial services, as part of a broader attempt to transform the regulatory structure surrounding it, on the basis of a democratic institutional balance.²⁰ According to the Commission, this regulatory overhaul was based around three key parameters. First, there was a need for deeper coordination between national stakeholders, which —by that time —were the ones responsible for the regulation and supervision of financial services. Second, the Commission recognized the need to reach greater levels of consistency of the regulation through convergence between the member states. Third and along the lines of the second, there was a clear issue of enforcement that needed to be addressed, in lack of a common—albeit broad—policy line that every member state could abide by.²¹ In that setting, the Lamfalussy Process was first introduced in securities and then also in banking and insurance, remaining the go-to policymaking framework until its replacement by the European System of Financial Supervision (ESFS).²²

In practice, the Lamfalussy Process comprised of four levels. On the first level, the initiation phase, the Commission would consult with market actors, including the European Securities Committee (ESC) and the Committee of European Securities Regulators (CESR), and adopt a proposal for a Regulation or Directive. In turn, that proposal was to be forwarded to the European Parliament and the Council, in line with the ordinary legislative procedure and the principle of co-decision. On the

¹⁹ Alexandre Lamfalussy, *Reflections on the Regulation of European Securities Markets*, The European Money and Finance Forum (2001), pp. 31 <https://www.suerf.org/studies/4953/reflections-on-the-regulation-of-european-securities-markets>.

²⁰ Christian De Visscher, Olivier Maiscoq, and Frédéric Varone, *The Lamfalussy Reform in the EU Securities Markets: Fiduciary Relationships, Policy Effectiveness and Balance of Power*, *Journal of Public Policy* 28 No. 1 (2008), pp. 19–47, <http://www.jstor.org/stable/40072034>.

²¹ European Commission, *Review of the Lamfalussy Process*, eur-lex.europa.eu (June 2008), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l32056&from=EN>.

²² Committee of Wise Men, *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets*, (February 2001), https://www.esma.europa.eu/sites/default/files/library/2015/11/lamfalussy_report.pdf.

second level, the consultation phase, the Commission would adopt the specific measures stipulated within the Directive or Regulation, essentially putting them into effect. Prior to that, the Commission would have to consult with the ESC, which is the advisory committee composed of MS representatives and chaired by a representative of the Commission. In a similar manner, the Commission would consult with the CESR, an independent advisory committee comprising of national regulators appointed by each MS.²³ On the backdrop of these consultations, the Commission would draft implementation measures, which were to be sent back to the ESC for approval. If approved, the Commission could proceed with their adoption. In the case of objection by the ESC, the draft is redirected to the Council, which, in turn, can adopt them—through Qualified Majority Voting (QMV)—, not adopt without any opposition, which enables the Commission to proceed with their application, or oppose them. In the latter scenario, the Commission has three options: introduction of amendments on the original draft, resubmission of the draft in its original form, or submission of a new legislative proposal to the Council and the European Parliament. The European Parliament is fully informed throughout the process and has the capacity to highlight a non-binding resolution to the Commission, as well as inform the Council on its own position.²⁴

On the third level of the Lamfalussy Process, the implementation phase, CESR is tasked with ensuring proper implementation of the legislation in every MS. Entrusted with competences to supplement areas that the initial Community legislation does not cover, CESR is responsible of issuing administrative guidelines, common standards, and joint interpretation recommendations.²⁵ Throughout this process a representative of the Commission is present, unless a question of confidentiality is raised, whereas the preparatory work is entrusted with permanent and non-permanent expert groups. On the fourth and last level of the process, the enforcement phase, Commission is in charge of monitoring the ‘consistent transposition and subsequent application’ of the measures introduced over the first two levels. Beyond the level of monitoring, as guardian of Community legislation, the Commission, in the scenario of failure to meet regulatory obligations, can commence the respective proceedings against a violating MS. In parallel to that, an inter-institutional

²³ Committee of European Securities Regulators, *Charter of the Committee of European Securities Regulators*, (September 2008), pp. 1-3, https://www.esma.europa.eu/sites/default/files/library/2015/11/08_375d_final_website.pdf.

²⁴ Julia LEMONIA RAPTIS, *European Financial Regulation: ESMA and the Lamfalussy Process, the Renewed European Legislative Process in the Field of Securities Regulation*, *The Columbia Journal of European Law* 18 No. 3 (2012).

²⁵ CESR, *Charter of the Committee of European Securities Regulators*, pp. 4

monitoring group (IIMG) was formed in 2002, comprised of six independent experts, with the Commission, the Parliament and the Council selecting two each. The task entrusted to the IIMG still revolved around monitoring and of the entire process, in an attempt to resolve occasional blockages and boost its overall efficiency.

The Lamfalussy Process, and the key role of the CESR in particular, has been perceived as one of the prime examples of experimentalist governance in the EU, capitalizing on the presence of comitology, within which institutions intensify their consultation by third actors that are prevalent in the securities market.²⁶ There is a clear attempt to delimit the policy-making process and guide it towards a less hierarchical model, building on the concept of broader co-decision, but also going one step further with the operationalization of secondary autonomous authorities. These ‘bridging actors’, despite their non-binding regulatory contribution, manage to introduce another line of communication between EU institutions or a new line between national actors and the EU, respectively.²⁷ In turn, both the formation and mandate of the IIMG underline the focus on monitoring and report-back mechanisms—two key characteristics of experimentalist governance. This established feedback branch, bringing independent experts in contact with the Commission, the Parliament, and the Council, unlocks a plethora of feedback opportunities. In that framework, CESR appears to be a key ‘experimentalist’ mechanism, connecting the EU with national authorities, enabling peer review within its premises, and having specific competences that revolve around consultation.²⁸

The Lamfalussy Reform was perceived as a successful trajectory shift for EU policymaking in general, requiring minor adjustments, despite the fact that it highlighted several institutional challenges along the way. In its review, the Commission recognized it as a positive shift, which had to be supplemented with more transparency, more coordination, and more competences.²⁹ With its primary focus on monitoring, this new framework managed to resolve several bottlenecks, proving the need for more feedback mechanisms in the policymaking process. However, it has been acknowledged that it could

²⁶ Klaus Ulrich Schmolke, *The Inclusion of the Comitology Practice into the Lamfalussy Process increasing the Participation of the European Parliament in Decision Making*, *Europarecht* 41 No. 3 (2006), pp. 432–48.

²⁷ Lamfalussy, *Reflections on the Regulation of European Securities Markets*, pp. 18

²⁸ Eilís Ferran, *Building an EU Securities Market*, Cambridge University Press (2004), pp. 178–186, <https://doi.org/10.1017/CBO9780511494765>.

²⁹ European Commission, *Review of the Lamfalussy Process*

have achieved more, by being even more efficient, if actors like the IIMG were allowed to maintain a stronger role in the process. Especially when it comes to the third level and the implementation phase, it was argued that a stronger platform of coordination around supervision and national-level regulation, backed by an appropriate legal basis, would have extinguished occasional trust issues between the MS and potentially unlock the formation of more supervisory methods along the lines of the Lamfalussy framework in other policy areas.³⁰ In practical terms this was also reflecting on the lack of funding available for these actors that hindered their effectiveness. To guarantee a better performance the process had to be embedded in Community law in a much more decisive fashion, demanding more competences granted by EU institutions, primarily the Council, and national actors alike.

II. European Securities and Markets Authority

A decade after the introduction of the Lamfalussy process and in the middle of an unprecedented financial shock throughout the Union, it was clear that a revised governance style should be introduced along the lines of its predecessor, focusing on intensified coordination, effective monitoring, and quick responses in terms of policy remedies.³¹ As recognized by the de Larosière Report in 2009, the financial crisis had exacerbated the Union's deep need for stronger macro-prudential supervision, early warning mechanisms and an overarching system of supervision with enhanced competences that could overcome blockages in the relationships between national competent authorities.³² As such, in 2011, the ESFS was introduced as the new framework for supervision of financial services in the EU. Within the premises of the ESFS system there were three key actors: the European Supervisory Authorities (ESAs), the European Systemic Risk Board (ESRB),

³⁰ Inter-Institutional Monitoring Group, *Financial Services: Inter-Institutional Monitoring Group Publishes Final Report on Lamfalussy Process*, European Commission (October 2007), https://ec.europa.eu/commission/presscorner/detail/en/IP_07_1495.

³¹ Duncan Alford, *The Lamfalussy Process and EU Bank Regulation: Another Step on the Road to Pan-European Bank Regulation?*, SSRN Electronic Journal (2006), <https://doi.org/10.2139/ssrn.1341325>.

³² Jacques De Larosière, *The High-Level Group on Financial Supervision in the EU*, European Commission (February 2009), https://ec.europa.eu/economy_finance/publications/pages/publication14527_en.pdf.

and the Joint Committee of European Supervisory Authorities (JC-ESA).³³ All three of these actors were to cooperate with national supervisory authorities from each MS, which were still recognized as the ones with the authority to supervise financial institutions operating under their respective jurisdictions. In contrast with the Lamfalussy system, the ESFS was granted a broad scope from the very beginning, encompassing three different segments of financial services. As a result, the ESA branched into three main authorities: the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), and the European Insurance and Occupational Pensions Authority (EIOPA). In that context, the focus of this chapter shall lie onto ESMA, the direct successor to CESR, in order to highlight the reforms on EU governance from an experimentalist standpoint.

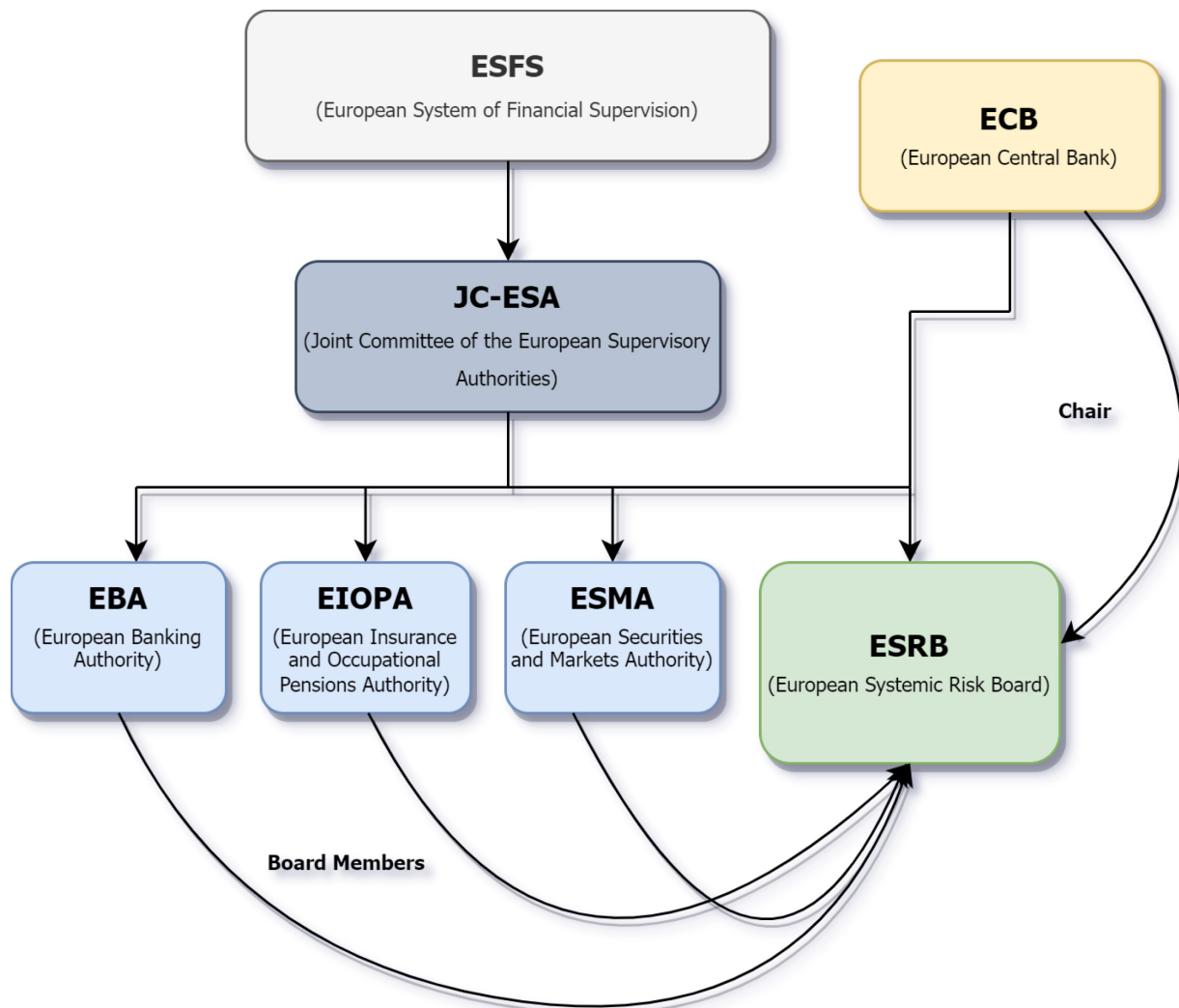


Figure 1: The European System of Financial Supervision (ESFS) (Source: ECB)

³³ European Parliament, *Review of the New European System of Financial Supervision*, European Parliament (2013), [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/507446/IPOL-ECON_ET\(2013\)507446_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/507446/IPOL-ECON_ET(2013)507446_EN.pdf).

An authority focused solely on the securities segment, ESMA was tasked with the establishment of common regulatory standards and practices for the MS, through recommendations, monitoring of national authorities, and peer review with the other EU institutions, along the lines of their formally close cooperation. The first key change as part of the de Larosière Reform is that the ESAs were formed as independent EU bodies, with full legal personalities and a clear regulatory and supervisory mandate. As such, their competences are not limited compared to their predecessors, as CESR, for instance, was limited to non-binding guidelines. Instead, in selected policy areas where legislation does not entail the adoption of binding technical standards, the ESAs can adopt them and, through the Commission's endorsement, render them legally valid and binding.³⁴ In addition, the ESAs are granted a secondary arbitrary profile, empowered to resolve disputes between MS and safeguard the even application of Union law. Under that justification the ESAs follow a three-level mechanism of gradual intervention towards resolution of disagreements between MS that culminates in 'measures of last resort'—binding decisions concerning specific national supervisors.³⁵

As one of the ESAs, ESMA also has had an overall strengthening and broadening of its capacities. Unlike its predecessor, ESMA, viewed as the centerpiece of the securities branch of the ESFS system, is more involved in the regulatory process, thanks to its formally empowered relationships with other key stakeholders—EU and national institutions alike. It is worth underlining the formal aspect of these relationships, that can be traced back to the authorities' regulatory basis, as ESMA manages to maintain the dual profile that CESR sought but failed to support, due to its lack of competences.³⁶ In this case, ESMA remains on a level of competence far below the established key players in securities regulation, as in the Commission, the Council, or the national authorities, but also retains a high level of independence, with a legal personality, administrative and financial autonomy, as well as—limited—binding decision capabilities. In addition, ESMA lies at the epicenter of a well-established network of feedback and peer review, on the backdrop of two-dimensional accountability. As such,

³⁴ Marloes van Rijsbergen, *Legitimacy and Effectiveness of ESMA's Soft Law*, Edward Elgar Publishing Limited (2021), pp. 26–29

³⁵ Olivia Johanna Erdélyi, *Twin Peaks for Europe, State-of-the-art Financial Supervisory Consolidation : Rethinking the Group Support Regime under Solvency II*, Springer (2016), pp. 17–20

³⁶ Pablo Iglesias Rodríguez, *ESMA as a Residual Lawmaker: The Political Economy and Constitutionality of ESMA's Product Intervention Measures on Complex Financial Products*, *European Business Organization Law Review* 22 No. 4 (2021), pp. 627–671, <https://doi.org/10.1007/s4080402100218y>.

ESMA is not only 'vertically' accountable to the Parliament and the Council where there is a clear disparity of competences, but it is also 'horizontally' accountable, participating in common fora with the other ESAs, like the JC-ESA, addressing the accountability concerns that were raised during the Lamfalussy Reform.³⁷ As a result, ESMA encompasses all of the regulatory and advisory functions of CESR, but it is also given a position in a full-fledged regulatory framework with some quasi-regulatory instruments of its own.

Reverting back to the experimentalist theory, ESMA can be interpreted as an even better iteration of CESR. Tasked to tackle the lack of effectiveness of its predecessor it was entrusted with significantly stronger rule-making competences. In parallel, ESMA retained and empowered all the elements that rendered CESR partially successful: relative autonomy, monitoring mechanisms, peer review, open consultation with expert groups. In fact, it even addressed the weak point of non-binding deliberation, that was viewed as the limit for networked governance, essentially broadening the applicability of the experimentalist paradigm.³⁸ However, limitations are still evident, mainly due to the reluctant stance of the other stakeholders to allow an 'independent' actor to hold onto such power. Just like in the case of CESR, ESMA was the recipient of high suspicion and scrutiny by the other actors, EU institutions and national competent authorities alike, in spite of the fact that its competences were still limited in a broader sense. If that was the case, nonetheless, why did ESMA emerge even stronger than its predecessor?

The answer to this question is twofold and alongside the following case studies will assist in highlighting the conditions that allow experimentalist governance to be adopted and flourish. First, the financial crisis ravaging the EU in that timeframe had highlighted an unpopular yet necessary route towards regulatory empowerment of the Union. With financial services—including banking, pension funds and securities—being in the eye of the cyclone, the heavily monitored and regulatory-agile template provided by the Lamfalussy process was viewed as the blueprint that could guarantee high level of coordination between all stakeholders over a paramount policy area. In that light, exogenous pressures had an effect on the consensus to double-down on an experimentalist

³⁷ Thomas Schillemans, *Does Horizontal Accountability Work?*, *Administration & Society* 43 No. 4 (May 2011), pp. 387–416, <https://doi.org/10.1177/0095399711412931>.

³⁸ Sabel and Zeitlin, *Experimentalist Governance in the European Union: Towards a New Architecture*, pp. 57.

framework.³⁹ Second, the establishment of the ESFS in its current form introduced minimum—yet noticeable—shifts in the balance of power within the EU. On the one hand, the Commission had been a clear proponent of broader regulatory capabilities in terms of financial services, even if that had to come indirectly, through a set of satellite entities—like the ESAs—rather than directly. On the other hand, the Council and the national authorities were opposed to the strengthening of the Commission's competences. However, in light of the circumstances and along the lines of the agencification of the EU, 'independent' actors of intergovernmental character were more approachable, thus acceptable.⁴⁰ As a result, experimentalist forms of governance in financial services appear to be applicable, effective, but also conditional.

B Experimentalist Governance in Defense Cooperation

In search of a case study that projects the limitations of experimentalist governance, it is argued that pinpointing a failed application of the framework cannot adequately highlighting its limitations, that would allow us to set out the conditions of its success. Instead, the focus should be on policy areas that experimentalist solutions are either minimum or barely considered; policy areas that have evaded—or deliberately been excluded—from the broad scope of the framework, as set out by Sabel and Zeitlin. As such, what is to follow is an attempt to view European cooperation over defense matters within the context of experimentalist governance. Further examination of this policy domain is characterized by several stakeholders within the Common Security and Defense Policy (CSDP), which are either partially involved in that policy area or are entirely dedicated to that but as part of an institution with a broader scope, such as the European Commission's Directorate General of Defense Industry and Space (DG DEFIS) or the Military Committee (EUMC)—a preparatory body of the Foreign Affairs Council (FAC). Pinpointing a case study that continues along the progression from

³⁹ Niamh Moloney, *Reform or Revolution? The Financial Crisis, EU Financial Markets Law, and the European Securities and Markets Authority*, *The International and Comparative Law Quarterly* 60 No. 2 (2011), pp. 521–33, <https://www.jstor.org/stable/23017011>.

⁴⁰ Agnieszka Nitszke, *EU Agencification? A New Framework for the Functioning of Decentralized Agencies of the European Union*, *Athenaeum Polskie Studia Politologiczne* 59 (September 2018), pp. 205–223, <https://doi.org/10.15804/athena.2018.59.13>.

practice towards institutionalization – from the Lamfalussy Process to the ESFS—, the chapter will focus on the Permanent Structured Cooperation (PESCO), a cooperative undertaking amongst the majority of the EU MS, pursuing further structural integration of armed forces.

I. Introducing a 'sleeping beauty'

The first iteration of PESCO was introduced as part of the Constitutional Treaty of 2004—a treaty that posed to act as the Union's next step towards further integration. Moving past its time and the MS' preparedness, the European Constitution by definition introduced a constitutionalist aspect for the EU at the expense of national sovereignty, which resulted in great reluctance amongst the 25. It was not until the Dutch and French referenda of 2005 when that reluctance translated into clear rejection—a critical blow not only for the positivist view towards European treaties, but also for European federalism. In the aftermath of the Constitutional Treaty and the emergence of the Reform Treaty—the Lisbon Treaty of 2009—that arrived to salvage the abrupt pause of European integration, the opening for structural integration of armed forces was retained, thus keeping alive the possibility of an institutional structure to serve that purpose, underneath the broader umbrella of the CSDP.⁴¹

In theory, this opening allowed for MS, that have already established commitments with one another in regard to military cooperation, to establish a permanent structure within the existing legal framework of the EU. As such, especially in situations that would require intense cooperation between MS, the EU framework would foster an institutional branch to facilitate that process. In that light, PESCO represented a form of optional cooperation between MS that maintained a strongly situational character. Regardless, a provision that alluded to a nuanced interpretation of Article 42 of the Treaty of the European Union (TEU), Eurosceptic voices, that had grown all the more stronger following the rejection of the European Constitution, opposed the establishment of PESCO upon the signing of the Lisbon Treaty.⁴² That reluctance, however, was not novel, as European defense has been characterized by a 'negative starting point', coming across severe obstacles and discrepancies

⁴¹ European Commission, *Consolidated Version of the Treaty on European Union*, Article 42 (Ex Article 17 TEU), Europa.eu (2016), pp. 39-39, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12016M042>.

⁴² Ibid. Art.46, pp. 40-41

between MS that prevented them from adopting a more positivist approach.⁴³ As a result, PESCO—an initiative that could follow along the lines of the latter approach—remained inactive, justifying its characterization as a “sleeping beauty”.⁴⁴

PESCO’s inactive state cannot be solely explained by the unfavorable atmosphere in the EU regarding further integration—let alone deepened defense cohesion—, as its broad scope allowed for different interpretations. On a national actor basis, it is worth focusing on the Big Three: The United Kingdom, France, and Germany.⁴⁵ The UK spearheaded the obstruction of PESCO, viewing it as a significant threat towards its national sovereignty. Traditionally showing little interest towards the promotion of the CSDP, the UK would accept the formation of an institutional structure strictly on an intergovernmental basis. In that sense, the UK’s lack of cooperation in regard to the establishment of PESCO, explain to a great extent why it was not ‘awakened’ pre-Brexit.⁴⁶ In turn, France viewed PESCO as the blueprint for further defense integration that would solidify the EU as global security provider, extending its military capabilities so that they match its established strength over foreign and economic policy. However, the French side was also determined to put the initiative forward even if it were to create a military sub-group within the Union, advocating for differentiated integration, which Germany heavily opposed. From a German perspective, PESCO had a strong symbolical rather than pragmatism side, especially in the post-Brexit reality, and, thus, should emphasize on horizontal rather than vertical integration. Based on the aforementioned, it is evident that PESCO, despite its relatively clear theoretical mandate, was pragmatically vague—an element that arguably allowed its inclusion in the Treaty of Lisbon in the first place.⁴⁷

In lack of a concise, structural framework for that initiative the following question emerges rather naturally: Could PESCO be established along the lines of the experimentalist concept, as described

⁴³ Jolyon Howorth, *Differentiation in Security and Defence Policy*, Comparative European Politics 17 No. 2 (2019), pp. 261–277, <https://doi.org/10.1057/s4129501900161w>.

⁴⁴ Jean-Claude Juncker, *Speech by President Jean-Claude Juncker at the Defence and Security Conference Prague: In Defence of Europe*, Defence and Security Conference Prague: In defence of Europe (June 9, 2017).

⁴⁵ Gianni Bonvicini, *Proposals for a Revival of Permanent Structured Cooperation*, The Polish Quarterly of International Affairs 22 No. 3 (2013), pp. 44–58.

⁴⁶ Sven Biscop, *The UK and European Defence: Leading or Leaving?*, International Affairs 88 No. 6 (2012), pp. 1297–1313, <https://doi.org/10.1111/j.14682346.2012.01133.x>.

⁴⁷ Antonio Missiroli, James Rogers, and Andrea Gilli, *Enabling the Future: European Military Capabilities 2013–2025: Challenges and Avenues*, EU Institute For Security Studies (2013), pp. 52–59

by Sabel and Zeitlin? Existing conditions suggest that it would be possible. PESCO claimed a spot within an already established network of actors with decision-making capabilities, both on a European and a national level. Within the premises of a network that would bring decisionmakers into contact with experts, particularly through the consultations of agencies including the European Defense Agency (EDA), PESCO could act as the facilitator of coordination and communication between these three levels, essentially promoting multi-level decision-making. In that light, taking into consideration the extremely narrow margins of EU-level defense policymaking, PESCO could also adopt a profile along the lines of the aforementioned CESR: a consultative institution, strongly dependent on authorization by the Commission and the Council, that would participate via the issuing of administrative guidelines, common standards, or joint interpretation recommendations.⁴⁸ Beyond that, PESCO could have been an institution whose primary focus is monitoring armed forces around the EU, transposing an intrinsic element of experimentalist governance into the policy area of defense, essentially unlocking peer review and intensified cooperation.⁴⁹ Consequently, the setting in which PESCO was to be created was not unfavorable towards institutionalization, despite the sensitivity of the policy area of defense; PESCO could have been a supplementary institution to the national and intergovernmental European authorities, enjoying minimum or no policymaking independence, but supporting multi-level decision-making.

II. 'Awakening' the Permanent Structured Cooperation (PESCO)

In the years that followed the Treaty of Lisbon, the EU was met with several externalities that altered the very balance of the entire European structure—let alone its priorities. In fact, these externalities were taking place on two levels: the financial and the geopolitical. On the one hand, as discussed on previous chapters, several EU economies were subject to significant stress, rendering excessive national defense expenditure rather questionable. As a result, with very few exceptions, in the years following the Treaty of Lisbon, MS were trying to either reduce or stabilize their expenditure on

⁴⁸ Sabel and Zeitlin, *Experimentalist Governance in the European Union: Towards a New Architecture*, pp. 60

⁴⁹ Steven Blockmans and Dylan Macchiarini Crosson, *PESCO: A Force for Positive Integration in EU Defence*, *European Foreign Affairs Review* 26 (2021), pp. 87–110, <http://www.kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\EERR\EERR2021028.pdf>.

defense. On the other hand, however, amidst the financial crisis, geopolitical equilibria—especially in the Middle East—were toppled. In the rather volatile geopolitical landscape of the Arab Spring in the Southeast and the annexation of Crimea in the East, the EU had to demonstrate a high level of preparedness. In the aftermath of these conflicts, the migration crisis that followed, underlined both the necessity for better coordination over issues dealing with national sovereignty, but also the grave antitheses characterizing the positions of various MS. In that setting, the UK's withdrawal from the Union was the last straw; the EU was coming apart under the burden of consecutive crises or—to be more precise—its inadequacy to address those crises effectively. Consequently, for all the aforementioned reasons, an adaptation to the new environment was a requirement, reaching as far as the awakening of the 'sleeping beauty of the Lisbon Treaty'.⁵⁰

In 2017, PESCO became a reality, behind the efforts of France and Germany, which, as described previously, advocated for a focus on capabilities and inclusiveness, respectively.⁵¹ In arguably the most critical point of this case study, however, PESCO was realized in the form of a process, rather than an institution. Arguments for this choice vary but tend to revolve around two main parameters; first, a process was a model much easier for France and Germany to agree on, given their mentioned differences. Second, a process would retain a much lower profile compared to a full-fledged institution focused on defense. As such, on the basis of swift and non-extravagant cooperation, PESCO—the process—was initiated with 10 projects, being inclusive but not mandatory for all MS, with 25 out of the 27 eventually becoming members. To Germany's satisfaction, PESCO did not have any military capability requirements, rendering the process unifying rather than discriminatory. To France's satisfaction, participating MS had to just pledge towards the development of their capabilities, unlocking the potential for the Union's defensive upscale.⁵² Regardless, PESCO's reinvention reiterates, apart from the grave need for defense integration, the characteristic sensitivity and complexity of dealing with such a topic on any level above the national. Even under

⁵⁰ Sven Biscop and Jo Coelmont, *CSDP and the 'Ghent Framework': The Indirect Approach to Permanent Structured Cooperation?*, *European Foreign Affairs Review* 16 (2011), pp. 149–67, <http://lib.ugent.be/catalog/pug01:4229685>.

⁵¹ Council of the European Union, *Council Decision (CFSP) 2017/2315 of 11 December 2017 Establishing Permanent Structured Cooperation (PESCO) and Determining the List of Participating Member States*, Council of the European Union (December 2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017D2315&from=EN>.

⁵² Andrew Rettman, *France and Germany Propose EU 'Defence Union'*, *EU Observer* (September 2016), <https://euobserver.com/world/135022>.

those pressing circumstances, MS decisiveness is overcome by reluctance to entrust more fractions of their sovereignty with the EU—a network that was consecutively penetrated by externalities over the lapse of the decade of crises.⁵³

In technical terms, PESCO as a process would still serve its mandate under the framework of inclusive expression and enhanced cooperation in the field of defense. In absence of an individual entity, its internal structure is based on two levels: the Council and the Projects levels. First, the Council is responsible with the entire policymaking process, as well as overall policy direction and performance assessment of the participating states. Second, on the Projects level, the group of MS participating on each project ('project members') is managing its development, under the Council's oversight. Despite not being able to change governance rules, project members are allowed to designate a leading member, that can, in turn, introduce minor changes in terms of the internal coordination, provided that it notifies the PESCO Secretariat. The PESCO Secretariat is the single point of contact for project members and is composed of the European External Action Service (EEAS), the EU Military Staff (EUMS) and the EDA. Last but not least, the PESCO process is funded by the European Defense Fund (EDF).⁵⁴

In order to establish a common *modus operandi*, members would have to make twenty binding commitments towards the development of their capabilities. Going one step further from 'empty promises', participating states would have to meet specific objectives related to their commitments, which were divided into five categories: defense investment expenditure; force availability, interoperability, flexibility and deployability; harmonization, capability specialization and training cooperation; and the implementation of the Capability Development Mechanism (CDM) and Equipment Development Programme (EDP) by the EDA. Monitoring of MS' progress takes place through National Implementation Plans (NIPs)—annual reports of progress to inform the other participating states; the

⁵³ Daniel Fiott, Antonio Missiroli, and Thierry Tardy, *Permanent Structured Cooperation: What's in a Name?*, European Union Institute for Security Studies (2017), pp. 11-25 <https://www.iss.europa.eu/content/permanent-structured-cooperation-what%E2%80%99s-name>.

⁵⁴ Council of the European Union, *Council Decision Establishing a Common Set of Governance Rules for PESCO Projects*, Council of the European Union (June 2018), <https://www.consilium.europa.eu/media/35786/council-decision-pesco-projects.pdf>.

EDA contributes to that through Coordinated Annual Review on Defense (CARD), a secondary report that has to be considered by MS following the CDM.⁵⁵

Based on the aforementioned, PESCO showcases a strong intergovernmental profile, which is to be expected given that it revolves around defense cooperation. As such, the Council retains its overarching role in the process, by being the single actor with decision-making capabilities. However, PESCO could be also viewed as proof of the neo-functionalist perspective and the spillover effects in European integration, still representing the incremental supranationalization of national defense in the EU, under the CSDP umbrella.⁵⁶ Beyond that point, PESCO demonstrates few characteristics echoing the experimentalist style of governance, investing heavily on monitoring and feedback between institutions, as part of a multi-level network connecting national and EU actors. Despite that façade, PESCO projects are completely stripped of autonomy; even in the minute level of project coordination, authorization has to come through the PESCO Secretariat, which is composed of other institutions. In a vague setting, seemingly able to accommodate a new institution with experimentalist characteristics, PESCO's pseudo-awakening resulted in a process at the bottom of a clear hierarchy chain, below a single-level intergovernmental decisionmaker—the Council.

C. Conditions for a Successful Case of Experimentalist Governance

Following two sets of case studies—from the Lamfalussy process to ESMA and inactive to active PESCO—the question that arises is not about the success or failure of the concept of experimentalist governance; instead, the aforementioned antithesis highlights the conditional nature of the framework, which renders it more or less applicable—and thus successful—depending on conditions beyond policy domains. If that is the case, what are the conditions that allow the emergence of

⁵⁵ Permanent Structured Cooperation - PESCO, *Deepening Defence Cooperation among EU Member States*, PESCO (October 2021), https://www.eeas.europa.eu/sites/default/files/pesco_factsheet_2021-12.pdf.

⁵⁶ Steven Blockmans, *PESCO's Microcosm of Differentiated Integration*, TMC Asser Press (2021), pp. 163–176, https://doi.org/10.1007/9789462654235_7.

frameworks or structures along the lines of what was described by Sabel and Zeitlin as experimentalist governance?

I. Lack of sovereignty concerns

Based on the aforementioned case studies, it appears that experimentalist forms of governance are subject to certain conditions that can limit their effectiveness and, thus, the possibility of them being adopted, instead of a more traditional, hierarchical model. For the first condition, it is worth starting from the idea of European integration. In principle, continual integration is established on top of key policy areas that have already been elevated to the Community level of decision-making or new policy areas that require regulation, in what is known, according to the neo-functionalist theory, as the spillover effect.⁵⁷ It is the deepening and broadening of the EU through integration that has formulated a ground-level dynamic between the Union and the MS, which is based on the fundamental principle of conferral. Thanks to that principle and the institutional network it created, the introduction of alternative styles of architecture—like the DDP—is possible.

Going back to the successful case studies presented by Sabel and Zeitlin, every policy domain that was examined had the commonality of a well-established European legal framework, on top of which new forms of governance were allowed to be experimented with. As such, it is presented as if the experimentalist concept is successful throughout the spectrum of EU policies, whereas it appears that it has been this way only for the policy domains that the EU has made significant and ‘tangible’ progress.⁵⁸ Going back to the first case study, the Lamfalussy Process, it is clear that the policy domain of financial services has an already established European aspect, from the perspective of the MS, on the backdrop of the Single Market. In a setting where national and EU-level authorities were already required to cooperate with one another, the new framework introduced a structure that would strengthen the existing network by intensifying cooperation. From that standpoint, it can be supported that for supranationalized policy domains—meaning the policy areas for which decision-

⁵⁷ Philippe Schmitter, *Ernst B. Haas and the Legacy of Neofunctionalism*, *Journal of European Public Policy* 12 No. 2 (2005), pp. 255–172, <https://doi.org/10.1080/13501760500043951>.

⁵⁸ Tanja Börzel, *Experimentalist Governance in the EU: The Emperor’s New Clothes?*, *Regulation & Governance* 6 No. 3 (September 2012), pp. 378–384, <https://doi.org/10.1111/j.1748-5991.2012.01159.x>.

making above the national level is an established procedure—a shift towards experimentalist forms of governance appears more logical, or even natural.

On that note, a supranational level of regulatory coordination not only acts as a facilitator for experimentalist governance, but also as an accelerator, straying away from the traditional incrementalism that characterizes the strengthening of non-principal EU agents over several policy areas.⁵⁹ Focusing on the revision of the Lamfalussy Process and the introduction of the ESFS, the regulatory framework not only was on the basis of the Community method, but it was also revised to further enhance the decision-making capabilities of ‘bridging’ actors. As such, the limited, consultative and soft law power of CESR was both broadened and enhanced within its successor, ESMA, which maintains a high degree of conditional—yet more independent—regulatory authority. Thus, it is noted that ESMA’s acceleration in terms of involvement in the regulatory process, whilst retaining legal, financial and administrative autonomy, has been possible—to a great extent—thanks to the degree of integration on the policy area of financial services. Even though it can be argued that this enhancement takes place on the backdrop of political motives and the agencification process in the EU, driven by the MS, the Council and the European Council to limit the Commission’s dominance in policy-making, amidst an environment of established co-decision networks,⁶⁰ experimentalist architectures not only are more plausible to emerge but also faster to evolve and broaden their scope.

Moving onto the second case study, however, both applicability and development pace of experimentalist architectures appears to be affected in low-integrated policy areas, like defense cooperation. Despite the fact that CSDP has been a significant pillar in the history of European integration, it has failed to invoke the same level of EU-optimism in the MS, contrasting the conservative alacrity expressed throughout the deepening of the Single Market. In turn, defense cooperation has been a policy area of critical reluctance on behalf of the MS, with several ‘red lines’ that limited further integration in that regard.⁶¹ National intransigence on issues of defense is intertwined with questions of sovereignty, which, in turn, set the limit for European integration, let

⁵⁹ Benson and Russel, *Patterns of EU Energy Policy Outputs: Incrementalism or Punctuated Equilibrium?*, pp. 198-205

⁶⁰ Koen Verhoest, *Agencification in Europe*, The Palgrave Handbook of Public Administration and Management in Europe (November 2017), pp. 327-346, https://doi.org/10.1057/978-1-137-55269-3_17.

⁶¹ Christian Deubner, *Security and Defence Cooperation in the EU: A Matter of Utility and Choice*, 1st edition, Nomos Verlagsgesellschaft (2018), pp.25-38

alone on an experimentalist basis. As such, PESCO's significance is consistently defined by the complexity characterizing policy alignment over issues of defense, rather than its actual incremental progress. From a broader—arguably more demanding—perspective, PESCO's eventual establishment as a process, essentially puppeteered by the Council, pales in comparison to what it could have been, based on the broad scope it was given during its incubation phase. Even though, PESCO could have emerged as a soft power, intergovernmental, 'bridging' actor, along the lines of CESR and ESMA, it did not; instead, PESCO in its current form is not only a missed opportunity, but an outright rejection of non-traditional, and most importantly not hierarchically distinct, forms of governance.

Based on the aforementioned, despite its broad scope of coverage, experimentalist governance is conditionally dependent to policy areas that have the capacity to accommodate its model. Focusing on the aspect of multi-level decision making, the abandonment of traditional hierarchical structures relies on the level of conferral of sovereign rights to the European architecture in the first place. As such, policy areas of deepened integration, like segments of the Single Market, create a formidable environment for polyarchic systems to emerge, reinstating national actors or creating new European ones that alongside the primary actors—EU and MS—form a network of deliberation in decision making. Conversely, policy areas of lesser integration, like the area of CSDP, as an equivalent of high concentration of national sovereignty concerns, provide limited chances for conferral of relevant rights to non-state actors, containing the usage of the Community method in decision making. With a regulatory architecture that is difficult to penetrate with primary actors of the EU, let alone nascent agents and processes, vertical hierarchy of powers over matters of defense should be perceived as the fundamental safety clause, reassuring a MS of its survivability, even outside of the EU context. Even if that clause does not have an immediate use—which is rather debatable in the aftermath of Brexit—, history has shown that it is a notion that many MS can default to, alluding to an immovable object. Oddly enough, the not-so-unstoppable force of the experimentalist styles of governance based around the Community method have conditional applicability and efficiency, pre-requiring the integrational bedrock of policy areas that are devoid of potential demands for conferral of sovereign rights.

II. Lack of interest discrepancies

Arguably the most important objective for governance beyond the national level is facilitating the achievement of the respective interests, meaning the goals that are quite complex—or outright impossible—for a state to achieve on its own.⁶² As such, strategic coordination, even on the basis of broad guidelines, is an intrinsic element in the work of institutions operating within the EU, especially when looking at the Commission. Transposing that within an experimentalist framework, before deliberation and multi-level decision-making, a fundamental level of agreement is necessary, rendering the framework not only applicable but also sustainable; interest discrepancies, albeit foreseeable, can undermine both the efficiency and the integrity of any structure of group decision-making, let alone a group of states of equal nominal importance as the EU.

The aforementioned frame of aligned interests is a given for the Union and, as such, it is treated as a basic fact also in the experimentalist framework. Returning to the case study of the Lamfalussy process, as well as its subsequent evolution into the ESFS, there is a clear common line that all stakeholders wished to follow in terms of objectives. What was first described in the Report of the Committee of Wise Men, under Alexandre Lamfalussy, as a ‘need for change’ was maintained throughout the revisions and was used as the foundation of ESFS.⁶³ Acknowledging the problematic state introduced by EU and national level regulatory disparities, that hindered the efficiency of the financial services industry, MS shared a fundamental common ground, regardless of their differences in particular aspects of the topic. MS and EU institutions alike recognized the need for a regulatory system of minimum complexity that promoted transparent cooperation between stakeholders, addressing the issues of insufficient monitoring and enforcement that were commonly identified.⁶⁴

Consequently, it was much easier for the Commission to be in a position to encompass these interests in a broad strategy, translating it overtime into a process and later into a full-fledged institutional branch, that enjoyed the acceptance—presumably of different degrees—by the MS. In reference to the previous discussion on deliberation depending on integration, it is true that the higher level of EU

⁶² Marton Varju, *Member State Interests and European Union Law Revisiting the Foundations of Member State Obligations*, 1st edition, Routledge (2021), pp. 206–212.

⁶³ Committee of Wise Men, *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets*, pp. 2–3

⁶⁴ European Commission, *Review of the Lamfalussy Process*

integration is over a specific policy domain, the more are the common interests for the MS that can be served via EU-level decision-making.⁶⁵ For instance, in terms of regulation under the broad scope of the Single Market, despite the abundance of discrepancies between the economies of the different MS that result into more—albeit minute—conflicts of interest, all participants wish for an efficient and clear regulatory framework. In addition, for the sector of financial services in particular, it is in their best interest that this framework boosts overall cooperation, through additional instances of transparent consultation, given that the better part of regulatory activity is—by definition—taking place beyond the level of national control. As such, integrated policy areas allow for the formulation of a substratum of aligned interests between stakeholders, which, in turn, enables the establishment and popularization of Community decision-making.

Examining the argument inversely, absence of aligned interests prevents the consideration of experimentalist alternatives as a viable option of governance. Returning to the second case study, that of EU defense cooperation, the aforementioned discrepancies are prevalent, on both levels of capacities and interests, highlighting separate strategies for strong and relatively weaker MS. In that setting, the lack of an institutional structure—of the aforementioned caliber—driving defense cooperation further exacerbates this issue, with stronger MS resorting towards the direct usage of their power outside of an EU context. As such, current cooperation between EU-MS over issues of defense tend to take place on the basis of bilateral or multilateral agreements or as part of broader cooperation through extra-EU institutions, like the North Atlantic Treaty Organization (NATO). Accordingly, this allows for the formulation of cooperative clusters or long-term alliances based on different parameters, such as geopolitical positioning, pre-existing frameworks of regional cooperation, parallel strategic orientation, or similar defensive capabilities.⁶⁶

Even though different capacities are equally evident in financial services, the existence of the Single Market provides a framework of harmonization and convergence towards common lines of interest, allowing the resurgence of the aforementioned parameters within an institutionalized context. In fact, it has been suggested that this is an inescapable phenomenon even within an experimentalist context,

⁶⁵ Peter Bursens et al., *Complex Political Decisionmaking: Leadership, Legitimacy and Communication*, Routledge (2017), pp. 25–40.

⁶⁶ Maxime Larivé, *Debating European Security and Defense Policy: Understanding the Complexity*, Ashgate (2014), pp. 115–33.

as stronger MS will project their own power and interests in any form of decision-making framework, including the Community-method.⁶⁷ While this represents an argument against the efficacy of multi-level governance in limiting dominant states from promoting their own agendas through institutional structures, it also suggests that the establishment of such forms of governance is quite difficult in the first place. Of course, this alludes to the first argument of this paper, that policy areas still characterized by sovereignty concerns are integrated at a slower and incremental pace. As such, even when the EU attempts to provide a wide framework for defensive cooperation—as in the case of PESCO—MS are reluctant to confer aspects of such rights to institutions in which their control can be limited, opting for short-term, intergovernmental, objective-oriented—bilateral or multilateral—agreements instead.

Along that line of thought, interest alignment can be perceived as another condition for a successful case of experimentalist governance. Viewing experimentalist structures as the continuation of Community-method in decision-making, in order for the first to be possible the latter needs to be established beforehand. In policy areas where that is not in the best interest of the MS, European integration is more superficial and incremental. As seen in the case of PESCO, the Commission may attempt to create a strategy highlighting the—albeit vague—common interests shared between the states. However, given the sensitivity of the topic, not only these solutions cannot encompass the pivotal interests of the MS, but they come across state intransigence in terms of their eventual implementation.⁶⁸ As a result, what could have been established as a permanent EU agent of formal defense cooperation in the EU, had to be altered into an elective process that did not take any level of authority away from the—driven by the MS—Council. What is viewed by some as the realization of an incremental step towards EU defense integration, can also be interpreted as the extinguishment of an opportunity to make significant progress in that regard, validating the argument that sovereign interests are best promoted via state-led—rather than common—agendas.⁶⁹ In that light, interest

⁶⁷ Börzel, *Experimentalist Governance in the EU: The Emperor's New Clothes?*, pp. 13

⁶⁸ Simon Sweeney and Neil Winn, *EU Security and Defence Cooperation in Times of Dissent: Analysing PESCO, the European Defence Fund and the European Intervention Initiative (EII) in the Shadow of Brexit*, *Defence Studies* 20 No. 3 (2020), pp. 224–249, <https://doi.org/10.1080/14702436.2020.1778472>.

⁶⁹ Julian Bergmann and Patrick Müller, *Failing Forward in the EU's Common Security and Defense Policy: The Integration of EU Crisis Management*, *Journal of European Public Policy* 28 No. 10 (2021), pp. 1669–1687, <https://doi.org/10.1080/13501763.2021.1954064>.

incompatibilities within an EU context over a certain policy area, prevent the diffusion of decision-making capabilities and, thus, the implementation of experimentalist concepts of governance.

III. Lack of externalities

In continuation of the previous argument regarding MS' interest alignment and possible transposition onto the European level, an aspect to be highlighted is the dynamic nature of interests themselves. Even when it comes to fundamental national interests, such as financial stability or territoriality, they can be affected by externalities, meaning events beyond the control of either the MS or even the EU. Especially taking into consideration the reality within the EU over the last two decades—frequently dubbed as a prolonged period of crises—has come across an abundance of externalities that have significantly affected the internal balances of the Union. Ranging from mere effects to integrity-threatening crises, it is argued that such events, can affect the EU's very trajectory towards governance, and, more precisely, the willingness of MS to support Community decision-making, forming yet another condition for the successful implementation of experimentalist styles of governance.

Interestingly enough, throughout the time window that both sets of case studies take place, there were crucial externalities that—could have or—had an impact on their respective policy areas. Starting from the beginning, the Lamfalussy Process was introduced in 2002, during the early stages of the adoption of the single currency. The mindset behind its introduction was fairly ameliorative towards the patchwork of regulatory steps that were involved in financial services regulation, as well as corrective, attempting to boost consistent interpretation of regulations on the national level, while addressing the emerging issues of monitoring and enforcement. Albeit a significant success, the Lamfalussy Process was replaced by the ESFS in 2011, well within a severe financial crisis that had spread out the entirety of the Union, particularly damaging the European South. Without that transition being explicitly fueled by the crisis at hand, the introduction of the ESFS marked a radical shift towards the institutionalization of the processes introduced by its predecessor.⁷⁰ Via the

⁷⁰ Mark Dawson, *The Legal and Political Accountability Structure of 'PostCrisis' EU Economic Governance*, *Journal of Common Market Studies* 53 No. 5 (2015), pp. 976–993, <https://doi.org/10.1111/jcms.12248>.

crystallization of a multi-level decision-making framework, not only did institutions like ESMA emerge stronger, enjoying broader regulatory capabilities, but it also provided a policy-making network to navigate the EU's financial services sector throughout a raging crisis.⁷¹

On that note, it could be suggested that this commitment to the process attests to the ability of experimentalist forms of governance to prevail regardless of externalities. In fact, it could be argued that not only multi-level governance is viable during times of crises, but also perceived by EU institutions and MS alike as a better alternative over other hierarchical architectures.⁷² A counterargument to that, however, would be that the experimentalist concept was already in place before the emergence of the crisis. In other words, instead of a crisis-induced shift towards experimentalism, EU governance maintained the course towards the same direction.⁷³ Taking into account the success story of the Lamfalussy process, addressing the crucial—especially in times of crises—issues of monitoring and implementation of common practices, alongside the dependency of struggling states towards EU funding, ‘doubling-down’ on that framework was the best possible choice in the first place. From that standpoint, the proved relationship between crises and the implementation of experimentalist architectures is not based on causality; instead, it highlights two key takeaways: first, established iterations of DDP can be proven resilient in times of crises, on the backdrop of their critical capacities in multi-actor deliberation, peer review and close monitoring. Second, transitions in styles of governance amidst a crisis tend to take place along—rather than against—the lines of the pre-established framework. As such, in the case of the successful Lamfalussy Reform, the successor framework, especially in the context of a crisis threatening the entire sector, was bound to follow down the same experimentalist path.

Building on top of the last takeaway through the second set of case studies, the ‘sleeping beauty’ of the Lisbon Treaty was introduced in 2009, as a possibility for a future institutional structure aimed at structural integration of armed forces. At the time of signing, regional conflicts were present but not

⁷¹ Despina Chatzimanoli, *A Crisis of Governance? – from Lamfalussy to de Larosière or Bridging the Gap between Law and New Governance in the EU Financial Services Sector*, European Journal of Risk Regulation 2 No. 3 (2011), pp. 322–339, <http://www.jstor.org/stable/24323096>.

⁷² Jonathan Zeitlin, *EU Experimentalist Governance in Times of Crisis*, West European Politics 39 No. 5 (June 2016), pp. 1073–1094, <https://doi.org/10.1080/01402382.2016.1181873>.

⁷³ Armin Steinbach, *EU Economic Governance after the Crisis: Revisiting the Accountability Shift in EU Economic Governance*, Journal of European Public Policy 26 No. 9 (2019), 1354–1372, <https://doi.org/10.1080/13501763.2018.1520912>.

affecting immediate geopolitical interests of EU-MS, highlighting the resurgence of Boko Haram in Nigeria, the escalation of the Gaza War, and the clash between Afghanistan and Iran. From an institutionalized cooperation perspective, however, the counter-piracy military Operation Atalanta in Somalia was a critical instance of EU-wide joint defense action, with all EU-MS taking part.⁷⁴ In the years that followed, however, the necessity for EU defensive preparedness rose exponentially on the backdrop of two key series of events: the Arab Spring in the South and the Russo-Ukrainian War—which resulted in the annexation of Crimea—in the East. Taking also into account the immediate threats posed by increased terrorist attacks and rising migration in the aftermath of the aforementioned conflicts, the EU found itself in a volatile geopolitical environment, in need for better defense strategies that would incite cooperation and assist in the protection of its members' national security.⁷⁵

In that setting and even though the importance of institutional cooperation was recognized, the implementation of PESCO in 2017 arrived as a minor step towards further integration, contrasting what it could have become. Acknowledging the difficulty in establishing it even in this form in the first place, especially in such a volatile timeframe, it appears that an institution focused on some level of Community decision-making was not considered as an option, despite the fact that it was provided with both an adequate vision and geopolitical parameters that could justify its creation. At the end of the day, MS resorted to incremental integration instead, enabling PESCO but granting an absolute intergovernmental character that explicitly fell within the context of formalization of existing informal processes of defensive coordination.⁷⁶ Returning to the argument of defaulting in times of crises, rather than introducing groundbreaking changes, pressing geopolitical circumstances solidified the implementation of PESCO as a process that would sacrifice breadth of scope and capabilities for the permissive consensus that would allow it becoming a reality. As a result, the

⁷⁴ Peter Dombrowski and Simon Reich, *The EU's Maritime Operations and the Future of European Security: Learning from Operations Atalanta and Sophia*, *Comparative European Politics* 17 No. 6 (2018), pp. 860–84, <https://doi.org/10.1057/s4129501801314>.

⁷⁵ Alistair Shepherd, *The EU Security Continuum - Blurring Internal and External Security*, Routledge (July 2021), pp. 10–26, <https://doi.org/10.4324/9781315677705>.

⁷⁶ Bonvicini, *Proposals for a Revival of Permanent Structured Cooperation*, pp. 50–58

introduction of PESCO in a non-experimental form, despite its potential to be one, could be tied with the very effect of externalities and geopolitical unrest on governance.

From that perspective, a third condition that could be highlighted for a successful implementation of DDP would be the overall lack of externalities. It is argued that such phenomena provide MS with incentives towards introversion in decision-making, opting for either national or intergovernmental solutions under a clear hierarchical structure. Unless an experimentalist framework has been set in motion before the emergence of a crisis, MS tend to default away from reforms that strengthen the comitology committees and EU-level agencies, despite given the chance to further build on it and benefit from the advantages that it provides. Consequently, alluding to the argument that supranational cooperation is not only facilitated but practically enabled by a stable environment, theoretical concepts of governance relying on extension of powers beyond the level of state—or that of intergovernmental cooperation—are also heavily dependent on the lack of externalities. That is not to say that experimentalist governance particularly struggles in times of turbulence more than any other traditional hierarchical structure; instead, a trajectory shift towards that direction prerequisites the absence of the volatility and uncertainty, that are present in times of crisis.

Conclusions

DDP is an empirical framework of experimentalist governance that describes –arguably– the next step in EU decision-making on a structurally stable and inherently cooperative multi-level basis. A great example to attest to its effectiveness is the Lamfalussy process, addressing issues of enforcement and monitoring while entrusting nascent institutions, like the CESR, with minor regulatory independence. Its continuator, the ESFS framework, and ESMA in particular, not only retained the experimentalist character but they increased the competences conferred to independent actors, proving that DDP is a framework not only sustainable over time, but also over times of crises. In a similar setting but a different policy domain, however, the framework came across significant obstacles that prevented it from being implemented. Under the CSDP architecture, PESCO was a groundbreaking alternative for defense cooperation, posing as the fertile ground that would allow

experimentalist governance to flourish in the less integrated policy area of defense cooperation amongst MS. Kept inactive after its formal introduction as a Treaty provision just to be implemented as a procedural framework in 2017, PESCO posed as a potential success story for DDP but was formed under old hierarchical models—a positive step towards integration, nonetheless, but a minor one, considering what it could have been.

Examination of the aforementioned cases underlines the fact that DDP is subject to certain conditions that prevent its universal application on EU policymaking. The first condition is the absence of sovereignty concerns; the Community method is gravely hindered by MS reluctance to upload policy-making capabilities onto the EU level over policy areas that affect aspects of their sovereignty. Instead, they gravitate towards intergovernmental structures with clear hierarchy, where dependency to third-party decision-making is limited or non-existent. The second condition is the lack of interest fragmentation, according to which a multi-polar regulatory network prerequisites an alignment of interests. On that note the importance of pre-existing frameworks is highlighted via the contrast of established integration between the EU financial and defense policies. As such, bilateral or multilateral agreements are preferred in scenarios where common denominators in terms of MS interests cannot be adequately encompassed by a single EU framework. The third condition for experimentalist governance is the lack of externalities. Whilst both policy domains experienced shocks during the decade of crises, it is argued that the EU's reform rationale was based on stabilization rather than amelioration, which resulted in continuing the experimentalist concept in financial services as well as not introducing it in defense cooperation. However, the fact that, in the first case, the framework was already established and proven successful, adds to the argument that the pressure of external shocks pushes decision-making towards conservative crisis management rather than revolutionary experimentalism.

Experimentalist governance is a promising framework for the EU, despite its incomplete nature. Albeit conditional and dependent to policy areas, it can provide a formidable setting for decision-making, boosting democracy through deliberation and solving critical regulatory bottlenecks. Unfortunately, the completion of the theory is rather unlikely to come through its application on policy domains like defense cooperation. It should be acknowledged that experimentalism is deemed inapplicable in such policy areas due to MS intransigence to push integration forward in that regard—a parameter that

falls outside the scope of the theory and solely under the jurisdiction of MS themselves. This adds to the perception that the contrast between the national and the EU levels, the intergovernmental against the supranational, is one that reflects on every aspect of the Union, as part of its very definition. EU policymaking has several limitations, most of which are elective rather than natural, and that reflects on its governance, as well as the theories that attempt to interpret it. At the end of the day, it is quite likely that the Union, no matter how far it progresses and integrates, can limit but not completely escape its historic gravitation towards hegemonical governance; striving to be led by a 'headless' king, but a king, nonetheless.

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